

THE BASIC LAW OF HUNGARY
A First Commentary

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Edited by

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Foreword

It is always a pleasure to write a foreword to an edited volume of such distinguished colleagues as the authors of the present book, most of whom I have the privilege of knowing personally, some of whom have been my good friends for several years.

To use the constitutional proverb by Charles Evans Hughes, expressed more than a century ago, “the Constitution is what the judges say it is” (*Speech at Elmira*, 3 May 1907). Accordingly, every work about a new constitution, such as the Hungarian Basic Law, is at best an educated guess before we see the actual judicial case law built on it. It does not mean, of course, that such guesses are futile, but whether the detailed descriptions of a new constitution will fit legal reality or not will only become clear later. Scholarly doctrinal descriptions of law, such as the ones in this volume, however, are actually not descriptions in a classical sense. They rather hope to be self-fulfilling descriptions of something that exists only in the heads of lawyers: of law.

Such descriptions have to be systematic, i.e. they have to offer an elaborate conceptual system also called *Rechtsdogmatik*. This volume is an excellent attempt in this genre. This elaboration of concepts, however, is not to be

made in a vacuum, but always with an eye on social reality. Rechtsdogmatik and its specific constitutional form, *Verfassungsdogmatik*, are therefore aids to the judges in deciding new cases, having the task of building up an accurate conceptual system for the sake of legal certainty (i.e. the predictability of future practice). A complete separation from legal practice would result in the inability of those applying the law to make use of the insights delivered by legal scholarship (due to the absence of links), i.e. scholarly works could by no means contribute to the increase of legal certainty. Therefore, the starting point has to be the content of concepts (even if this may not always be very elegant) as perceived by the relevant legal actors (in the case of a constitution: the constitutional court). If all the relevant actors “falsely” think “x” to be the content of a given concept (when it is in fact “y”), then the content of that concept becomes “x” (*communis error facit ius*). This, however, does not mean that the common opinion (*herrschende Meinung*) cannot be questioned. If an implicit – and hitherto undiscovered – consequence of a commonly held opinion “A” contradicts the likewise commonly accepted opinion “B”, one of these views may be challenged (the one that is more important according to the commonly held opinion “C”). What the relevant actors exactly think the content of a given legal text (and its concepts) is becomes manifest through their interpretational practice. And the most important relevant actor in such questions in Hungary will continue to be the Constitutional Court.

Such an approach of legal scholarship and of judicial case-law can also help to correct mistakes in the text of a legal document. There is no perfect constitution, or more generally, there is no perfect legal document at all. Thus the role of judges and legal scholars is to try to fill in the gaps and to try to correct mistakes afterwards by means of interpretation. The need for such corrections can be minimised if codification is thorough and if legal scholars can have an influence on the drafting process. During the constitution-making process in Hungary, some of the authors of this book, and also myself, relentlessly bombarded the politicians with explanations and ideas about how the Constitution should (or rather should not) be changed. The hopes have, however, been frustrated; the impact of legal scholarship proved to be disappointingly limited: the many conferences and published expert reports (amongst them also two entirely new private scholarly drafts) were mirrored only in a few provisions, and some vital elements of the concerns sadly remained unheard. Thus Hungarian legal scholarship now has to take its second chance, and it has to try to influence the case-law of courts (especially that of the Constitutional Court). Legal scholars are primarily not meant to praise or to criticise norms anyway. Our usual task is to make the best out of the text of a norm, thus to *interpret it in its best possible light* (creatively, if necessary) with the help of a systematic *Rechtsdogmatik*. My colleagues took on this challenge in this book with the very best intentions and with a convincing

doctrinal inventory.

Every new constitution is an occasion for the public to re-think basic questions of their political community. But it is also an occasion for domestic constitutional scholars to re-think basic concepts and structures of their constitutional law. And in most cases, it is a good occasion for foreign constitutional lawyers to collect some interesting new material for their next analysis in comparative constitutional law. This volume is primarily aimed at the latter audience, which because of linguistic reasons would otherwise not be able to access precise and detailed information on the new Hungarian Basic Law. It should, of course, be read with the disclaimer that usually applies to scholarly works on new constitutions, as described above. It often expresses the authors' wishes and hopes, which will be tested in the future, in this case by how, in fact, the Hungarian Constitutional Court responds to constitutional challenges.

András Jakab
12 November 2011
Heidelberg

Preface

“Give me a place to stand on, and I will move the Earth!” Archimedes said. The statement that no movement can be made without solid ground underfoot does not pertain only to physics; every change needs a standpoint from which the alteration can be evaluated.

The situation is much the same in the Hungarian legal system these days. Many changes involving public law at a fundamental level have occurred—the most apparent being the new Basic Law.

On the one hand, a country’s constitution is a political document containing the most basic values of the society. Consequently it is not a surprise that very different evaluations have come up both in Hungary and abroad; some welcomed the new institutions, while some others interpreted the Basic Law as a derogation of the values of Hungarian constitutionalism.

On the other hand, the Basic Law is not the end of the process but the beginning of a new one. In our point of view the mere text of the Basic Law is necessary, but not enough, to evaluate Hungarian constitutionalism; it is also essential to know how the Basic Law will be interpreted in the courts and in the Constitutional Court’s adjudication.

Therefore the authors and editors of this volume attempt to

give a general outlook on the state of Hungarian constitutional law with special regard to the Basic Law. Beside the description we interpret the specific provisions, searching for the differences between the Basic Law and the Constitution being in force until the end of 2011.

Although the Basic Law was adopted 18 April 2011, the constitutional law is still under serious changes. Many cardinal statutes fundamentally involving the constitutional system are being debated at the Parliament. However, the manuscript of this volume was closed at 31 October 2011; consequently the authors could regard only laws that were adopted at that time.

We hope that the volume will be useful for theorists both abroad and in Hungary, and for everybody seeking information on Hungarian constitutionalism.

Finally, we are grateful to Johanna Fröhlich and to Endre Orbán for the efforts they made in the creation of this volume.

Laus viventi Deo.

19 December 2011

Lóránt Csink
Balázs Schanda
András Zs.Varga

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Chapter I

The Creation of the Basic Law of Hungary

László TRÓCSÁNYI

1. Characteristics of Hungarian constitution-making before the Transition

The adoption of the new Hungarian Basic Law triggered significant and controversial echoes globally. Articles appeared in international press that criticised both the method of adoption of the constitution and its content; the Venice Commission issued an opinion¹ as well, and the European Parliament also dealt with the Hungarian constitution-making process. The national constitution is the most important legal and political document of a country. In the politically and economically unified Europe one rather rarely pays as much attention to the adoption of a country's constitution as has been in the case with Hungary's. Every country may decide on its national constitution within the scope of its sovereignty, albeit it is

apparent that in certain cases international organisations play an active role in the creation of a constitution or a constitutional framework, as was the case in Bosnia-Herzegovina and Kosovo; it is, however, rare that the constitution of an EU Member State cause serious debate in Europe.

The Council of Europe and the European Parliament showed interest both in the circumstances of the birth of the Hungarian Basic Law and in its content; therefore, it is useful to take account of the criticisms.

In order to be able to form an informed opinion on the Hungarian constitution, we deem it important to present the Hungarian context in terms of constitutional history and the past twenty years' political and constitutional legal developments.

2. Constitutional history affecting the Basic Law

Historically, there have been two types of constitutions in Hungary: the historical constitution and the written constitution. The Kingdom of Hungary, like the United Kingdom, did not have a written constitution until 1945, aside from the short-lived constitution of the 1919 Hungarian Council's Republic. The constitution consisted of different organic laws. No written constitution was adopted at the time of the creation of the Austro-Hungarian

Monarchy in 1867 nor later. In the era of the monarchy, Hungary was independent of Austria in terms of the regulation of the structure of the state and the protections of fundamental rights. The organisational structure of the protection of the constitution came to life in the era of the monarchy, mainly based on German influence. The Supreme State Audit Office and the Supreme Administrative Court already operated as important organs of the protections of fundamental rights. The person of the monarch was the same; the two countries managed their fiscal, military and foreign affairs jointly. Diplomatic presence was assured by the embassies of the Austro-Hungarian Monarchy.

After World War I and the peace treaties of Versailles and Trianon, in 1920 Austria adopted a modern, written constitution and Hungary continued abiding by its historical constitution. In the era of the public law *provisorium*, the Hungarian State was formally considered to be a kingdom, but in the factual absence of the king the presidential powers were exercised by the governor. Between the two World Wars there were debates on a constitutional reform in the bicameral parliament, but the adoption of a constitution in the form of one single document was not even on the table. Public law traditions were strong in Hungary, the constitution was based in the Doctrine of the Holy Crown, i.e. the Crown represented the continuity of the 1000-year-old Hungarian statehood and the unity of the Hungarian nation. An important role was attributed, among

others, to the 1222 Golden Bull (Aranybulla) (in comparison to the 1215 Magna Charta Libertatum) and to the reform legislation adopted before the outbreak of the 1848 Revolution that already carved certain fundamental rights in stone. Until the end of World War II the historical constitution was a kind of symbol; there was significant influence on constitutional traditions on the part of important societal circles. The political parties of the era were satisfied with the historical constitution; no relevant effort was made to adopt a consolidated written constitution. Constitutional law literature explained the context of the institutions of Hungarian constitutionalism based on the historical constitution.

After World War II radical change took place. In 1945 the form of government became a republic instead of a kingdom. In 1946 a temporary "little constitution" ("kisalkotmány"²) was adopted, primarily settling the question of the aforementioned form of government and, following from the foregoing, regulated the new order of the structure of the State. The democratic framework did not last for long because in 1949, based on the Soviet example, Hungary became a country of the dictatorship of the proletariat. In 1949 the first comprehensive consolidated written constitution was adopted, on the basis of the 1936 Soviet (Bukharin) Constitution. The Constitution became the foundation of a dictatorial state. Similarly to the 1936 Soviet Constitution, the State only formally assured the citizens' rights, but these rights had ideological content.

The 1949 communist Constitution, however, “softened” later on due to amendments to the Constitution, but in its character the paramount law carried on to serve the one-party state structure. The content and the “Bukharin touch” of the 1949 Constitution symbolised the loss of the country’s independence. We will further analyse below the provision of the National Avowal, according to which Hungary denies the existence of its national self-determination in the period between 19 March 1944 and 2 May 1990 and pursuant to this does not recognise the legal continuity with the 1949 communist Constitution.

3. Constitutional attempts at the time of the transition and after

It has to be noted among the peculiarities of the 1989 Transition that Hungary was the only country that did not adopt a totally new constitution. In 1989, as part of National Roundtable negotiations there were discussions of the new state structure and what laws would be adopted in order for the country to move from a monolithic societal setting into a democratic framework based on a multi-party system. The result of the National Roundtable negotiations was that the elected MPs could vote on the acts on the right of association (which made possible the establishment of parties), the right of assembly, and on the right to freedom of conscience and religion already in place since 1985. With the enactment of the Act XXXI of 1989 it was decided

to amend the 1949 Constitution, then the Act on the establishment of the Constitutional Court was adopted as a result of the National Roundtable negotiations.

The 1949 Constitution received new content in 1989; thus, it could be the foundation of the democratic state setting. The constitutional amendment of 1989 came into force as a result of a compromise between the former and the new political elite and this compromise assured that a parliamentary democracy was established in Hungary with the head of the executive branch being the Prime Minister. The Constitution, building on the separation of powers, created a sort of equilibrium among the state organs by granting the Constitutional Court the most extensive jurisdiction amongst all European constitutional courts. Among others, the Act on the Constitutional Court made possible that anyone could initiate a review of any legislative measures (including local governments' decrees as well) by the Constitutional Court. The Transition was manifested in free elections, in the free establishment of parties and in the creation of the Constitutional Court. In 1989, at the time of the constitutional amendment, political parties thought that the new constitution would be adopted by the parliament elected in 1990, based on free legislative elections. The former and new political elite shared the erroneous hypothesis that they would be capable of adopting a new constitution after the elections, which, however, was not possible due to the continuous lack of agreement between the political parties.³

No formally new constitution was adopted; however, the constitutional amendment of 19 June 1990, enacted by the first freely elected parliament, rewrote the Constitution in more than fifty instances, particularly in the following domains: constitutional statutes prescribed for the regulation of fundamental rights (e.g. taxes) ceased to exist and were rendered ineffective; the procedure of election and the powers of the President of the Republic changed as did the powers of the Parliament. This is important because due to this legal-technical solution the Constitution itself thus is not rooted in the parliament of the *ancien régime* but in the first freely elected one.

Between 1990 and 2010 the necessity of the adoption of a formally new constitution had been, from time to time and with a varying intensity, a recurring topic.

The new government of the first freely elected parliament was headed by József Antall. The political powers were totally engaged in seeing their duties through following the Transition and the relevant administrative and legislative work. The adoption of the new constitution was never even on the table between 1990 and 1994; the necessary parliamentary majority was absent, and political parties waged a heavy fight against one other. It was the duty of the newly established Constitutional Court to interpret the provisions of the Constitution that had been dusted off and modified at its core in 1989, but which should rather be classified as an old one in light of its structure. With its decisions of definitive significance, the Constitutional

Court, led by its president at the time, László Sólyom (later President of the Republic), actually became the gatekeeper of the Transition and the organ that set out the constitutional rules. The justices of the Constitutional Court, all of them outstanding jurists, worked out real constitutional legal doctrines by interpreting the Constitution from an expanded viewpoint by way of their judicial activism. They reached decisions in questions of determinative significance such as, for example, the right to life and the abolition of the death penalty, the compensations for the damages caused to one's person and property in the previous regimes, and the powers of the President of the Republic to appoint public functionaries. László Sólyom intended to base the decisions of the Constitutional Court on an "invisible constitution"⁴ as well as the visible one since the general principles of constitutionalism, those that were not necessarily present in the written constitution, would also be observed. Between 1990 and 1994, the decisions of the Constitutional Court *quasi* complemented the Constitution, and the Court acted as a sort of constitution-making power through its decisions abstractly interpreting the Constitution. Due to this concept of the "invisible constitution" and the probably overzealous judicial activism of constitutional judges both political and professional attacks struck the Constitutional Court.

Between 1994 and 1998, the left-liberal government was in command of the constitution-making power in the Parliament, i.e. it acquired two-thirds of the mandates. It

was among their objectives to adopt a formally new constitution and in this regard a separate preparatory committee had been set up as well within the body of the Parliament. Several constitutional drafts were compiled in this period; however, due to the disappearance of harmony between the left-liberal parties the new constitution could not have been adopted during the parliamentary term. On the contrary, the Constitutional Court paved the way for the new-born Hungarian democracy with its activist decisions.

In the next parliamentary term, under the first Orbán-administration (1998–2002) there were no real attempts at constitution-making, in part because the central-right government was not in command of the two-thirds majority necessary to adopt the constitution. The structure of separation of powers remained stable and, besides parliamentary governance, the Prime Minister played an increased role in defining the policy of the State. As the political atmosphere was against the adoption of a new constitution in that period, the government have a symbolic Act in remembering the foundation of the Hungarian State adopted. Act I of 2000 was enacted on the memory of the foundation of the Hungarian State by King St. Stephen and on the Holy Crown. According to the Act, the Holy Crown lives in the conscience of the nation and in the Hungarian public legal traditions as an artefact embodying the continuity and independence of the Hungarian State. With this act the Holy Crown (the symbol of the historical constitution) became a part of an effective substantive law.⁵

Changes took place at that time – which were manifested in the fact that the Constitutional Court renewed in its members – when the Court no longer considered that the “invisible constitution” could be followed, and a normative point of view was primarily apparent in the decisions of the Court.

Under the left-wing governments between 2002 and 2010, there were some cautious attempts at constitution-making, but due to the absence of a necessary parliamentary authorisation and majority, there was no chance to adopt a new constitution. In this era, between 2000 and 2010, the function of the President of the Republic became more important, under the terms of office of both Ferenc Mádai and László Sólyom, who assumed an active role, oftentimes initiating *ex ante* constitutional review to the Constitutional Court. László Sólyom did not wish to consult the political parties when making his recommendations for appointments to certain public positions; he even took on open conflicts with the parties and State institutions. From the early years of the 21st century, the Constitutional Court strived to return to the jurisprudence established at the beginning of the 1990s in its decisions, i.e. that of the “invisible constitution”. The President and the Constitutional Court represented a powerful counterbalance for left-wing governments; therefore, it is no coincidence that both the President of the Republic and the Constitutional Court have been heavily criticized.

Between 1990 and 2010, Hungary was a state under the

rule of law in a constitutional legal sense, despite the fact that the amendment adopted in 1989 did not create a totally new constitution.⁶ The Constitution, with the help of the Constitutional Court, was able to ensure the operation of a democratic state structure.⁷ The fact that politicians have not always observed the basic principles of constitutionalism in their dealings was not the fault of the Constitution. However, the euphoria of the adoption of a new constitution was missing, the date of adoption of the Constitution was criticised, as was its provisional character.

4. The necessity of the new constitution and the adoption of the basic law

The adoption of the new Constitution was based on both political and legal reasons. Its legal justification was that the text of the Constitution became harder to establish⁸ and even the constitutional preamble referred to the temporariness thereof. The political impetus for constitution-making seemed to be stronger between 2002 and 2010, but primarily from the beginning of 2006 a political, economic and moral crisis appeared.

The April 2010 Hungarian parliamentary elections made the adoption of a new constitution possible. The party coalition FIDESZ-KDNP, led by Viktor Orbán, gained a two-thirds majority in the Parliament; the left-wing obtained weak results and a radical right-wing party also crossed the

threshold and obtained seats. Before the second round of the elections, the candidate for Prime Minister announced that if his party should receive parliamentary support, he would consider this to be an authorisation to make meaningful changes, including the adoption of a new constitution.

The political point of view of the new government was to present a new country image instead of the current pessimistic, disappointed one and to aim at creating a strong state instead of a weak one. The government did not want reforms but rather to reorganise the country and the state structure that had fallen apart. With the parliamentary supermajority, the Prime Minister felt authorised and obliged to make important political and economic decisions in the first year of his governance. He had already decreased the number of local government representatives by half on the occasion of the 2010 autumn elections. In order to restore budgetary balance a so-called crisis-tax was prescribed to be paid by multinational corporations in certain sectors. The Prime Minister announced that within one year after the elections the new Constitution would be adopted, and it was signed by the President of the Republic on 25 April 2011, one year after the 2010 elections.

The Parliament, with its Decision, on 29 June 2010 had set up an *ad hoc* committee to draw up the new Constitution. In the original 45-member committee every party was represented; however, later on the opposition parties

withdrew themselves from the work without ever resuming their participation, justifying the action by invoking the restriction of the Constitutional Court's powers in controlling financial (tax) laws adopted by the Parliament. The committee concluded its activities in the beginning of March 2011, when the Parliament adopted the regulatory principles of the new constitution.⁹ The text of the Basic Law was then referred to parliamentary debate on 14 March, and in the following nine days of discussion the Parliament adopted the new Basic Law on 18 April 2011, which would enter into force 1 January 2012.

The enactment of the new constitution was not followed by a referendum; instead the Prime Minister decided to set up a National Consultation Body in January 2011. The questionnaire was distributed by the Consultation Body among voters and was filled out by approximately one million people: every citizen could answer twelve questions in relation to constitution-making. Universities, local governments, churches and civil society organisations also could offer their contribution and opinion with respect to constitution-making and several professional, constitutional legal conferences were organised.

The adoption of the new constitution was criticised several times from abroad, with regard to the process being overly quick. However, if one takes the amount of time at the disposal, then in our view the period of one year in itself cannot be considered to be scarce. It is a fact that the proposed text of the Basic Law only became public on 14

March 2011 but during the year-long preparatory work several conferences and publications made it possible for everyone to share their views.¹⁰ The Venice Commission places excessive emphasis on the methodology of the adoption of the constitution in their opinion and they analyse, above all, political and not legal aspects in connection therewith. Voicing an opinion about inner, domestic state politics shall always be handled delicately and rather requires political assessment.

The opposition parties (except for independent MPs and a radical right party that voted against the adoption) chose not to participate in the adoption of the Basic Law. Notwithstanding the above, the adoption of the Basic Law took place within legitimate circumstances. The parties possessing the two-thirds majority drew up the text of the Basic Law and, after plenary debates and negotiations on motions for modifications, adopted it. The parliamentary opposition criticised the constitutional process primarily on extra-parliamentary grounds, by resorting to international fora, their principal reason being that the Basic Law is not the constitution of the country but that of only one part of the country. Therefore, there is merit in referring back to the French example mentioned above: in 1958, the political adversaries of De Gaulle opposed the Constitution of the 5th Republic, but in due time it was proven to function adequately and today every French political party accepts the structure of the State established by De Gaulle. Real societal acceptance of a constitution can only be

adequately measured with lapse of time. From the point of view of subjects, the requirement of sufficient time is basic in case of adaptation to every newly introduced piece of legislation and with regard to learning how to coexist with those. The question of whether or not a legitimately adopted constitution has real societal legitimacy cannot be immediately answered. The practice of the constitution must be assessed along with the constitution itself.

5. The denomination “basic law” and the constructive force of the national avowal

The Basic Law has a completely new structure compared to the previous constitution. The National Avowal is followed by the Foundation, which declares the goals of the State and announces norms of self-definition, organised into articles by letters. The next part, partitioned in Roman numerals, is the chapter of Freedom and Responsibility containing the provisions on fundamental rights, which is followed by the part of the structure of the State, in Arabic numerals.

Prior to the 14 March referral for debate to the Parliament of the draft of the constitutional legislators, a decision was made to use the denomination “Basic Law” in lieu of “Constitution”. One possible justification for this is that a reference to the historical constitution appears in the text of the Basic Law and the constitutional legislator intended to

declare in the Basic Law that Hungary honours the achievements of the historical constitution and the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation. Moreover, the Basic Law shall be interpreted in accordance with the National Avowal. My opinion is that, by applying the denomination "Basic Law", the constitutional legislator indirectly declared the importance of the achievements of the historical constitution, which enables the judicial bodies to make references thereto. Primarily, it is the duty of the Constitutional Court to define which parts of these achievements can be taken into consideration without the infringement of the Basic Law and which documents can be references in constitutional jurisprudence.¹¹

The National Avowal is more than a preamble as a conventional element of national constitutions. In its content it resembles a festive declaration, but it does not place emphasis on the celebratory statement of the rights of the individual. Among its more important elements are the declaration of independence and national identity and the emphatic acknowledgement of societal communities (family, nation). By mentioning that individual liberty can only be complete in cooperation with others, the emphasis is diverted from individualism to the role of communities in the Avowal. Albeit the Avowal refers to the Hungarian people, fundamentally it considers cohesion and belonging to be important. Peace, security, public order, replenishment of justice and liberty are the common goals

of the citizen and the State, i.e. the National Avowal aims to create a community among citizens, and between the citizen and the State.

The following statement is important in light of Hungarian history: the statute of limitations is not recognised in connection with the crimes committed in either the socialist nor the communist dictatorships. Interpretative discussions are yet to follow on the sentence stating, in the context of the aforementioned historical narrative (reflecting on the events of the period between March 1944 and May 1990), that there is no continuity with the 1949 communist constitution, which was the foundation of a tyrannical regime and therefore declares its nullity.¹² The Basic Law declares that it shall be interpreted in accordance with the National Avowal; thus, if we consider the Constitutional Court and the ordinary courts to be entitled to conduct the interpretation, then neither the Constitutional Court nor the ordinary courts can circumvent providing responses to the motions based on the nullity of the provisional Constitution. Considering that the Basic Law enters into force only on 1 January 2012, it is important for the interim provisions necessary to the entry into force to be adopted by then.

6. Relations with trans-border hungarians

Due to historical causes, Hungary is in a unique situation as there are a significant body of Hungarians living outside

the borders of the country, primarily in neighbouring countries. The notions of political and cultural nation show differences. Those living inside the borders of the country belong to the political nation, but all Hungarians are part of the cultural nation, irrespective of their domicile. The 1989 constitutional amendment has already set forth that the Republic of Hungary feels responsibility for the fate of the Hungarians living outside its borders and shall promote the fostering of their links with Hungary. Taking this into consideration, the Hungarian Parliament adopted the Act LXII of 2001 in reference to the Hungarians living in neighbouring the countries, also known as the Status Act. The Venice Commission, in its opinion of 2001¹³ acknowledged the right of kin-states to adopt laws in order to promote links between the kin-state and those living outside of it. Based on the aforementioned law, Hungary offers support since 2001 to cultural associations and to families in neighbouring countries that have their children taught in Hungarian.

The new Basic Law considers the Hungarians living beyond its borders to be part of the Hungarian nation; therefore, it contains provisions on the cohesion of the unified Hungarian nation, which refers to the cultural nation and not to the narrow sense of the political nation. It follows, moreover, from the cultural nation definition that Hungary bears responsibility for the fate of the Hungarians living beyond its borders and will facilitate the survival and development of their communities; it will support their

efforts to preserve their Hungarian identity, the assertion of their individual and collective rights, the establishment of their community self-governments, and their prosperity in their native lands, and shall promote their cooperation with each other and with Hungary.

The provisions of the Basic Law do not possess any extra-territorial force; Hungarian State organs were assigned duties in order to promote the cohesion of the Hungarian nation that is unified in a cultural sense. Hungary, as a member of the EU and the Council of Europe, in a unifying and diverse Europe, wishes to promote the unity of the cultural nation in the spirit of cultural diversity. Therefore, the Basic Law considered it to be important to set forth directly after its provisions on trans-border Hungarians that in order to enhance the liberty, prosperity and security of European nations, Hungary shall contribute to the creation of European unity. The Basic Law continues to ensure the harmony of international and domestic law. The Venice Commission felt it important to mention that the provisions of the Basic Law with regard to trans-border Hungarians and international relations should be interpreted in harmony and interaction with domestic laws, and in this respect the Commission welcomed the provisions of Article Q of the Basic Law, which sets this forth.¹⁴

7. The right to vote of hungarians living beyond the borders

Although the Basic Law does not determine it explicitly, there is already a discussion about whether Hungary wishes to grant suffrage and hence the right to vote to trans-border Hungarians. In the light of regulation that is in force at present only those Hungarian citizens have the right to vote that have registered addresses in Hungary. Hungary amended the Act on Citizenship in 2010, thus, in the following year anyone who considers him or herself to be Hungarian¹⁵ and have a certified knowledge of the Hungarian language can apply for Hungarian nationality based on individual petition. Until 2010, every Hungarian living abroad whose ascendants were Hungarian citizens, excluding those living in the neighbouring countries, could file a petition for Hungarian nationality. The legislator terminated the said limitation by the 2010 amendment to the Act on Citizenship; therefore, today, every trans-border Hungarian can apply and be granted nationality on individual petition, provided that the petitioner meets the conditions prescribed (e.g. knowledge of the Hungarian language).

The Basic Law assigns the regulation of the right to vote of trans-border Hungarians to the electoral regulation to be adopted by cardinal statute; it only provides an opportunity for the legislator to give the right to vote to Hungarians living abroad. The decisions of the ECHR¹⁶ and the opinion of the Venice Commission also examine the question of out-of-country voting.¹⁷ Most European countries ensure that their citizens exercise their right to vote whether on a

permanent basis, as residents, or temporarily staying abroad. There are more foreign case studies at the disposal of Hungary in putting together the regulation, thus, the examples of relevant legislation in France, Italy, Portugal and Poland will be taken into consideration. In the 2012 parliamentary elections, for example, French citizens living abroad or possessing double nationality will be entitled to vote and to be elected for both the Senate and (as a development) for the National Assembly.¹⁸ In my view, the French case study might well serve as an example for Hungary in the future, when the regulation of the right to vote of trans-border Hungarians is drawn up.

8. Sources of inspiration for the regulation of fundamental rights¹⁹

European documents on fundamental rights have played an important role among the inspirational sources of the fundamental rights' regulation. For a long time during the constitution-making process, there was debate about whether it was possible to incorporate the Charter of Fundamental Rights of the European Union (hereinafter: the Charter) into the Hungarian domestic constitution.²⁰ The preliminary opinion of the Venice Commission was asked for by the Minister of Administration and Justice on this subject. The Commission stated in its advisory opinion that member states can refer to the Charter and its apparent significance in the implementation of EU law and that the

Charter can serve as a source of inspiration when drafting the national constitution. The Commission, however, did not recommend full incorporation of the Charter to the constitutional legislator due to the fact that a full transplantation would result in legal difficulties considering that the ECJ is entitled to interpret the Charter, which means the Constitutional Court would be in a position to give up its autonomy in interpreting the constitution, thereby endangering several aspects of national sovereignty. Moreover, the full incorporation of the Charter into the national constitution would lead to further problems because ordinary courts would turn to the ECJ on the subject of compliance with the Charter of national law implementing EU law. Such actions would of course infringe the prestige of the Constitutional Court.²¹ In the end, the constitutional legislator used the Charter as a source of inspiration, as it did with the ECHR. The provisions relevant to certain fundamental rights literally correspond to the wording of the Charter or the ECHR, but it is not a full incorporation. The decisions of the Constitutional Court on the limitations of fundamental rights were also used in creating the regulation.²²

Fundamental rights are regulated in the Basic Law in a much wider scope than in the fundamental rights' catalogue of the previous constitution. Some of the few examples enumerated below clearly show that the catalogue of fundamental rights in the new Basic Law declares new criteria as well, making the Basic Law a true 21st-century

constitution. Among the provisions on the right to property it was also prescribed that it shall entail social responsibility. This reference evidences the application of community criteria besides the individualist point of view in the Basic Law. The constitution also sets forth that Hungary strives to ensure decent housing and access to public services for everyone.

The Basic Law particularly emphasises the necessity of protecting agricultural land and drinking water supply and it provides that whomever damages the environment shall restore the damage done or bear the expenses thereof as prescribed by law. As a matter relevant to environmental protection, the constitution declares that no pollutant waste shall be brought into Hungary for the purpose of dumping. Hungary wishes to promote the right to physical and mental health by ensuring that agriculture remains free from any genetically modified organism, by providing access to healthy food and drinking water, by managing industrial safety and healthcare, by supporting sports and regular physical exercise, and by ensuring environmental protection.

The Hungarian Basic Law may also be the only national constitution that contains provisions on sign language as a part of Hungarian culture.

The comments in relation to the content of the regulation of fundamental rights can prove to be of useful assistance in the course of legal interpretation by practitioners. The

catalogue of fundamental rights in the Basic Law is in accordance with the ECHR; it relies on the Charter. The Venice Commission's view according to which life imprisonment without the possibility of parole could infringe the ECHR may generate some debate however. Both Great Britain and the Netherlands allow life imprisonment without the possibility of parole. "Any hope of release"²³ may be important, but the Hungarian Basic Law and the regulation of the two aforementioned countries provides for such hope by the practice of the right to clemency. In the case of Hungary, it should be taken into due consideration whether or not to adopt an autonomous piece of legislation on the right to clemency in the future. It is a shame that the Venice Commission did not further consider the issue of the right of clemency and did not analyse the British and Dutch case studies but voiced an unfavourable opinion in this matter. Nonetheless, in our view, just balance can be created in this respect by setting forth the statutory regulation of the right of clemency.

9. The case of cardinal statutes

One of the many criticisms of the Basic Law is the large number of references to cardinal statutes in it. Cardinal statutes are statutes (acts of Parliament) in the case of adoption or amendment of statutes for which the vote of two-thirds of the MPs present is necessary. The Basic Law defines 39 domains to be regulated by cardinal statutes, which is more than the number of acts adopted by two-

thirds majority in the previous constitution: the 1949 constitution enumerated 33 of these domains to be regulated by qualified majority. The 39 regulatory subjects of cardinal statutes in themselves should not give rise to criticism; but the fear that the political party having the two-thirds majority in the Parliament will be able to decide the content of cardinal statutes is a valid one. This is, however, a political reason and not a legal criterion. With respect to economic governance, according to the Basic Law, nine domains were assigned in the scope of regulation by cardinal statutes in the case of public finances, however, earlier on, only the State Audit Office and party finances were assigned to be regulated by qualified, two-thirds majority. The Basic Law regulates fundamental rights and the most important rules regarding state organs in adequate detail; the competences of State organs are rather more detailed therein than in the previous constitution. The same rules apply to the constitutional review of statutes passed by two-thirds qualified majority as to that of ordinary statutes. Hungary is a signatory of the ECHR and is bound by the EU Treaties (including the binding Charter) and other international documents. Presumably, the political practice arising out of the constitutional regulation of cardinal statutes would not cause problems if and when a political party would not be in command of the prescribed qualified majority in the Parliament. In the past twenty years two Hungarian governments had two-thirds majority and the necessary "two-thirds statutes" (now cardinal laws) were adopted in a

large number of pertinent regulatory domains, provided there was political will thereto. The fact that any amendments of necessary statutes may be not be forthcoming for a considerable period of time in the case of lack of political will is undisputable.²⁴

Instead of focusing on the political scruples in the creation of cardinal statutes it would be better to deal with the issue of whether cardinal statutes are needed or not. Would it have been possible to constitutionalise in a way that circumvented the application of cardinal statutes? Presumably yes, but in that case a more detailed Basic Law would have to have been adopted. The objective of the constitutional legislator was to adopt a shorter Basic Law: a so-called “core constitution”²⁵ and detailed regulations in cardinal statutes were considered to be practical. This solution is not unknown in Hungarian public law tradition, because this kind of regulation played an important role both before World War II and after the 1989 Transition.²⁶

What can be subject to discussion is whether or not the regulations in cardinal statutes are necessary in every case enumerated in the Basic Law. The questions of whether the basic rules of the pension system, the tax system or the budget management require cardinal legal regulation can be answered differently in the different domains. It is a recurring criticism of Hungarian economic policy that it is unpredictable and unstable; therefore, the constitutional legislator decided that the Basic Law should regulate financial regulatory subjects in cardinal statutes. The

question of whether or not these statutes will be able to assume the stabilising role expected of economic governance is, in my opinion, dependent on the concrete normative content thereof. That said, this question could be answered only after the enactment of the said cardinal statutes.

The institution of the Budget Council and the attacks thereon, in relation to public finances, shall also be elaborated upon. The Budget Council gave its prior approval to the adoption of the State Budget Act.²⁷ It shall be the subject of future constitutional interpretation what the consequences are of a possible adoption of the State Budget Act by the Parliament without the prior approval of the Council. In adjudicating this issue the wording of the Basic Law shall be taken into consideration, according to which the Budget Council is an organ supporting the Parliament's legislative activities, which examines the feasibility of the budget and contributes to the preparation of the State Budget Act. The existence of any veto power mentioned by the Venice Commission is nowhere indicated in the text of the Basic Law.²⁸

The future of the debate revolving around cardinal statutes will be defined by the extent of participation of political parties in the floor debates when adopting cardinal statutes, and by the extent of consultation between the parties. In case the parties' parliamentary work is guided by the spirit of constructivism and a search for consensus, there is a chance to avoid that the adoption of cardinals

statutes cause new tension, which might even be apparent on the international playground.

10. The protection of the constitution: issues arising

Among the tensions surrounding the adoption of the new Basic Law, most debates surfaced with regard to the status of the Constitutional Court. In these debates the idea emerged that fundamental rights protection should be administered in the future by ordinary courts and the possibility of establishing a separate, autonomous administrative court was also mentioned.

Eventually, the Basic Law disregarded the introduction of decentralisation as an option and stayed with the institution of an autonomous (centralised) Constitutional Court. In this domain, numerous debates of principle arose; particularly in terms of the following questions: How do the *ex ante* and *posterior* constitutional reviews relate to each other; how could the *ex ante* review be strengthened to the detriment of *posterior* law review? Should the *actio popularis* be maintained with respect to the initiation of *posterior* law review? How could the institution of the “real” constitutional complaint be introduced? The Minister of Administration and Justice has preliminarily asked for the Venice Commission’s opinion on these questions²⁹ and the topic was subject to discussion at several international conferences.

The Basic Law eventually chose a solution based on a compromise. The scope of *ex ante* review was maintained; moreover, it was even broadened with respect to those entitled to request such review. *Ex ante* review can be requested, as beforehand, by the President of the Republic following parliamentary adoption, but prior to the publication of a statute. On such initiative the Constitutional Court shall decide within thirty days the latest, as a matter of urgency. The Parliament may submit an adopted statute for constitutional review to the Constitutional Court upon a motion to that effect by (i) the initiator of said statute, (ii) the Government, (iii) the Speaker (before the final vote). The Parliament rules on the motion following the final vote. *Posterior* law review can be requested by (i) the Government, (ii) one-fourth of the MPs, or (iii) the Commissioner for Fundamental Rights (formerly Parliamentary Commissioner for Civil Rights, ombudsman) in the future.

Albeit in terms of *posterior* constitutional review the powers of the Constitutional Court indeed have been restricted, the Court was granted real “*pouvoir*” to rule on constitutional complaints,³⁰ based on the German model. According to the Basic Law the Constitutional Court, based on a constitutional complaint, reviews the conformity of any piece of legislation applied in a particular case or any judicial decision with the Basic Law. But what happens in those cases where no decision is made at the end of proceedings, hence there is no administrative or judicial

decision? Is it necessary to exhaust judicial remedies or is the Constitutional Court entitled to disregard the exhaustion of judicial remedies in cases of exception? It shall be further clarified against what kind of judicial decision those concerned are entitled to turn to the Constitutional Court via a constitutional complaint. The present practice shall be avoided, which makes possible for the parties whose fundamental rights were infringed upon that they can simultaneously commence the review of the judicial decision via ordinary judicial review and also file a constitutional complaint. As for other provisions on the protection of the constitution, the following changes have been made, in several cases reinforcing the *status quo* of the regulation: (i) the power of the Constitutional Court extends to the cassation of the unconstitutional legal measure or legal provision; (ii) the power of the Constitutional Court in adjudicating judicial proposals remains unaffected; (iii) any judge can initiate proceedings before the Constitutional Court by the simultaneous suspension of its own proceedings if the judge finds that an applicable statute might be unconstitutional.³¹

There has indeed been significant change in terms of the powers of the Constitutional Court: abstract constitutional review seems to shift towards concrete review. Earlier on, around 1600 cases went to the Court annually, a majority of which were based on abstract review founded on *actio popularis*. Adjudication of these cases took ten years in certain cases since the Constitutional Court intended to

reach decisions on issues that concerned society as a whole. In the future, posterior review will lose ground; however, it is expected that the opposition (one-fourth of the MPs) intends to attack the politically biased statutes. If the opposition parties are fragmented then a sort of coordination will be needed among them in order to be able to request the proceedings of the Court. In the future, most likely the constitutional complaints will account for a significant part of the workload of the Constitutional Court; after resorting to ordinary courts, especially in the first period, presumably many will use the institution of constitutional complaint. These changes, however, supposedly require new structural and procedural rules, which entail the amendment of the present act on the Constitutional Court (in form of a cardinal statute). Changes are to be expected also in the present, non-adversary Constitutional Court proceedings that are mainly based on Plenary Sessions of the Court. Predictably, different panel formations might be created in accordance with the character of the cases and the adversary procedure should not be further ignored. The Act on the Constitutional Court to be adopted in the fall will answer the structural and procedural questions that are open today. The Constitutional Court will consist of fifteen justices instead of the previous eleven, a change that is justified by the need to handle the workload arising out of the constitutional complaints.³² Constitutional complaints will be directed against final court judgments; therefore, the principle of legal certainty requires the Court to be able to decide on

these matters within a relatively short deadline.³³

It is a significant change in the interpretative powers of the Court that the provisions of the Basic Law shall be interpreted in accordance with the National Avowal and the achievements of the historical constitution. This grants the Constitutional Court with extensive authority. Besides constitutional principles, the Constitutional Court will have to interpret the ideas and principles contained in the National Avowal and refer to the achievements of the historical constitution in its decisions.

In connection with financial statutes (budget, tax and excise statutes, etc.) the powers of the Court have been diminished. The Court will only be entitled to exercise constitutional control over these statutes if and when these infringe on certain fundamental rights (e.g. human dignity, freedom of religion and conscience) defined in the Basic Law. However, the Court exercises complete control over these statutes if the rules pertinent to the legislative process are infringed upon. Such a restriction of powers was found to be detrimental by the Venice Commission as well, who urged the restoration of the full extent of the control exercised by the Constitutional Court.³⁴ The constitutional legislator showed some flexibility in this matter to the extent that it ensures the full scope of constitutional control of financial laws if the State debt decreases to less than 50% of the GDP. The objective of the government is to get out of the economic crisis, thus, it is deemed important to be able to enforce its measures. It

should be emphasised that those having their fundamental rights infringed upon by financial statutes should be able to protect their rights by exhausting ordinary judicial remedies in a manner that conforms to the ECHR and the EU Treaties.

11. Conclusions

The Hungarian Basic Law is the result of the 2010 elections, pursuant to which the governing party was given political trust so as to realise the promises contained in its program, particularly the adoption and realisation of a new constitution. The due time of constitution-making³⁵ has come, because the previous elected party never brought results that would have made possible the adoption of a new constitution, or disharmony between the political parties sabotaged the adoption thereof. The Prime Minister of the party coalition that received the two-thirds majority acted upon the possibility of constitution-making. The adoption of the Basic Law primarily had political and only secondarily legal reasons; the Basic Law wishes to contribute to the elimination of the political, economic and moral crisis apparent in the society. The constitution-making process indeed had unique circumstances; the opposition did not participate therein, disputing its legitimacy.³⁶

The escalation of the process, however, as at the time of the 1989 “revolution by negotiation”, was not revolution-like;

therefore the new Basic Law should not be deemed a revolutionary constitution. No changes were made in the structure of the State that would change the basic features of the country's administrative framework. Hungary's state structure will not change substantially under the new Basic Law. Parliamentary republic remains the form of government, with the outstanding role of the Prime Minister and the government. The control organs, such as the Constitutional Court, though partially lost, but also won certain powers and the requirement of financial and budgetary discipline was reinforced in the Constitution. The National Avowal intends to strengthen national cohesion, and beyond classic individual fundamental rights, criteria of communal responsibility also appear in the field of fundamental rights.

According to the temporariness clause contained in the present constitutional preamble, the constitution was established "until the adoption of the new Constitution of our country" therefore, the current constitution-making process should rather be considered as the beginning of a new era, an effort to shake off the above-mentioned symbolic burden of the past twenty years and to close that period. As I have already mentioned, it takes some time to be able to pass judgment on a constitution and its practice. Society will declare its value judgment on the provisions of the new Basic Law based on the operational experiences of State organs; therefore, final statements on the societal legitimacy of the Basic Law can only be made based on

the experience. The Basic Law and its method of adoption can be subject to debate; however, what cannot be disputed is that Hungary is a democratic state under the rule of law.

In my view, it should be examined whether or not the Venice Commission acted correctly when they directly requested Hungary to amend certain provisions of the Basic Law. I base this assertion on the fact that neither the ECHR nor the ECJ has such authorisation. The Venice Commission, in its current quality, should have made recommendations in terms of the interpretation of the Basic Law, merely urging Hungary to respect international regulations. It is useful to bear in mind that constitutional law is a highly sensitive terrain; its subject matter is the sovereignty of the state, through which the state acts sovereign but, constantly observing international rules, defines its own constitutional framework. The Venice Commission has recently compiled an opinion on the rule of law,³⁷ enumerating the elements of a rule-of-law constitutional state. According to the report, these are the following: a) the rule of law, legality; b) the requirement of legal security; c) prohibition of arbitrariness; d) the right to turn to independent judicial fora; e) protection of human rights; f) prohibition of discrimination, equality before the law.

In addition, the common European constitution heritage has two main elements. Firstly, free elections – correct electoral statutes can ensure political change – and secondly, the protection of human rights is the foundation of the

democratic state structure. The protection and promotion of these rights are set forth by international documents, besides the national constitutions, as binding every state.

Hungary is a democratic state that respects the achievements of the common European constitutional heritage. Obviously, the birth of every new constitution may give rise to debate; however, even the Venice Commission does not go on to criticise the fundamental values of the new constitution and welcomes the fact of its adoption. Only after it has been put into practice can we pass judgment on whether a constitution will stand the test of time or not.

Notes

- ¹ CDL-AD(2011)001 (28 March 2011) on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary and CDL(2011)032 (6 June 2011) Draft Opinion on the New Constitution of Hungary.
- ² A term used by István Kukorelli in his work *Tradíció és modernizáció a magyar alkotmányjogban* ("Tradition and Modernization in Hungarian Constitutional Law", Szószadvég, Budapest, 2006).
- ³ The drafts put together by private persons and by scientific and research institutions and the decrees of Parliament signifying the importance of the cause of constitution-making or the legislation that set forth important principles for the future constitutionalisation. This has been continuously reworked but was never subject to political debate resulting in the adoption of either. Decree of the Parliament No. 119/1996 (XI.21) would have provided for the regulatory principles of a new constitution that later failed due to lack of political consensus; and Act I of 2000 could be cited as legislation rising from the memory of the foundation of the Hungarian State by King St Stephen and the Holy Crown, which practically provided guidelines for the transformation of the constitutional preamble, applying historical narrative and representing the Crown as meaning the unity of

the nation, in the context of the boons of the Foundation of the State by St Stephen. I will later discuss Act I of 2000 and the constitutional efforts of the parliamentary sessions following the transition as well.

4 Decision 23/1990 of the Constitutional Court, the concurring opinion of Lószló Sólyom.

5 The power of the Crown (Regina) to embody the nation and represent unity is not unknown and it is especially apparent in the Anglo-Saxon sense of community and national philosophy.

6 The new constitution that was born through the amendment in 1989 declared itself temporary in its preamble. I will later discuss in detail the political implications of this provision and the “symbolic burden” on the shoulders of the constitutional legislator due to the declared temporariness.

7 For elaboration of this reasoning see, e.g., Sulyok, Márton; Trócsónyi, Lószló: *Preambulum* (“Preamble” in Jakab, Andrós (ed.): *Az Alkotmány kommentárja* (“Commentary on the Constitution”), vol. 1, Szózdavég, Budapest, 2009, pp.99–101.

8 Difficulties in interpretation are partially due to some unfortunate accidents, e.g. the Special Edition of the Official Journal of 23 October 2009, when all the amendments to the Constitution were published in a consolidated manner. However, contrary to the intention to publish a consolidated text, the issue in question contains the texts from earlier editions of the journal, where certain misleading versions were included, e.g. the President of the Republic sets the date for the Soviet elections.

9 That the constitution-making process was in the international eye was unquestionable at this point, which is best evidenced by an international experts’ conference on the subject organized by the Ministry of Foreign Affairs (MFA) and the Hungarian Academy of Sciences (HAS), where famous public lawyers and political scientists disserted on the international opinion in terms of core questions of the constitution-making process and on relevant case-studies. Dominique Rousseau, Francis Delpérée, Didier Maus, Carlo Casini, and Peter Huber among others participated at the conference. For a resumé of the conference see: Sulyok, Márton, *Alkotmányozós Magyarországón: Példók, lehetőségek, visszhangok, tanulsógok – Fókuszban: az összehasonlító alkotmányjog szerepe az alkotmányfejlesztésben* (“Constitutionalisation in Hungary. Examples, Opportunities, Reactions and Lessons – The Role of Comparative Constitutional Law in Focus”) in

- ¹⁰ Based on the above reasons I do not agree with the Venice Commission's general and non-legal observation that the preparation of the new Hungarian constitution was inappropriate. Constitution-making processes have different natural histories; the emphasis, however, shall be on the document adopted. Cf. CDL(2011)032.
- ¹¹ The Venice Commission, in the working documents of its opinion, already refers to the scruple, according to which it is problematic that the meaning of the "achievements of the historical constitution" is not clear in the National Avowal since there is no clear and unified scientific standpoint on the exact content of the historical constitution. Cf. CDL(2011)032, item 35.
- ¹² The Venice Commission deals with this question in the working documents of its opinion, (particularly CDL(2011)032, item 36–38), but concludes after enumerating and analysing the legal reasons arising out of the declaration of nullity and the questioning of legitimacy of both the Constitution and the newly adopted Basic Law that such a declaration shall be considered to be a political one. However, the Commission also states that it finds worrying that the Avowal ("preamble" in the Commission's wording) as a constitutional element that bears an important political message was adopted with a controversial content and without regard to the interpretative difficulties mentioned above.
- ¹³ CDL-INF(2001)19 Report on Preferential Treatment of National Minorities by the Kin-State.
- ¹⁴ Cf. CDL(2011)032, 10, item 42–43.
- ¹⁵ By paraphrasing the wording of the National Avowal, the wording of "whoever considers herself to be Hungarian" can also be interpreted in a way that it could mean that everyone can file a petition for Hungarian nationality who considers herself as part of the Hungarian cultural nation.
- ¹⁶ In this respect, for example, *Aziz v Cyprus*, 69949/01.
- ¹⁷ From the work of the Venice Commission see, e.g., CDL-EL(2010)013 Study. Out-of-Country Voting Legal Provisions or CDL-AD(2002)13, which is cited in relation to the right to vote of trans-border citizens by Pogonyi, Szabolcs; M. Kovács, Mária; Körtvélyesi, Zsolt, *The Politics of External Kin-State Citizenship in East Central Europe, October 2010*, EUDO Citizenship Observatory – European University Institute, Robert Schuman Centre For Advanced Studies, p.14.

¹⁸ The 23 July 2008 constitutional amendment opened the possibility thereof, then the provisions entered into force by way of 14 April 2011 organic law (*Loi organique du 14 Avril 2011 relative à l'élection des députés et des sénateurs*). The Conseil Constitutionnel also dealt with the issue in one of their decisions of 12 April 2011, in which they found the regulation to be constitutional as part of *ex ante* constitutional review (*Décision No. 2011-628-DC*).

¹⁹ The issue is examined by the Venice Commission as well in CDL-AD(2011)001 and CDL(2011)032; particularly CDL(2011)032 item 57–89. in terms of the final text adopted.

²⁰ The incorporation of fundamental rights instruments into national constitutions is not unprecedented; e.g. the 1946 constitution of the French Fourth Republic, which incorporated the fundamental rights provisions of the 1789 Declaration of the Rights of Man by a preambular reference made thereto, for the purposes of interpretation. Nonetheless, we shall bear in mind the questions raised by the existence and operation of a multi-level Europe when examining the application of the solution presented. We analyse this issue extensively below.

²¹ See CDL-AD(2011)001, 6, item 25, “The incorporation of the Charter as a whole or of some parts of it could lead to legal complications”. I have already discussed the relevant observations of the Commission above.

²² See, e.g., the necessity-proportionality test constructed by the Constitutional Court, which was incorporated into the Basic Law as part of a fundamental rights protection clause.

²³ E.g. in *Hill v. United Kingdom*, 19365/02, 18 March (2003) Cf. the concrete standpoint of the Venice Commission, CDL(2011)032, 15, item 70–71.

²⁴ In my opinion, the Venice Commission’s view that free elections would become meaningless due to the large number of cardinal statutes should be true for the present constitution as well, because it contains more than 33 regulatory subjects (e.g. freedom of religion and conscience, media) in which a two-thirds qualified majority is necessary.

²⁵ The original Hungarian expression *mag-alkotmány* is used by Varga Zs., Andrós in *A mag-alkotmány védelmében* (“In the Defence of the Concept of Core Constitution”), Pózmány Law Working Papers, 2011/2. <http://www.plwp.iak.ppke.hu/hu/muhelytanulmanyok/2011/9-2011-2.html>.

²⁶ I note this by pointing out that at the time the name was mentioned, it covered the norms binding the Parliament due to the absence of a written constitution. The two-thirds majority as a distinctive feature came to life later on; at the time of the transition “two-thirds laws” were called constitutional statutes, which was later changed to “*kétharmados*” after 1990 in order to ensure the cohesion of the hierarchy of legal measures.

²⁷ The English language text of the recently adopted Basic Law applies a different but erroneous wording: prior consent.

²⁸ Cf. CDL(2011)032, 26, item 129–130.

²⁹ Cf. CDL-AD(2011)001.

³⁰ Article 24 paragraph (2) item d).

³¹ However, it is important to mention hereby that in the case of judicial proposals the injunction issued to suspend the proceedings due to the discovery of a constitutional question can be appealed at the second instance, which means that a court of second instance becomes entitled to rule on a constitutional issue, which is not allowed in the Hungarian system and contrary to the basic functions of the centralized constitutional court model.

³² It is noteworthy that the original legislation setting up the Constitutional Court also aimed at the election of fifteen justices, of which only eleven were filled later on due to practical reasons.

³³ Based on the international experts’ opinions at our disposal it can be asserted that certain reasonable but binding administrative deadlines shall be established in putting together the legislation on the Constitutional Court.

³⁴ As the Commission states: It is the definitive role of the Constitutional Court in a democratic society that it possess a broad range of powers because “a sufficiently large scale of competences is essential to ensure that the court oversees the constitutionality of the most important principles and settings of the society, including all constitutionally guaranteed fundamental rights. Therefore, restricting the Court’s competence in such a way that it would review certain state Acts only with regard to a limited part of the Constitution runs counter to the obvious aim of the constitutional legislature in the Hungarian parliament ‘to enhance the protection of fundamental rights in Hungary’” (CDL-AD(2011)001, 10, item 54).

³⁵ See Sulyok, Trócsónyi, *op. cit.*, pp.52–60.

³⁶ I do not state that the crisis of legitimacy is not unknown in Hungary relevant to the constitution-making process. In 1989, the legitimacy of the extra-parliamentary transitional constitution-making was debated even by the body (NEKA – Nemzeti Keresztal, National Roundtable) that saw it through. This is why compromise was needed on some questions. The reason for the 1989 (legal) legitimacy crisis is to be found in Hungarian public law tradition since in Hungary the legislator and the constitutional legislator are not separated. Therefore, those negotiating in the transition did not *per se* have any *sensu strictu* authorisation to adopt a new constitution because the conciliation of interests leading to an all-encompassing constitutional amendment was conducted outside the frame of the constitutional legislator, i.e. the Parliament. Several people debate the legitimacy of the 2010–2011 constitution-making from political aspects, but its legal legitimacy is unquestionable since it happened within the frame of the constitutional legislator. For more on the legitimacy and legitimisation of constitution-making see: Takócs, Péter, *Az Alkotmány legitimitása* ("The Legitimacy of the Constitution") in *Alkotmánybírósági Szemle* ("Constitutional Court's Review"), 1/2011, pp.58–65.

³⁷ 24 March 2011. CDL(2010)141rev2 Draft Report on the Rule of Law, item 40–63.

Chapter II

The National Avowal

Ferenc HORKAY HÖRCHER

In what follows I am going to analyse the first chapter of the new Hungarian Basic Law, which is identified as National Avowal. In the first part of the essay I address the opening portion of the Basic Law as a separate entity, which requires special attention and special treatment in its interpretation.¹ It is an autonomous piece of writing that should be understood and measured by its own standards. First of all, I define the genre to which it belongs and enumerate some of the requirements of that particular genre that the text intends to comply with. My assumption is that the genre leads directly to a number of the text's formal features, including its length, structure and style. But the genre also decides some of the main thematic elements of the text, which are by now at the centre of public discussion in Hungary and, to a certain extent, in Europe as well, e.g. the mentioning of the name of God and Christianity, the reference to the nation's historical past, the enumeration of the supposed main values of the political community and the text's vision of the nation's future. The genre also helps

one to identify the speakers and the audience: there is a parallel reference in the text to members of the Hungarian nation, or Hungarian citizens as speakers, and to their community, the nation, taken as a kind of corporate personality, whose past, present and future is alluded to.²

In the second part I shall make an effort to suggest in what direction the public discourse on the Hungarian constitution, including its authorised interpretation by the Constitutional Court, should be widened up if interpreters wish to do justice to the requirements raised by the assumed genre of the Avowal. Here I shall recall a thesis I put forward a few years ago,³ according to which the earlier Constitution was the result of a political compromise of the relevant parties of the National Roundtable discussions (including the ruling communists and the new, segmented and democratically not yet legitimised opposition) during the Transition. The main features of this earlier Constitution, including the general tendency of its interpretation by the first Constitutional Court led by László Sólyom, reflected the political impasse, which was an unintended consequence of the otherwise fortunate compromise, which led to the peaceful Transition itself. This political deadlock, I claimed, was expressed by the obstinate adherence to legal certainty and the acclaimed superiority of the rule of law over other democratic values and the Constitution's preference of value-neutrality over the popular demand for substantial justice. I shall test this earlier thesis of mine by considering how far and in what ways the framers of the

new Basic Law might be shown to have wanted to redress this shortcoming of the earlier Constitution, and in what sense the National Avowal is to be seen as a catalogue of the main values claimed to be shared historically by the whole political community.

1. The genre and its consequences

1.1. The genre

In legal documents terminological nuances make all the difference. It is therefore of the utmost significance that the new Hungarian Basic Law (*Alaptörvény*) is not labelled as a constitution.⁴ Similarly one should stress that the first chapter of the Basic Law is not a prologue or a preamble (even these two should not be taken to mean exactly the same), but is entitled a National Avowal (*Nemzeti hitvallás*). By interpreting this term, I shall be arguing, one can establish the precise literary-legal genre of this piece of text, and by way of defining the genre one can indirectly deduce its implied relationship with the main body of the Basic Law.

Firstly, I have to emphasise my conviction that in terminological matters one should always rely on the authentic terms used in the original (in this case, Hungarian) language version and not on translations – not even on the authorised one. In this case, one should see that the concept of *avowal* is not the same as “*hitvallás*”.

The root of the English term is 'avow', a thirteenth-century word in English, meaning "acknowledge, accept, recognise". As a synonym of *avouch*, it means, according to Fowler: to "own publicly to, make no secret of, not shrink from admitting, acknowledge one's responsibility for ..." ⁵ It is claimed to be a legal concept as well. ⁶ On the other hand, the main field of reference of the Hungarian term "*hitvallás*" is, of course, religious. It consists of two words, "*hit*", meaning conviction and "*vallás*", meaning both religion and confession. Together the phrase means confession of faith. The word is used in the Hungarian equivalents of terms like the *The Niceno-Constantinopolitan Creed* or the *Augsburg Confession*. Alister E. McGrath, however, distinguishes between the creeds of Christendom and the concept of the confessions of faith in the time of the Reformation used by the different denominations. ⁷ The creeds of the early Church were accepted by the magisterial reformers, because "they were seen as an important check against the individualism of the radical reformation (which generally declined to regard these creeds as having any authority)". On the other hand, confessions of faith "were regarded as authoritative by specific groupings within the Reformation". McGrath refers to the Lutheran Augsburg Confession (1530), the Confession of Basel (1534) and the Geneva Confession (1536), among others.

"*Nemzeti*" means national. If put together with "*vallomás*", this is a creed or confession of (political) faith used in a

national context or performed by the nation itself. The reason why this transposition of the term from a religious to a political context seems reasonable is simple: in Hungary the nationalist discourse goes back at least to the early sixteenth century, when – after the last “national” king, Matthias Corvinus, had died – the fear of a foreign ruler generated a “nationalist” discourse, and this means that Hungarian “nationalism” is coeval with the Reformation. As we shall see, one of the key figures behind the Hungarian constitutional tradition, István Werbőczy, author–compiler of the famous *Tripartitum*, a collection of statutory and customary laws of the Kingdom of Hungary,⁸ already positioned himself in the context of a foreign court and nationalist country cleavage, on the side of the “nationalists”.⁹ If nationalism and the Reformation were born approximately at the same time, it is no wonder that nationalism in Hungary is articulated within a religious discursive framework, and – on the other hand – that the Reformation is interpreted in a political – i.e. nationalistic – frame of reference here. This is the result of the fact that the Hapsburgs came to be seen as the arch-enemy, both in political and in religious terms, for reformed nationalist Hungarians, being foreign and Catholic rulers in the times of the religious wars and given the loss of Hungarian national independence.¹⁰

Taking into account this historical background there is not much incomprehensible in the term, and genre of the National Avowal, and – what is more – in the fact that it is

used as the title of the opening section of the country's 21st-century Basic Law.¹¹ However, the genre itself seriously restricts the framers' elbow-room, closely connecting the new chapter to traditional forms of discourse. In what follows we are going to see these restrictions and their actual consequences. But before anything else, one needs to confront the issue of the legitimacy of the new Basic Law, as it, too, determines the potential interpretations of the National Avowal.

1.2. The present deficit and potential legitimacy of the Basic Law

As it is well known, the new Hungarian Basic Law was accepted by the two-thirds Fidesz-KDNP majority of the Hungarian Parliament with a remarkable rapidity in April 2011. Its idea was first seriously mentioned by the Prime Minister in an interview between the two rounds of the national elections in April 2010, and in a year's time, on 25 April 2011, it was signed by the President of the Republic. Referring to "numerous concerns within the civil society over the lack of transparency of the process of the adoption of the new Constitution and the inadequate consultation of the Hungarian society", the Venice Commission, in March 2011, "criticised the procedure of drafting, deliberating and adopting the new Constitution for its tight time-limits and restricted possibilities of debate", expressing its "regret that no consensus had been possible".¹² In June, the Commission thought that "the above-mentioned comments

are still valid”.¹³ I think that this criticism is indeed true and significant, and it will have a long- lasting impact on the social-political reception of the Basic Law.

However, I also think that in fact most of the written constitutions were framed and accepted among tight political circumstances, and there was rarely chance for wide-ranging consensus-seeking and detailed negotiations among the different political groups, not to mention the whole civil society. No doubt, Hume’s dictum on the rather dubious origin of all governments comes to mind: “Almost all the governments which exist at present, or of which there remains any record in story, have been founded originally, either on usurpation or conquest, or both, without any presence of a fair consent or voluntary subjection of the people.”¹⁴ His comment is certainly meant as a Machiavellian note on the use of power at the bottom of all authority. But his criticism covers elected governments as well, which is perhaps more relevant here:

But where no force interposes, and election takes place; what is this election so highly vaunted? It is either the combination of a few great men, who decide for the whole, and will allow of no opposition; or it is the fury of a multitude, that follow a seditious ringleader, who is not known, perhaps, to a dozen among them, and who owes his advancement merely to his own impudence, or to the momentary caprice of his fellows? Are these disorderly

elections, which are rare too, of such mighty authority as to be the only lawful foundation of all government and allegiance?¹⁵

One should take Hume's cautious remark – stemming from the Platonic–Aristotelian criticism of popular democracies, aimed at the false illusions of the Enlightenment, trusting too much human rationality – more seriously even today. Hume, with a biting irony, reprehends his contemporaries for being “so much in love with a philosophical origin to government, as to imagine all others monstrous and irregular”.¹⁶ Therefore, following Hume, I would regard the *ad hoc* and less than satisfactory preliminary negotiations for drafting the Hungarian constitutional document less of a philosophical problem. I am convinced that on condition that the created collection of basic norms can be interpreted in the interest of the whole of the political continuity as well as for its individual members, regardless of their political alliances and social standing or sympathies, it might be accepted later by the whole community.

If one accepts these considerations the new Basic Law will have to prove not that it was born according to the common standards written in handbooks of democracy, but that it can be interpreted in the interest of all and everyone under its effect. This condition practically means that the question is whether or not the text is vague enough to give room to further, sophisticated interpretations (mainly by the

Constitutional Court), allowing to represent the rights and interests of those whose representatives decided not to take part in the negotiations during the process of its creation. If these manoeuvres will prove to be possible, the legitimacy of the new Basic Law might be within reach. I agree with its critics, however, that until then, this very lacuna in its legitimacy remains a pending question, which has an impact on the possible interpretations of the text itself.

1.3. Length, structure and style

The recent literature on European preambles keeps telling us that as they serve to reaffirm the national identity of a given community, substantial preambles are more common among nations that experienced foreign or internal tyranny than in the constitutions of established democracies.¹⁷ The self-esteem and self-identification of the political communities of the new democracies is in need of reinforcement, and preambles can help in their self-expression.

The first chapter in the Basic Law is called a National Avowal – this title signals that a rather special function is attributed to it. Through this inner title the framers declare that this portion of the text is to be read differently: it should be taken as a quasi-religious or literary text. That is why it can be lengthier than any former preambles: it is perceived to behave like a work of art. The stylistic register of the text is also to be interpreted in this light. The National Avowal's

tone refers back to the classical literary masterpieces of Hungarian literature in ages, when literature served very clearly political missions. And more particularly it refers back to the great nineteenth-century national hymns of the Hungarians, to the *Himnusz* by Kölcsey and the *Szózat* by Vörösmarty. This is made quite explicit by the motto: "God bless the Hungarians",¹⁸ which directly borrows the first line of Kölcsey's poem. Written in 1823 by one of the leading political theoreticians and practicing politicians of the age, it did not last as the official anthem of the country for long, although it was so regarded by custom, and was proposed to be authorised as such by the Parliament in 1903. The Emperor did not sanction the bill, as he no doubt preferred Haydn's *Gott erhaltet* the patriotic Hungarian hymn.

If you compare the two texts, it is most evident that the text of the Hymn (*Himnusz*) is just as much a repertoire of Hungary's glorious and often tragic past as is that of the Avowal. It starts out from the episode when the Hungarian tribes entered the Carpathian Basin: "By Thy help our fathers gained Kárpát's proud and sacred height",¹⁹ and similarly, the Avowal starts with Saint Stephen, the founder of the State: "We are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago," and it also refers to the "Carpathian Basin". Neither of these texts restricts its scope to the glorious events, but includes emphatically also the tragic moments of national history. Both of them focus in a Gnostic way on the tragic

choice between national independence and liberty on the one hand or national servitude and disaster on the other. And certainly, the tone of the Hymn is just as much solemn as that of the Avowal.

If we have a look at the *Szózat* (Solemn Address), again its title already betokens a kind of quasi-religious hymn, also chanted even today at national festivals. This one, too, already in its title, and much more in its text, makes the same use of language and past, serving national memory and national mourning as the *Himnusz* or the Avowal does. What is more, one finds the same relationship between the whole national community and its individual members here as is evidenced by the Avowal: the nation commands complete fidelity and devotion from its members, preceding even their private interests, promising them home in their life and graveyard in their death, because “No other spot in all the world / can touch your heart.”²⁰ It is also remarkable that it, too, presents the Hungarian nation as the saviour of the world, a martyr among the nations – and a similar kind of devotion and calling can be felt in the Avowal: “We are proud that our people has over the centuries defended Europe.”

To sum up my main point here: I claim that the much-adorned classics of national literature, the *Himnusz* and the *Szózat*, lend their tone and much of their topic to the National Avowal. In this respect it comes nearer to the products of Hungarian national poetry than to the preambles of other national constitutions. What is more this

claim stands, even if I tend to accept that the lyrical power of the text is much weaker than that of the masterworks I have compared it to. There are harsh critics who would go as far as to say that stylistically the Avowal is almost kitschy. But this claim again misses the point. What matters – as far as constitutional interpretation is concerned – is that it is a type of linguistic product that works allegorically and rhetorically much more naturally than as a legal (pre)text. And this way it once again reminds us that the National Avowal requires special treatment and no automatic constitutional application is really adequate in its case.

1.4. Main points of the public debate

In this part of the paper I shall concentrate on four sensitive points of the debate about the Avowal: (1) whether or not it is permissible to include the mentioning of God in a text like this, (2) whether or not the inclusion of the historical constitution has any legal relevance, (3) whether or not the exclusions of the time of the Communist Constitution from the constitutional tradition makes sense, and finally, (4) whether or not the emphatic reference to community interests is justified, and if so, on what grounds.

(1) Perhaps the most important argument against the name of God appearing in constitutional documents²¹ is the one according to which it would hurt the requirement of state neutrality concerning questions of faith, worldview or ideology. This neutrality is claimed to be the first requisite

of a democratic regime, and the guarantee of the autonomy of its citizens, allowing them the freedom of choice among different, often very different democratic political parties in public life, and among differing, often opposing visions of life in their private one. However, one should not disregard the fact that the requirement itself is not neutral. It was articulated, for example, by the apostle of political liberalism, John Rawls, in his *magnum opus*, *A Theory of Justice* (1971), which was nothing less than a plea for an egalitarian reworking of classical liberalism. His neutrality principle, according to which the liberal state should not promote any particular “conception of the good”, is an expression of the liberal view of politics, and as such, cannot itself be neutral, even if it professes neutrality as one of its most important basic values. In his opinion, democratic politics is about creating what he calls a just society. To reach this state of affairs – he seems to suggest – one needs only to solve a problem of mathematical equilibrium. But he underscores alternative views of politics, and in this way tries to determine the rules of the game before the game itself starts off. Liberalism in his hand becomes a meta-political theory.²²

I would argue therefore that the neutrality principle is hardly tenable in the case of a truly democratic constitution. Each and every political community has its reservoir of traditional values and one of the aims of framing a constitution is to make them explicit. This does not mean that a constitution should point to one single political orientation. On the

contrary, it should be open to embrace all the values significantly present in a society. Therefore, if there are religious believers in a significant number in a given society, its constitution should not shrink from a reference to the god(s) of this/these religion(s).

There is another fear that can lead some sensitive critics to raise objections against any direct references in a constitutional document to God. This is the liberal principle of the separation of church and state, already formulated in the US constitution at the end of the eighteenth century, as a conclusion drawn from the fierce religious tensions earlier.²³ The concept itself was created in the seventeenth century by the British enlightened philosopher, John Locke.²⁴ In this case again, it would be easy to argue that the argument is itself partisan, the philosopher, himself an active politician, trying to draw the conclusions of the fierce political struggles of his time, which sometimes turned into destructive rebellions, in Britain, due to religious disagreements. But in this case the dogma is too widely accepted by now to be disregarded this way. Therefore one should argue in this case from the premise of accepting the dogma. Yet it does not seem too difficult to do so. For indeed the separation requirement does not seem to be violated by the direct reference to God, as long as it is not the God of a certain denomination, or religious confession. Also, the type of text in which the phrase appears makes it impossible to hurt the separation thesis. For indeed it is not within the main body of the National

Avowal, but appears in a fragmentary sentence standing all alone in front of the main text, serving as a kind of motto to it (or to the whole body of the Basic Law). The function of a motto excludes the possibility that it be taken as a constitutional norm. Taken from the first line of the national anthem, it remains simply a literary quotation in the text of the Basic Law, no doubt with a strong symbolic resonance, but not working as part of a norm, and therefore meaning nothing specific legally.

(2) The second difficulty of the Avowal raised by the critics of the Basic Law is its incorporation of an earlier notion of Hungarian constitutional tradition: that of the historical constitution. The claim is that the term of a historical constitution sounds anachronistic and alien in the context of a written constitutional document. According to item 29 of the opinion of the Venice Commission, the term is too vague:

The concept of “historical constitution”, used both in the Preamble and in Art. R, dealing specifically with the interpretation of the Constitution, brings with it a certain vagueness into constitutional interpretation. There is no clear definition what the “achievements of the historical constitution”, referred to in Article R, are.²⁵ [In item 34 the *Opinion* further notes:] The reference to the “historical constitution” is quite unclear, since there have been different stages in the development of different historical situations in

Hungary and therefore there is no clear and no consensual understanding of the term “historical constitution”.²⁶

Trying to clarify the vague concept, and in order to explain the call to refer to it, one should make use of the secondary literature in Hungarian legal history, which is undoubtedly huge on this issue, and certainly there is no wide-ranging consensus concerning the gist of it. (One could of course ask if there could be a consensus about any historical phenomenon that has an influence on present-day politics.) In order to get a balanced view I shall turn to those partly or wholly independent observers, who still had or have a firsthand professional knowledge of Hungarian constitutional history: the late Professor László Péter (himself of Hungarian origin, but teaching and researching in the UK) and Martyn Rady, also from the University of London, School of Slavonic and East European Studies. Here are some historical data brought up by them, which might be relevant to make sense of the problem itself.

Although Hungary received its first written constitution only from its Communist regime after World War II, it looks back to a long line of constitutional practice. As László Péter put it: “Hungary’s ancient constitution (...) was generated by custom.”²⁷ It was collected in a creative compilation and presented to the national assembly (the so-called Diet) in 1514; at first supported but finally not authorised by the king, and published privately in Vienna by the author, István

Werbőczy, in legal Latin language. Sometimes quite innovative in its content, the *Tripartitum* was always considered a reliable summary of ancient Hungarian constitutional practice. This customary ancient constitution “was still the dominant source of law” “well into the nineteenth century”.²⁸ After the April Laws of the Hungarian Revolution against the Hapsburgs in 1848 and the unconstitutional Hapsburg oppression of the revolution and the constitutional tradition between 1849–1867, an unexpected return to this tradition occurred, represented, for example, by the debates about what came to be called by the idea or doctrine of the Holy Crown. The doctrine concerned the public law status of what was called the Hungarian Crown, determining the rights of the (noble) Hungarians in the Hapsburg Empire under the jurisdiction of the Crown personified by the actual king. However, in the modern situation jurists had to decide about the relationship between “*consuetudo*” and statute law, the new way of governing people in an ever-more-complex European society. According to Péter, due to the interpretative talent of politics professor Győző Concha, law professor Ákos Timon, and leading politician Count Albert Apponyi, the *Tripartitum* played a major role in Hungarian Monarchical political debates, because politicians relied on it, “explaining into Werbőczy’s passage the legislative sovereignty of the state”.²⁹ What is more, “The precepts as well as the doctrine read into the *Tripartitum* survived after the collapse of the Habsburg Monarchy.”³⁰ On the other hand, after World War II, “The doctrine of the Holy Crown

became a red-rag for communists: some party hacks even labelled it a fascist ideology.”³¹

It is only natural, therefore, that if the tyrannical communist regime created a new, written constitution and threw away the historical one, after the fall of communism a new, democratic regime will distrust that written creation and will try to do its best to refurbish whatever is possible from the old, historical one. However, the constitution-making members of the National Roundtable talks in 1989 were not careful enough in this respect to secure the legitimacy of the new written Constitution. I find the present references to the historical Constitution gestures to heal wounds of the body politic, even if it comes a bit too late.³²

But beside this symbolic relevance, there is a further chance for its revitalisation. I think that it is not yet possible to assess the exact legal significance of the references in the Basic Law to a historical constitution. Constitutional legitimacy is decided in the long run, and it might depend on historical accidents as well. But one thing is sure: a lot will depend on whether or not its official interpretation, basically determined by the Constitutional Court, will be both creative and loyal enough to find ways to incorporate as much as possible from the country's constitutional tradition into the explanation of the vaguer parts of the Basic Law. Legal continuity is an important principle of the practice of the Hungarian Constitutional Court, and now the text of the Constitution explicitly demands a widening up of the horizon of continuity, in order to incorporate into its

scope some of the still relevant values (called achievements in the Avowal) of the ancient Constitution. How exactly this can be done is an open question at the moment, but one thing is sure: the nature of constitutional legal practice must change as soon as the Basic Law explicitly refers to the historical Constitution as the source of its interpretation. From that moment the understanding of the constitutional norms require a historical background knowledge of, and where possible, also argumentative references to the Hungarian constitutional tradition.

(3) A further criticism of the Avowal is concerned with the supposed legal paradox created by the apparently “*ex tunc* nullity” of the old Constitution, stated by the Basic Law:

We do not recognise the communist constitution of 1949, since it was the basis for the tyrannical regime; 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.³³

However, in my opinion, there is no paradox here, or, more accurately, the paradox is a (legal) technical problem only since, as far as political philosophy is concerned, the democratic standpoint and a tyrannical constitution are

non-negotiable. Therefore it is only natural that a newly founded democracy detaches itself from any remnants of a tyrannical past. You found the same robustness of self-distancing in the case of German legal thinking in connection with its recent past after World War II, and in Spain after the fall of the Franco regime. In my opinion nothing less direct would be acceptable on a democratic politico-philosophical basis, and compared to this demand, the technical legal solution is a secondary problem.

(4) Modern constitutional safeguards usually serve the defence of individual rights. This is, however, only a recent development. Although the defence of private property and other individual rights can be traced back at least to the Habeas Corpus Act (1679) and the Bill of Rights (1689) in British context, the logic behind modern constitutions was not simply the defence of the individual citizen against the state (i.e. the ruler). In fact, individual rights were pushed forward only by Grotius and his contemporaries. Before that the idea of the individual versus his/her community was hard to extrapolate. In fact individual identity was firmly based beforehand on the particular community one was (or became) a member of. Individual liberty was therefore directly dependent on communal liberty. I do not think that the perceptible shift of emphasis from the defence of individual rights to a double focus on the defence of both individual rights and the socio-political values of the whole political community substantiated by the history of political thought and justified by the reflections on the often

competing findings of recent re-conceptualisations of liberal democracies in communitarian,³⁴ civic humanist and (neo- or civic-) Republican thought is misconceived or unacceptable.³⁵ On the contrary, my understanding is that this is the result of a necessary development of democratic political theory initiated by recent Western experiences of political disinterest on the one side, and populist hyper-activism on the other side, both endangering the right workings of legitimate political institutions and of democratically elected agents in Western constitutional regimes. Given that the genre of the National Avowal by its very nature requires an identification with the “first person plural” viewpoint, I take it as an effort by the constitution-makers to react adequately on these later developments of constitutional thought. In the meantime I am also keen to emphasise the dangers of a too strongly “nationalistic” constitutional programme,³⁶ and therefore I would like to point out the efforts of the constitution-makers to balance the patriotic line with a European and regional agenda.³⁷

2. The national avowal as an interpretative tool and as a catalogue of basic values

So far, starting out from the genre of the text of the National Avowal, we have seen that it belongs to a quasi-religious, highly charged literary genre, which makes its reading as a constitutional legal document rather uneasy. We have seen

that the lack of political consensus at the time of its framing might be an obstacle to an open-minded and trustful reading of it even today, and I suggested to rightly weigh each and every word about the rather tragic historical experiences of the nation's past, taking into account the recent national traumas expressing themselves in the words of the Avowal. I mentioned that its vagueness might be seen as an effort to make room for competing political thoughts to find guarantees for their particular values in the text. I explained its relative length, highly rhetorical style and complex structure by the historical parallels in the classical (nineteenth-century) Hungarian literary tradition. I also made sense of the mentioning of God's name, of the concept of the historical constitution and of community values, also referring to the genre itself in connection with these.

In what follows I will present how the National Avowal relates to the main body of the text of the Basic Law, and more particularly, how and to what extent it could be used to interpret the actual norms of the Basic Law. Finally, I have to show the utmost significance I attribute to the fact that by the National Avowal a – perhaps not yet perfect – effort was made to give a more or less unbiased overview of the history and reinstate a catalogue of the traditional basic values of the political community of the Hungarians.

2.1. The National Avowal as an interpretative tool

To try to find the way the Avowal can, or should be used as

a tool to interpret the Basic Law, I sum up the relevant point of my earlier essay. Then I shall see how the text of the Basic Law itself demands from its users to be used as an interpretative tool.

As I mentioned above, in an earlier work I expressed the view that in order to bring Hungarian constitutional practice closer to the general public, the political parties should agree on the creation of a basic document that would sum up – if only in a catalogue format – the most important – and possibly sometimes even diverse – values of the community. One could try to see the National Avowal as answering exactly this question.³⁸ But that would definitely be a misapprehension. In fact, there are rather significant differences between my ideal scenario and what is actually contained in the Avowal. Let me show the differences and then point out in what respect I still hold my earlier view, that this value-catalogue should be used, but only very carefully as an interpretative tool to help to make sense of the norms of the new Basic Law.

First of all, in my earlier essay I regarded it as a necessary prerequisite of a legitimate basic document that it be the result of a political consensus on the shared values of the whole community. By now, I am convinced that this was an exaggerated demand, given the actual political situation, but still hold that a simple practical compromise would have been able to do the required job of a political negotiation.

Secondly, I was quite clear that the new basic document

should not be embedded in the text of the Constitution itself, because introducing another genre would disturb the autonomy of the understanding of the actual constitutional norms:

The basic document of the political transition would not be a contestant of the constitution, and would not take over the place of its predecessor. Rather, the basic document and the constitution would need to strengthen each other, as – *mutatis mutandis* – the Declaration of Independence in the US related to the Constitution.³⁹

Thirdly, I regarded the occasion of creating a basic document as a chance for a national self-examination, with a special focus on the stormy history of the twentieth century. This was envisaged by me as a kind of secular confession, which the genre of Avowal would have made possible – the more so, as the literary precursors – beside the rosy parts – all referred to national sins as well, like Kölcsey, claiming in the Hymn that “But, alas! for our misdeed, / Anger rose within Thy breast, / And Thy lightnings Thou did’st speed / From Thy thundering sky with zest”.⁴⁰ At this point one could also have learnt from similar national experiences, like from those of the Germans, the Spanish or the South Africans, who also had to cut links with a past oppressive regime, in which parts of the community turned against other parts of it, and where therefore the rituals of expressing repentance and

forgiveness would have its place. Let me also refer in connection with this theme to the gestures of Pope John-Paul II., asking for pardon for the sins of the misdeeds of the Church in earlier periods.

If one is interested in the philosophical stakes of the issue, Paul Ricoeur's ideas are worth consulting, especially his writings on making sense of the tragic or sinful moments of the past by a given community or between communities or between a community and the external world.⁴¹ To sum up the main points here, both the Pope and Ricoeur make tremendous efforts to show that real strength is not to demand vengeance or simple pardoning, but to get through a shared process of spiritual purgation by rituals of atonement and forgiving. This is all the more urgent because, as Ricoeur points out: "Political prose begins where vengeance ceases, if history is not to remain locked up within the deadly oscillation between eternal hatred and forgetful memory. A society cannot be continually angry with itself." If the Avowal had taken a more self-examining, and not simply a glorifying tone, this would have more closely resembled the Hymn and the Solemn Address, as the historical narratives of both these long poems touched upon the sins and guilt of the nation. The Solemn Address, for example, recalls the sins of the community by referring beside "long calamity" to "centuries of strife" as the cause of the national disasters. I wished that the Avowal could have been braver in its reconstruction of the tormented past of the nation.

But given all these differences between my ideal of a basic document and the actual Avowal, as the opening chapter of the Basic Law, I still hold the view that it might have a helpful role as an interpretative tool. I suggested earlier that

it would take off the shoulders of the body authorised to interpret and safeguard the constitution the difficult task of grounding the basic values. The role of constitutional control would be defined to consist in the constitutionally controlled surveillance of the process of the political actualisation of the already expressed constitutional values.⁴²

Significantly, to this daring thought-experiment I even in that essay added the following reservations “At the same time, the basic document of the political transition naturally needs to take into account the tradition of the constitutional interpretation worked out by the Constitutional Court.”

Something like this moderate reform of the constitutional interpretation is now explicitly demanded by the text of the Basic Law itself. In Article R para 3 we read: “The provisions of the Basic Law shall be interpreted in accordance with their purposes, the National Avowal and the achievements of our historical constitution.” Purpose is generally considered important in constitutional hermeneutics. However, the article explicitly refers to the National Avowal and “the achievements of our historical constitution” as well, which means that it will be difficult to disregard the Avowal in the actual practice of interpretation

exercised by the Constitutional Court. But, given the genre of the Avowal, one should keep in mind that its use in constitutional interpretation is strongly limited by its literary genre, and due to the metaphorical nature of poetic art, it cannot determine the line of interpretation as directly as if it were written in technical legal language. Its use is like the use of the Hymn in interpreting Hungarian national identity – through a careful process of literary interpretation.

2.2. An overview of the National Avowal: Fragments of the national history and a shorthand catalogue of the basic values

To see what I mean by this careful process, let us return once again to the National Avowal. As we have seen, it has two main building blocks: it is a combination of particular historical references and universal value-statements. Its historical approach might look a bit awkward to observers coming from a happier historical background, but in a country where the last century brought with it so many political upheavals: crises, wars and revolutions, oppressive regimes and unpredictable changes of regimes, history keeps its relevance even today in day-to-day politics. Also, the enumerations of the basic rights of the community and those of the individual members might be a bit long here, but it really has the function of expressing a pledge to democratic values as a

prerequisite of making sense of the Basic Law. In what follows I try to sum up in a more detailed fashion the main propositions of these two separate parts of the Basic Law.

Not surprisingly, the historical narrative starts out with a reference to Saint Stephen's reign, traditionally regarded as the founding moment of the Hungarian State. In this short reference to the rule of the first King, initiating the Holy Crown, the nation's past is closely tied up with the fate of Christian Europe. It is in this context that the Venice Commission's statement should be seen, which welcomes the double – national and universalist-European – perspective of the Avowal, recognising in the following note that: “notwithstanding the strong emphasis put on the national element and the role of the Hungarian nation, there has been an effort to find a balance, in the Preamble, between the national and universal elements”.⁴³ As both these perspectives belong to the nation's past, and both are highly valued, there is no other choice for any interpreter of the Basic Law, but to try to negotiate the national and the European components of it, claimed to be mutually dependent on each other: “We believe that our national culture is a rich contribution to the diversity of European unity.”

The only other historical moment mentioned in a cursory fashion in the text is the last century, of which the Avowal says the following: “We promise to preserve the intellectual and spiritual unity of our nation torn apart in the storms of the last century.” The rhetorical trope of the historical storm

that tears apart the nation is a biblical allusion, referring to the fate of the Jewish nation. The language is reminiscent of the pamphlets of the age of Reformation, when Hungary was torn apart both by religious disputes and by external enemies. And therefore the phrase's interpretative value is to look at the normative part with this twentieth-century experience in the back of one's mind, taking internal enmities, and the lack of solidarity in times of external threat as potentially leading to disasters, and therefore as dangerous to the national interest – as pointed out in our national tradition.

After this historical recapitulation, we find the catalogue of the basic values, starting out – as in the argumentative practice of the Constitutional Court – from human dignity.⁴⁴ This is a concept that is as much prevailing in the Catholic social teaching as in the secular philosophical tradition of the Enlightenment.⁴⁵ It was rightly chosen by the first president of the Hungarian Constitutional Court as the key value of the basic rights,⁴⁶ and apparently the new Basic Law keeps this starting point. Yet the Avowal makes more explicit that the concept of dignity is in accordance with the Catholic teaching, connecting individual freedom with the human urge of cooperation with others. From the Communitarian account of the nature of man, from the “thick description” of the person, it draws the values of fidelity, faith and love – all connected with the Christian teaching, but none contradicting Enlightened secular morality. It also establishes social virtues and common

goals supported by the State, and its own values of well-being, safety, order, justice and (civic) liberty. It also explicitly commits itself with democracy, opting exclusively for it in the competition of the different political regimes.

There again comes a historical detour, as the twentieth century witnessed non-democratic regimes in Hungary, and the Avowal repudiates both “national socialist and communist dictatorships”. This is something that is all-important to an understanding of the new Basic Law by foreign interpreters: that it is to be taken as an outright condemnation of all totalitarian regimes experienced in twentieth-century Hungary. It tries to re-establish the constitutional continuity, by connecting 19 March 1944 and 2 May 1990 as the two endpoints of a totalitarian constitution, overcoming national traditions.

And there a final turn occurs – from the past the discourse leads to the future, using the famous Burke an analogy of the covenant of the different generations of a nation. In Burke’s version it sounds like this:

Society is indeed a contract ... it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those

who are living, those who are dead, and those who are to be born.⁴⁷

And the Avowal refers to this famous locus the following way:

Our Basic Law shall be the basis of our legal order: it shall be a contract among Hungarians of the past, the present and the future; a living framework which expresses the nation's will and the boundaries within which we want to live.

With this gesture, the Avowal admits that it is based on a view of society that goes back to the great tradition of European social and political thought, connecting the teaching of the ancients, of the Church and of the Christian humanist and Enlightened modernist trends of ideas with the local constitutional tradition and common-sense experience, in order to fulfil its mission to help Hungarians confront an uncertain future.

Notes

- ¹ This must have been the opinion of the editors of this volume, who asked me – a non-lawyer, legal and political philosopher and a historian of ideas – to write this chapter.
- ² I am grateful to Dr Kálmán Pócza, who called my attention to this simple fact.
- ³ Horkay Hörcher, Ferenc, *Értékhiányos rendszerváltás* (“Value-Deficient Transition”), in Fodor, Gábor G. and Láncki, András (eds): *A dolgok természete* (“Nature of Things”), Budapest, Századvég, 2009, pp. 79–

4 It is not the theme of the present paper, therefore I would only like to point out very briefly that by opting for the title Basic Law the constitution-maker adheres to a view of the constitution that does not accept the positivist account according to which it is nothing more than a statute. Rather, it presents the constitution as consisting of the Basic Law and other cardinal laws, as well as of the constitutional tradition of the country. Due to the nature of this mixture one cannot pinpoint its content for once and all, but should rather look at it in its historically dynamic development.

5 <http://www.etymonline.com/index.php?term=avouch> The Online Etymological Dictionary refers to Fowler, H.W., *A Dictionary of Modern English Usage* (2nd edn), Oxford, Oxford University Press, 1965.

6 “An open declaration by an attorney representing a party in a lawsuit, made after the jury has been removed from the courtroom, that requests the admission of particular testimony from a witness that would otherwise be inadmissible because it has been successfully objected to during the trial.” <http://legal-dictionary.thefreedictionary.com/avowal>

7 Mccgrath, Alister E., *Christian Theology: An Introduction* (5th edn), Oxford, Blackwell Publishers, 2011, p. 63.

8 Werbőczy, István: *The Customary Law of the Renowned Kingdom of Hungary: A Work in Three Parts*, edited translated and critical apparatus: Bak, János; Banyó, Péter; Rady, Martyn, Idyllwild (CA, US), Charles Schlacks, 2005.

9 On this, see: Rady, Martin, *Stephen Werbőczy and his Tripartitum* in Bak, Banyó and Rady, *op. cit.*, pp. xxvii–xliv.

10 It is the irony of the tragic turn of Hungarian history that the furious struggle between the two (and very soon more) camps of contenders for the throne led the country open to foreign – non-Christian – invasion by the Ottoman Turks. One should also add for historical accuracy that Werbőczy himself, although his family belonged to the lower nobility, did still fiercely defend the Catholic position against the revolutionary doctrines of Luther. Fraknói attributes to him the following position: “With the instinct of the zealous believer, with the clear sightedness of the experienced politician, he realised that Luther’s attack will not lead to doing away with the problems of the Church, but shall lead to new schism, not to restoration but to revolution.” Fraknói, Vilmos, *Werbőczy István, 1456–1541*, Franklin-Társulat Könyvnyomdája, Budapest; A

Magyar Történelmi Társulat Kiadása, 1899, Book III, Chapter III. According to Fraknói, Werbőczy is also claimed to have met and debated with Luther. Online:

<http://mek.oszk.hu/05700/05752/html/03.htm#d1e1938>

¹¹ Two further notes need to be added in connection with the genre: Catholics even today practice a “confession” of sins, and in penal law “confession” means that the accused admits the charges against the accused. What is more, from the first of these modes of speaking, i.e. from religious confession a literary genre grew out, following the lead of Saint Augustine and Rousseau.

¹² Venice Commission, *Opinion on the new constitution of Hungary, adopted by the Venice Commission between 17–18 June, 2011* CDL-AD(2011)016, §11, referring to its earlier opinion of CDL-Ad(2011)001, item 16–19.

¹³ Venice Commission, *Opinion*, item 11.

¹⁴ Hume, David, *Of the Original Contract* (1748) in Hume, David, *Essays: Moral, Political and Literary*, ed. E.F. Miller, Indianapolis (IN, US), Liberty Fund, 1985, pp. 465–487, 471. Online: <http://www.constitution.org/dh/origcont.htm>

¹⁵ See Hume, *op. cit.*, p. 472.

¹⁶ See Hume, *op. cit.*, p. 472.

¹⁷ See, for example: Fekete, Balázs, *Történelmi elemek az EU-tagállamok alkotmány-preambulumaiban* (“Historical elements in the preambles of the constitutions of EU Member States”), in Lamm, Vanda; Majtényi, Balázs; and Papp, András (eds), *Preambulum az alkotmányokban*, Complex, Budapest, 2011, pp. 33–45, 38.

¹⁸ In the Hungarian version this line of prayer ends with an exclamation mark.

¹⁹ I used the 1881 William N. Loew translation. For a more recent one, see the translation by the acclaimed poet, George Szirtes, <http://www.nationalanthems.us/forum/YaBB.pl?action=print;num=1087952141>.

²⁰ I use the translation by Watson Kirkconnell.

²¹ Either as “*nominatio dei*” (simple mentioning of the name of God) or as “*invocatio Dei*” (invoking God). On this distinction and the following counter-arguments in the German context, see Silagi, Michael, *A német alaptörvény preambuluma: a preambulomok alkotmányos helyzete és*

jelentőége a német jogban (“The Preamble of the German “Grundgesetz: The constitutional status and significance of the preambles in the German Law”) in Lamm, *op. cit.*, pp. 47–58.

²² One could call this a paradox: neutrality (among values) becoming the basic value, the claim of neutrality itself turning out to be non-neutral.

²³ See the so-called Establishment Clause and the Free Exercise Clause of the First Amendment to the US Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” The interpretation of the Supreme Court had to base the whole policy of the separation of church and state on this rather vague and short form of the First Amendment.

²⁴ See Feldman, Noah, *Divided by God. America’s Church-State Problem and What We Should Do about It*, New York, Farrar, Straus and Giroux, 2005, p. 29, for this claim: “It took John Locke to translate the demand for liberty of conscience into a systematic argument for distinguishing the realm of government from the realm of religion.” See Locke’s *Letter Concerning Toleration* (1689), where he supports the separation thesis. However, see also his *The Reasonableness of Christianity* (1695), where the author presents himself as an Enlightened *and* Christian thinker.

²⁵ Venice Commission, *Opinion*, item 29.

²⁶ Venice Commission, *Opinion*, item 34.

²⁷ Péter, László, *The Primacy of Consuetudo in Hungarian Law* in Rady, Martyn (ed.), *Custom and Law in Central Europe*, Cambridge, Centre for European Legal Studies, University of Cambridge, 2003, pp. 101–111.

²⁸ Péter, *op. cit.*, p. 101. I also consulted the same author’s *The Impresible Authority of the Tripartitum*, from Werbőczy, pp. xiii–xxvi. Professor Péter has some more papers worth consulting in relation to the Hungarian constitutional tradition.

²⁹ Péter, *op. cit.*, p. xxv.

³⁰ Péter, *op. cit.*, p. xxv. György Bónis wrote in 1942: “our public law even today recognizes the ability of customary law to interpret, substitute and destroy statute law”. Bónis, György, *Törvény és szokás a Hármaskönyvben* (“Law and Custom in the Tripartitum”) in Balás, E.; Csekey, I.; Szászy, I.; Bónis, Gy.; and Werbőczy, István, *Universitas Francisco-Josephina, Acta Juridico-Politica*, 2, Kolozsvár, 1942, pp. 121–140, 138.

³¹ Péter, *op. cit.*, p. xxvi.

³² See the earlier essay of the present president of the Hungarian Constitutional Court on the relevance of historical constitution after the Transition period: Paczolay, Péter, *Atörténeti alkotmány és a konzervatív jogi gondolkodás* ("The Historical Constitution and Conservative Legal Thinking") in Toókéczi, László (ed.), *Magyar konzervativizmus, hagyomány és jelenkor*, Budapest, Batthány Lajos Alapítvány, 1994, pp. 29–36.

³³ The Venice Commission labelled this statement as creating a legal paradox, "since an illegitimate or even non-existent Parliament cannot enact a new Constitution". Venice Commission, item 35.

³⁴ See in Hungarian, my collection of essays and introductory essay on MacIntyre, Sandel, Ricoeur, Taylor and Walzer in Horkay Hörcher, Ferenc (ed.), *Közösségelvű politikai filozófiák* ("Communitarian Political Philosophies"), Budapest, Századvég, 2003.

³⁵ On the last two schools see the entry on Republicanism in the Stanford Encyclopaedia of Philosophy, written by Frank Lovett, at <http://plato.stanford.edu/entries/republicanism/>, focusing on the historical works by Arendt and Pocock on the one hand, and by Quentin Skinner as well as the political philosophical theory by Philip Pettit on the other hand. One could also refer to the social teachings of the Catholic Church here, pointing out that the idea of solidarity and the concept of the person helps to see the philosophical relevance of both the individual and the communal aspects in social-political thought.

³⁶ On the dangers see the most eloquent treatment of it by John Lukacs, in his *Democracy and Populism: Fear and Hatred*, New Haven (CT, US), Yale University Press, 2005, which however sometimes overstates its case.

³⁷ See the following quote from the Aowal: "We believe that our national culture is a rich contribution to the diversity of European unity. We respect the freedom and culture of other nations, and shall foster to cooperate with every nation of the world." For further comments on this point, see below in this essay.

³⁸ For this view, see Tóth, Gábor Attila, *Egy új alkotmány háttérelmélete* ("The Background Theory of a New Constitution"), *BUKSZ*, 22, volume 2, Summer 2010, pp. 138–141, 139–140. This article calls my standpoint, without any further argument, a "materialistic, value-centered

constitutional theory', presumably referring to Scheler's non-formal ethics of values. It presumes that if my article is put together with András Körösenyi's realistic approach, one can create of our – independent – writings a coherent system, and – again without proving it – that our articles advanced the radical reformation of the Hungarian constitutional regime as we witness it today.

³⁹ Horkay Hörcher, 2009, *op. cit.*, p. 71.

⁴⁰ As one can see from László Körössy's literal translation (<http://en.wikipedia.org/wiki/Himnusz>), the original uses the word "bún", meaning sin.

⁴¹ I recommend here Ricoeur's following works: *The Just*, translated by David Pellauer, Chicago and London, The University of Chicago Press, 2000, and *Memory, History, Forgetting*, translated by Kathleen Blamey and David Pellauer, Chicago and London, The University of Chicago Press, 2004.

⁴² Horkay Hörcher, 2009, *op. cit.*, p. 71.

⁴³ *Ibid.*, p. 33.

⁴⁴ For a detailed analysis of the court's interpretation of human dignity, see Dupre, Catherine, *Importing the Law in Post-Communist Traditions: The Hungarian Constitutional Court and the Right to Human Dignity*, Oxford, Hart Publishing, 2003.

⁴⁵ For the Catholic understanding of the concept, see *Gaudium et Spes, Pastoral Constitution on the Church in the Modern World*, Second Vatican Council, 1965. For the Enlightenment connection between morality and dignity, see Kant's *Groundwork for the Metaphysics of Morals*, edited and translated by Gregor, Mary. Cambridge, Cambridge University Press, 1998. For a recent overview of the relevant theory by Kant, see: von der Pfordten, Dieter, "On the Dignity of Man in Kant", *Philosophy*, 2009, 84/3, pp. 371–391. This text also refers to the following documents as sources of the present use of the term of human dignity in legal thought: "Preamble to the Charta of the UN in 1945, the Preamble and Article 1 of the General Declaration of Human Rights from 1948 and Article 1 Paragraph 1 of the Constitution of the Federal Republic of Germany from 1949". see in Pfordten, *op. cit.*, p. 373.

⁴⁶ On the Constitutional Court's interpretation of human dignity, see: *Tersztyánszkyé Vasadi, Éva: Az élethez és az emberi méltósághoz való jog az Alkotmánybíróság döntéseiben* ("The Right to Life and to

Human Dignity in the Decisions of the Constitutional Court), *Iustum Aequum Salutare*, V, 2009/2, pp. 93–102. She explains the concurring opinion by László Sólyom, for which see: *On Capital Punishment*, Decision 23/1990 (Hung. Const. Ct. Oct. 31, 1990.) (Sólyom, P., concurring), translated in Sólyom, László, and Brunner, Georg: *Constitutional Judiciary in a New Democracy: the Hungarian Constitutional Court*, Ann Arbor, The University of Michigan Press, 2000, pp. 118, 125. For an alternative interpretation of the concept of human dignity, see: Balázs, Zoltán, *Kant and Kolnai on (Human) Dignity* in Balázs, Zoltan, and Dunlop, Francis (eds), *Exploring the World of Human Practice*, Budapest, The CEU Press, 2004, pp. 251–66.

⁴⁷ Burke, Edmond, *Reflections on the French Revolution*, The Harvard Classics, 1909–14, para 165. Online: <http://www.bartleby.com/24/3/7.html>

Chapter III

Constituent and Constitutional Entities

Balázs SCHANDA

The Basic Law provides recognition for various entities: the constituent nation and national minorities as state constituent entities, as well as for the human person and different communities of individuals.

1. Nation and state

The preamble (“National Avowal”) begins with words familiar in modern constitutional history: “We, the members of the Hungarian nation ...” (capitalized in the Hungarian original). According to the Basic Law “the Hungarians” are the constituent nation. In Central – Eastern Europe this needs some clarification. The nation is not merely based on legal foundations as the community of citizens, but it is much more a historical, cultural and spiritual community. The preamble is a clear expression of bonds that go beyond legal ties.

Article D refers to “one single nation” meaning all Hungarians, including those who are not citizens of Hungary. The Hungarian State bears responsibility for the fate of Hungarians living beyond its borders – that is, for the ethnic Hungarian communities split apart by post-World War I and World War II border arrangements, even if their members lack Hungarian citizenship.¹ It has to be noted that the Basic Law does not strive for a territorial rearrangement as it urges with regard to Hungarian minorities in the neighboring countries “their prosperity in their native lands”, but asserts Hungary should support them in preserving their Hungarian identity. A novelty of the Basic Law is that it foresees more than just benefits for ethnic Hungarians residing in neighboring countries in their kin-state, Hungary, but it also promises support for the Hungarian communities, asserting individual and collective rights and establishing community self-governments (Article D). Support, however does not mean that the Basic Law has extra-territorial effect.

The conception of the nation based on a common culture and language and common fate raises the question of national minorities within the country in a peculiar way. The Basic Law (in a similar way to the Constitution) calls them “state constituent entities”, adding that minorities are parts of the political community. It has to be noted that not all ethnic groups are regarded as national minorities. Only indigenous groups (existing in the country for at least a century) recognised by Parliament qualify for collective

rights.² These minorities are, in fact, widely integrated into the Hungarian society.

Hungarian citizenship is primarily acquired by birth: a child of a Hungarian citizen shall be a citizen (Article G). The principle of *ius sanguinis* applies. This means that a child acquires Hungarian citizenship if one of his or her parents (being married or unmarried) is a Hungarian citizen. It is of no relevance where a child is born. Dual (multiple) citizenship is not excluded.

The preamble also refers to the Hungarian crown, the crown of Saint Steven (977–1038), the king who founded the State: “the Holy Crown, which embodies the constitutional continuity of the statehood of Hungary and the unity of the nation”. The theory of the Holy Crown has been a peculiar cornerstone of Hungarian public law. According to this, the nobility (the “nation”) was to be regarded as member of the Crown, as an expression of shared sovereignty. The Crown is not merely an object, but subject, more than a symbol of statehood. As the interpretation of the Basic Law should look to the historical constitution of Hungary, the theory of the Holy Crown – certainly under republican conditions – is not just of historical relevance.

According to Article B para 3: “The source of public power shall be the people.” The people in this respect are the members of the political community, as they exercise public power through elections or, exceptionally, through a referendum. Citizenship is certainly a requisite for political

rights. The “people” constitutes only a part (albeit a dominant part) of the “nation”, the latter being the constituent community. In this way the people (those having political rights) act on behalf of the nation.

A remarkable change relates to a symbolic step: in the future the name of the country (Hungary) shall be the name of the State, too. Since 1989 the official name of the State has been the “Republic of Hungary” (literally: Hungarian Republic; during the communist period: Peoples’ Republic of Hungary) whereas in the future the name of the State will be simply Hungary. The change does not suggest the consideration of changing the form of the State (re-establishment of the monarchy) – Hungary remains a republic – but rather aims at narrowing the gap between the country and the State. Patriotism in Hungary means that most Hungarians have an emotional tie to the country, whereas it does not mean that they have any kind of relation to the State. The new wording envisages a stronger connection of country and State: one cannot be a good patriot without being a good citizen. A number of institutions also got new names, referring to their national character, including somewhat unpopular institutions like the taxation authority (National Tax and Customs Administration instead of Tax and Financial Control Administration). It has to be noted that the republican tradition is not particularly deeply rooted in Hungary, as prior to the present republic there were only two short – and unsuccessful – republics in Hungary. The first republic

(November 1918) ended in a communist dictatorship four months later, whereas the second republic (February 1946) was shadowed by Soviet occupation and also ended by a total communist takeover by 1949. During the communist rule (1949– 89) Hungary was a “people’s republic”. Becoming a republic again in 1989 has meant that the communist legacy needed to be overcome; the last democratic settlement the constitution-makers could build on was the 1946 arrangement.

2. Constitutional entities

Sovereignty of the people [Article B para 3] goes alongside the separation of powers [Article C para 1]. No state organ embodies all public power. This – in a similar way to the Constitution of 1989 – is a significant difference to the communist constitution, where the Parliament (certainly that time not democratically elected) embodied the sovereignty as such. Parliament qualifies as the supreme body of popular representation [Article 1 para 1], whereas the President of the Republic, the Government, autonomous regulatory bodies, the Constitutional Court, courts, prosecution services, the commissioner for fundamental rights, as well as local governments – all mentioned expressly in the text – each have their share of the public power.

In exceptional cases the Parliament can, in the case of a motion of at least 200,000 electors, order a national

referendum. In this case the result is binding for the Parliament. However, under the Basic Law, financial issues (budget, taxes), election laws, ratified international agreements, decisions in personal matters, the dissolution of the Parliament, state of emergence and the use of military power and granting pardon cannot be subject of a referendum.

3. The person

The second part of the Basic Law, under the title “Freedom and responsibility” begins in the original, Hungarian version with the capitalized word MAN (a gender-neutral expression in Hungarian). The chapter goes well beyond fundamental rights and duties. The text suggests a conservative vision of the person (every person shall be responsible for his or herself – Article O), the family (grown-up children shall look after their parents if they are in need – Article XVI), and the community.

The passage on the right to life explicitly refers to the foetus as a life to be protected (Article II). This is not a novelty as such, as the Constitutional Court already stated the requirement in its first decision on abortion.³ The protection of the foetus, however, does not mean that the foetus has a right to life. Mentioning foetal life in the constitution is a novelty, but it does not bring changes to the regulation of abortion that recognises the right to seek abortion in the case of a personal crisis (*de facto* on demand).

4. Marriage and family

With regard to marriage the requirement is that marriage can only be a bond between a man and a woman (Article L). The Constitutional Court already stated in 1995 that homosexual relations cannot qualify as a marriage.⁴ Same-sex partnerships are acknowledged by law, but they shall not arrive at an equal legal footing as marriage.

Marriage is protected with regard to its contribution to the reproduction of the nation. The institution of the family comes into focus in many ways, from the solemn acknowledgement of its value (preamble) to the very practical provision prescribing that taxation of persons raising children shall be determined in consideration of the costs thereof [Article XXX para 2].

According to the Basic Law “Hungary shall promote the commitment to have children.” [Article L para 2]. Although this provision is placed next to the paragraph on marriage it does not relate only to married couples.

5. Communities

The Basic Law mentions a number of communities that gain in this sense a constitutional status. Churches (Article VII), political parties, associations, trade unions (Article VIII), the Hungarian Academy of Sciences and the Hungarian Academy of Arts (Article X), and institutions of

higher education (Article X) are entities that have or gain a constitutional footing. From the above-mentioned institutions the Hungarian Academy of Arts is a novelty. The Hungarian Academy of Arts was established as an association in 1992, and the Hungarian Academy of Sciences has also established a parallel institution. Elevating the Hungarian Academy of Arts to a constitutional level is a remarkable decision.

Notes

- [1](#) Acquisition of Hungarian citizenship was facilitated since 2010 as for ethnic Hungarians no residence in Hungary is required for naturalisation.
- [2](#) These are the Armenians, Bulgarians, Croats, Greeks, Germans, Poles, Roma, Romanians, Ruthenians, Serbs, Slovaks, Slovenes and Ukrainians.
- [3](#) Decision 64/1991 CC, in English see: Sólyom, László and Brunner, Georg, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court*, Ann Arbor, The University of Michigan Press, 2000, pp. 179–199.
- [4](#) Decision 14/1995 CC, in English see: Sólyom and Brunner, *op. cit.*, pp. 316–321.

Chapter IV

Sources of Law

Lóránt CSINK

1. Institutional background

1.1. The beginnings of the regulation

In Hungary, the modern regulation on the sources of law links to the adoption of the Act on Legislation in 1987. Hungary was still under communist dictatorship at that time, however, the Act on Legislation 1987 was an important step towards rule of law. The Act itself did not aim for a political transition, but it forced the legal regulation of social affairs.

The Act on Legislation 1987 determined both the subjects and the objects of sources of law: it defined whom is entitled to issue norms and under what terminology. Consequently, the Act on Legislation 1987 designated the statutes, the statutory decrees, the decrees of the Councils of Ministers, the ministerial decrees and the decrees of the local councils as laws.

Before the adoption of the Act, legislation belonged to the Presidential Council in practice; it issued statutory decrees with which it regulated most of the spheres of the society.¹

Therefore, the Act on Legislation 1987 increased the importance of parliamentary legislation by defining the topics that can only be regulated by statutes. This seemed to be a small step towards constitutionalism.

Another crucial element of the Act on Legislation 1987 was that it differentiated between laws (as generally binding legal regulations) and the so-called other legal means of state administration. These latter norms are internal norms that are compulsory only to the issuer and to the subordinated organs but cannot give rights to or impose obligations on “outsiders”. Rule of law also requires that the internal legal acts should be subordinated to the external ones, otherwise internal norms (that are not always made known to the public) could eventually supersede general external norms without the knowledge of the addressees.²

Besides defining the sources of law, the Act on Legislation 1987 also contained general principles concerning the legal order; such as the prohibition of retroactive effect, the prohibition of sub-delegation, the requirement of clarity of norms and the conditions of formal validity.

1.2. Sources of law at the political transition

During the process of political transition, the scope of sources of law changed, too. In the Constitution “Councils of Ministers” and “local councils” were replaced by “Government” and “local governments”. Furthermore, the Presidential Council was terminated and, according to the principle of democracy, the president was no longer the general substitute of the Parliament. Consequently, the

popular representative Parliament became the sole organ of statutory legislation.

On 23 October 1989 (on the anniversary of the freedom fight in 1956), Hungary proclaimed the republic and the general revision of the Constitution entered into force on this day. However, the decades of the totalitarian regimes have left their footprints on the state organisation, so the constitutional system could not change overnight. In 1989, due to the bad experiences Hungarian society did not have full trust in the legislator. Therefore, the regulation of many spheres of social affairs were left to constitutional statutes requiring qualified majority, in order not to override the achievements of the Roundtable Talks. However, this was in full contrast to the principle of parliamentarism and also prevented the governance from solving everyday problems.

Recognising this, after the first free election in 1990, the governing conservative party and the biggest liberal party in opposition agreed to amend the Constitution (Act XL of 1990) that terminated the institution of constitutional statutes. They were replaced, in a much smaller sphere, by statutes of qualified majority. Their adoption needed the vote of two-thirds of the Members of Parliament present.

1.3. Sources of law until 2011

Until 2011 the Constitution enlarged the scope of sources of law by granting the Governor of the National Bank of Hungary the right to issue decrees. Consequently, the issuing bank, upon the authorisation and within the frameworks of a statute, can independently regulate questions concerning monetary politics.

The constitutional adjudication also concerned the sources of law. As it is settled in Article 32/A of the Constitution, the Constitutional Court “shall review the constitutionality of laws”. Therefore, the Constitutional Court found it an important task to determine the notion of “law” in the sense of the Constitution.

In its initial period of activity, the Constitutional Court used the concepts of the Act on Legislation to decide whether a norm is “law”. Nevertheless, the Constitutional Court declared in its early phase of jurisprudence that the other legal means of state administration will not be determined by their name but by their content.³ Consequently, there are some norms that belong to the scope of other legal means of state administration by their names but not by their content, and there are also other norms that cannot be considered by their name or issuer as other legal means of state administration, nevertheless, they are similar in their content.

The common element of the adjudication of the Constitutional Court is that it has taken the Act on Legislation as an initial point. This was changed by the Decision 42/2005 CC, which did not take as principle the Act on Legislation for the determination of the concept of law; instead, it was based on the Constitution and came to the conclusion that the “law” mentioned in Article 32/A of the Constitution defines a more extended scope than that set forth in the Act on Legislation. The decision stated that

The rules of the Act on the Constitutional Court relating to the posterior constitutional review are

based on the provision of the Constitution, therefore they cannot be “taken back” from the competence of posterior constitutional review by a simple statutory amendment ... On the other hand, the competence of the posterior constitutional review from the Constitution in its entirety, i.e. the competence, covers all norms.

By this principle every normative act is a law, and conversely; a law is that which has a normative content. It is noteworthy that later on this thesis was inserted to the Constitution by an amendment in January 2011.

However, the concept of law has again been approached by the Decision 124/2008 CC from a different direction. Although this decision explicitly does not break with the content approach, it represents a rather formal standpoint. It sets out that the “Constitution determines itself, which state authority and in what form can issue laws.” In the sense of this decision, a law is that which may be issued by the Constitution as such.⁴

1.4. The new Act on Legislation, the amendment of the Constitution and the Basic Law

Both at the time of its adoption and in its future application, the Act on Legislation 1987 had an important role in regulating general questions of sources of law. However, it became more and more anachronistic; the idea of the substitution of the Act had emerged many times but there was no political consent to adopt a new one by the required

qualified majority.

The adoption of a new Act became essential when the Constitutional Court annulled *pro futuro* the Act on Legislation 1987.⁵ In the reasoning the Court stated that during the years the Act had come into conflict with the modern constitutional doctrines of legislation.

In 2010 the Parliament adopted the new Act on Legislation. Its peculiarity proved to be that it was created *before* the adoption of the Basic Law but *during* the process of constitutionalisation, so it had to conform with both the Constitution and the Basic Law.

The new Act and the collateral amendment of the Constitution introduced new institutions to the Hungarian constitutional law: the autonomous regulatory bodies. These organs became entitled to issue decrees upon the authorisation of a statute. With this, the scope and the hierarchy of the sources of law changed.

Although Article T of the Basic Law inserted several elements from Article 7/A of the Constitution, there are also some alterations. In the following I focus on these changes while examining the pertaining regulations of the Basic Law.

2. The scope of legislators

According to Article T of the Basic Law:

(1) A generally binding rule of conduct may be laid down by a law made by a body with legislative competence as specified in the Basic Law and

which is published in the Official Journal. A cardinal statute may define different rules for the publication of the decrees of local governments and other laws adopted during any special legal order.

(2) Laws shall be statutes, Government decrees, decrees of the Prime Minister, ministerial decrees, decrees of the Governor of the National Bank of Hungary, decrees of the heads of autonomous regulatory bodies and the decrees of local governments. Furthermore, laws shall be the decrees issued by the National Defence Council and the President of the Republic during any state of national crisis or state of emergency.

Article T para 1 maintains the thesis of Article 7/A para 1 of the Constitution, that a generally binding rule of conduct may be laid down by law only. Furthermore, it also states that such a law can be made only by bodies *specified in the Basic Law*. Upon the textual interpretation one might come to the conclusion that the Basic Law specifies all the legislators, like the Constitution, but that is incorrect.

Article T para 2 specifies the legislators, among them the heads of autonomous regulatory bodies. The definition of “autonomous regulatory body” is given by Article 23 para 1 of the Basic Law: “In cardinal statutes, the Parliament may establish autonomous regulatory bodies to perform tasks and competences in the sphere of the executive branch.” Para 4 of this Article, the Basic Law repeats the legislative authority of these organs:

Upon the authorisation granted by statute, in a sphere of competence defined by cardinal statute, the head of the autonomous regulatory body shall issue decrees that shall not conflict with statutes, Government decrees, decrees of the Prime Minister, ministerial decrees and decrees of the Governor of the National Bank of Hungary

The question arises: what is the common interpretation of Article T and Article 23? Article T wishes to give a full list of the legislators; it intends to declare a close taxation. On the other hand, from Article 23 it seems that the list of legislators is not closed, as cardinal statutes can stipulate some other legislators (by stipulating them as autonomous regulatory bodies). With regard to Article 23, the list of legislators in Article T seems to be unnecessary, as cardinal statutes can add other elements to it.

To sum up, one might say that the Basic Law intended to enlarge the legislative authority of autonomous regulatory bodies but it did not want to “overload” the text with describing all these organs. Therefore it broke with the doctrine set by the Decision 124/2008 CC of the Constitutional Court and authorised cardinal statutes to broaden the sphere of sources of law.

3. Statutes and decrees

Generally, the main difference between statutes and decrees seems to be that statutes can be issued directly by the Basic Law, without any specific authorisation (original

law), while decrees typically require the direct authorisation of a statute (derivative law).

To this general rule there are two exceptions. The Basic Law – like the Constitution – grants the Government and local governments the right to issue original decrees, i.e. without the authorisation of a statute. Nevertheless, neither the Government's nor the local government's legislative rights can be exercised *against* the Parliament.

Unlike the French, the Hungarian legal system does not grant an exclusive field for government decrees. While the French Constitution of 1958 reduces the legislative scope of the Parliament to certain topics defined therein,⁶ the Hungarian Parliament's legislative competence is full, within the frameworks of the Basic Law and international law.

The priority of statutes also comes from the fact that the Basic Law defines certain issues that must be regulated by statutes. According to the constitutional adjudication this does not mean the total restriction of issuing decrees in these fields. In these fields “direct and significant” regulations should be set by statute but “indirect and incidental” questions can also be regulated by decrees.⁷

4. Cardinal statutes

The most apparent change of the Basic Law seems to be that it introduced cardinal statutes. Article T para 4 states: “Cardinal statutes shall be statutes of the Parliament, whose adoption and amendment require a two-thirds majority of the votes of the Members of Parliament

present.”

Compared to the former system, however, the nomination of cardinal statutes is a greater alteration than the institution itself; the Constitution has already defined some issues to be regulated by at least two-thirds of the Members of Parliament present.

Cardinal statutes have also been debated by the Venice Commission:

This being said, the Venice Commission finds that a too wide use of cardinal laws is problematic with regard to both the Constitution and ordinary laws. In its view, there are issues on which the Constitution should arguably be more specific. These include for example the judiciary. On the other hand, there are issues which should/could have been left to ordinary legislation and majoritarian politics, such as family legislation or social and taxation policy. The Venice Commission considers that parliaments should be able to act in a flexible manner in order to adapt to new framework conditions and face new challenges within society. Functionality of a democratic system is rooted in its permanent ability to change. The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-third majority have of cementing its political preferences and the country's legal order. Elections, which, according to Article 3 of the First Protocol to the ECHR, should guarantee the “expression of the opinion of the people in the

choice of the legislator”, would become meaningless if the legislator would not be able to change important aspects of the legislation that should have been enacted with a simple majority. When not only the fundamental principles but also very specific and “detailed rules” on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk”⁸

The Basic Law contains over fifty references (in less than thirty different issues) to cardinal statutes, which is approximately the same amount as the references of the Constitution to qualified majority statutes.⁹ However, it is a major difference that the Constitution requires qualified majority mainly in the field of human rights, while the Basic Law points out issues of state organisation and the economic bases of the society to be regulated by cardinal statutes the most.

Two issues have been widely debated, issues in which the Government was charged with making its policy unalterable for future governments: namely, family relations and financial politics (including taxation and the pension system).

It is hard to decide whether the large number of cardinal statutes is a “risk for democracy”, as the Venice Commission states. The Basic Law has to consider two aspects: firstly, the stability of the social and economic basis of the country, and secondly, the flexibility of the legal system. Therefore, I do not find that the large number of cardinal statutes jeopardises democracy in itself, but I

would, if the cardinal statutes contained detailed and politically biased regulations instead of abstract and general principles.

In the Hungarian legal system, whereas an issue is to be regulated by the vote of the two-thirds of the Members of Parliament present, the requirement of qualified majority pertains only to the essential elements of the particular issue. Therefore, in my opinion, the best solution would be if the cardinal statutes regulated only the crucial points of the field in question and the rest would be left to simple majority. With this system, the foundations would be stable but the details would be flexible enough to follow the changing needs and aspirations of the society.

It is noteworthy that cardinal statutes and “ordinary” statutes are at the same level in the hierarchy of the sources of law; both can equally be subjects of constitutional adjudication.

5. The hierarchy of the sources of law

Article T of the Basic Law, has been criticised on the basis that the relation of the legislative acts is complicated and the hierarchy of the enlisted legislative acts remains open.¹⁰

5.1. The basis of the hierarchy of the sources of law

The fundamental elements of the hierarchy of the sources of law are rooted in the works of Hans Kelsen. He states that “the legal order is not a system of coordinated norms of equal level, but a hierarchy of different level of legal

norms”¹¹ He also states that “the legal order is a system of general and individual norms connected with each other according to the principle that law regulates its own creation”¹².

For the operation of the legal system a basic norm (*Grundnorm*) is needed that defines the creation of other laws. Kelsen identifies this norm as the constitution in the material sense. This is the unquestionable starting point of the legal system. The validity of other norms derives from this source and, conversely, other norms are valid because they root in the basic norm.

However, the basic norm is not the sole norm that can legitimate other norms. Laws, being legitimated by the basic norm, may also legitimate further norms, both general and individual. For instance, if the Parliament adopts a statute (upon the authorisation of the constitution) then such a statute may also authorise the issuing of a decree (as a general norm) but the statute can also authorise the judiciary to make decisions (as individual norms) by applying the statute. In this example, the common element of the decree and the judicial decision is that they are both based in the statute, they both have to conform to it. Either the decree or the judicial decision would be contradictory to the statute, the legal system would “sort it out”, via constitutional adjudication or via judicial remedies.

What comes from all of this? Firstly, that there is a hierarchical relation among the legal norms. The norm that represents the reason for the validity of another norm is called the “higher” norm.¹³ “A norm is valid because, and to the extent that, it had been created in a certain way, that is,

in a way determined by another norm, therefore that other norm is the immediate reason for the validity of the norm,” as Kelsen says.¹⁴

Secondly, due to the hierarchy of the particular norms, the legal system is integrated as a united system:

The unity of these norms is constituted by the fact that the creation of one norm – the lower one – is determined by another – the higher – the creation of which is determined by a still higher norm and that this regressus is terminated by a highest, the basic norm which, being the supreme reason of validity of the whole legal system, constitutes into unity.¹⁵

Consequently, if the question of the validity of a norm arises, it can be answered by examining whether or not the norm fits into the legal system, i.e. whether or not it is in accordance with higher norms and eventually with the basic norm.

Thirdly, there is no norm granting the validity of the basic norm; the validity of the final norm cannot be rooted in an even higher norm.¹⁶ The legitimacy of the basic norm (the constitution) is not the result of a legal procedure or of certain content. Instead, the normative strength of the constitution derives from the ability to influence the determination and regulation of everyday life.¹⁷

5.2. The hierarchy of sources of law in Hungary

Like the Constitution, the Basic Law does not explicitly

contain the hierarchy of the sources of law. Instead, it refers to the relation of laws by stipulating the laws that the particular laws cannot conflict with. Accordingly,

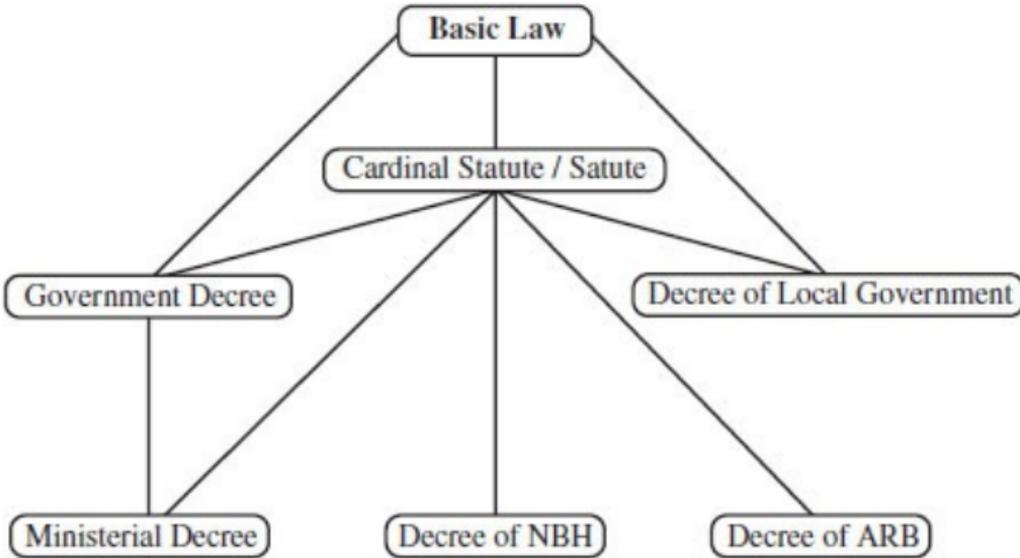
- Government decrees and the decrees of the Governor of the National Bank of Hungary (hereinafter: decrees of NBH) cannot conflict with statutes [Article 15 para 4; Article 41 para 4];
- Ministerial decrees (including the decrees of the Prime Minister that have no special hierarchical status) cannot conflict with statutes, government decrees and the decrees of NBH [Article 18 para 3];
- The decree of the head of the autonomous regulatory bodies (hereinafter: decree of ARB) cannot conflict with statutes, government decrees, the decrees of NBH and ministerial decrees [Article 23 para 4];
- The decrees of local governments cannot conflict with “other laws” [Article 32 para 3].

The textual interpretation of the Basic Law would lead to the conclusion that there is a clear and unambiguous hierarchy among the said laws according to the list above. Yet there is not. For instance, decrees of NBH are not in a higher level in the hierarchy than the decrees of ARB, as both the Governor of the NBH and the head of the ARB can issue a decree upon the *direct authorisation* of a statute. Upon such an authorisation both are obliged to issue the decree

and neither of them can subdelegate the authorisation (which is generally restricted in the Hungarian legal system).

Furthermore, law certainty results in the fact that statutes may grant *only one* authorisation to the same task: in Hungary, there is no “concurring authorisation”. As a consequence, there is no theoretical conflict between the decrees of the NBH and the decrees of ARB.¹⁸

Consequently, in the Hungarian legal system there is no linear hierarchy among the laws; instead, according to the Kelsenian basis, it should be examined which law can grant authorisation to which. Considering this, the hierarchy of sources of laws is as follows:



Cardinal statutes and statutes have the same rank, as was mentioned earlier. There is no hierarchy between government decrees and the decrees of local governments

either; both authorisations derive from the Basic Law or from a statute and they cannot authorise each other to issue a decree.¹⁹

There is no hierarchical relation among ministerial decrees, the decrees of NBH and the decrees of ARB. None can authorise the other to legislate. For the same reason no hierarchy can be settled between government decrees and the decrees of NBH or the decrees of ARB. The authorisation of these organs can only be granted by a statute. No situation may occur in which the validity of a decree of NBH or a decree of ABH would come from a government decree.

One cannot make a clear hierarchical distinction between government decrees and ministerial decrees either. Government decrees that were issued in original competence (i.e. not upon the authorisation of a statute) may freely authorise ministers to issue decrees in certain fields. In that case, the validity of the ministerial decree is rooted in the government decree. Otherwise, when a statute grants authorisation to the minister, the decree is out of the competence of the Government.

Notes

¹ For example, in 1982 the Parliament adopted only two statutes: the state budget of 1983 and the final accounts of 1981. In the same time the Presidential Council adopted 42 statutory decrees.

² Jakab, András, *The Republic of Hungary* in Wolfrum, Rüdiger, and Grote, Rainer (eds), *Constitutions of the Countries of the World*, Issue 2, Oxford, Oxford University Press, 2008.

³ Decision 60/1992 CC.

⁴ Paczolay, Péter (ed.), *Twenty Years of the Hungarian Constitutional Court*,

Budapest, Alkotmánybíróság, 2009, pp. 19–21.

⁵ Decision 121/2009 CC.

⁶ In the French Constitution, Article 34 stipulates the fields of parliamentary legislation and Article 37 states: “Matters other than those coming under the scope of statute law shall be matters for regulation.”

⁷ Decision 64/1991 CC.

⁸ Opinion 621/2011 of the Venice Commission, CDL-AD(2011)016, item 24.

⁹ The Basic Law stipulates the following issues to be regulated by cardinal statutes: citizenship, national symbols and decorations, family relations, publishing of laws, authority for the protection of information rights, churches, political parties, freedom of press, media, minority rights, elections of Members of Parliament, elections of representatives of local governments, status of Members of Parliaments, operation of the Parliament and of its committees, the president, autonomous regulatory bodies, the Constitutional Court, the judiciary, prosecution services, local governments, protection of national wealth, the taxation and pension system, the National Bank of Hungary, supervision of financial institutions, the State Audit Office, the Budget Council, police and intelligence, the national army and special legal orders. Furthermore, issues concerning the European Union also require qualified majority.

According to the Constitution, qualified majority is required in the following fields: EU affairs, national symbols, legislation and publishing of laws, special legal orders, status of Members of Parliament, national referendums, the president, the Constitutional Court, the Commissioner for Human Rights, the State Audit Office, the relationship between the Parliament and the government in EU affairs, the National Army, police and intelligence, local governments, the judiciary, public prosecutors, migration, information rights, religious freedom, freedom of press, the media, freedom of assembly, freedom of association, political parties, the right to asylum, minority rights, citizenship, right to strike, elections of Members of Parliament, elections of representatives of local governments, self-governments of the minorities.

There can be slight differences in counting the numbers of issues of the qualified majority, it depends on the categorisation of the fields.

¹⁰ Opinion 621/2011 of the Venice Commission, CDL-AD(2011)016, items 53–54.

¹¹ Kelsen, Hans, *Pure Theory of Law*, Berkeley and Los Angeles (CA, US), University of California Press, 1967, p. 221.

¹² Kelsen, Hans, *General Theory of Law and State*, Cambridge (MA, US), Harvard University Press, 1946, p. 32.

[13](#) Kelsen, 1967, *op. cit.*, p. 194.

[14](#) *Ibid.*, p. 221.

[15](#) Kelsen, 1946, *op. cit.*, p. 32.

[16](#) Kelsen, 1967, *op. cit.*, p. 195.

[17](#) Badura, Peter, *Staatsrecht. Systematische Erläuterung des Grundgesetzes*, 4, Auflage, München, Verlag C.H. Beck, 2010, p. 12.

[18](#) For example, if a certain issue is regulated both by a decree of NBH and a decree of ARB, there are three possibilities. First, that the statute grant the authorisation to the ARB. In that case, the decree of the NBH would be unconstitutional as it would have been issued without the direct authorisation of a statute.

The second possibility is that the statute grant no authorisation to the ARB. In that case the decree of the ARB would be unconstitutional but not because of violating the hierarchy, but because it was issued without authorisation.

Finally, another possibility is that the statute authorise both the NBH and the ARB to regulate the same field. In such a case, the statute itself would be unconstitutional due to infringing on legal certainty.

[19](#) Decision 1/2001 CC.

Chapter V

Rights and Freedoms

Zsolt BALOGH – Barnabás HAJAS

1. Introduction

The new Basic Law has restructured the location of fundamental freedoms. In order to emphasise their importance, they are now found in the opening of the Basic Law,¹ a form that complies with that of modern constitutions. There are four substantive areas mentioned here, also serving as bases for the identity of the chapter on fundamental freedoms.

- a) The chapter on fundamental freedoms is entitled “Freedom and responsibility”. This chapter, along with the general provisions² and other regulations, shows that the new regulation lays an emphasis on the role of the individual within the community, on the responsibility of individuals for themselves and the community. The National Avowal stipulates that individual freedom can only flourish by co-operation with others and it also declares that the most important framework for our living

together is provided by the family and the nation. The chapter on fundamental freedoms mentions the fundamental freedoms of a human being as well as those of the community. Applying a German model,³ the Basic Law declares in the regulation on property that “property shall entail social responsibility”.⁴ The place of the individual within the community is also referred to in the rule that establishes a connection between social allowances and a beneficial activity for the local community.⁵

- b) The next value present in the chapter on fundamental rights is related to work. It is mentioned in the National Avowal that the power of the community and the honour of human beings are based upon work, the product of human intellect. It is mentioned among the general principles that the economy of Hungary is based upon value-producing work and the freedom of enterprise. The role of the State to take measures for the opening of employment options is then stipulated as an objective of the State in the chapter on fundamental freedoms. The State should present the opportunity to everyone to work. The new Basic Law also affirms that every person shall be obliged to contribute to the community's enrichment with his or her work to the best of his or her abilities and potential.⁶ A value content is thus attached to the possibility of physical and intellectual work and enterprise in the Basic Law.

c) The Basic Law introduces a change in the regulation on social rights. The Constitution provided both social security and required allowances as rights. The new Basic Law clearly regulates social security as a state objective: Hungary (only) strives to provide social security to all of its citizens – the level of the allowances is not connected to the requirements of living but is subject to regulation by a separate act.⁷ The Basic Law does not mention the social security system among the institutional guarantees, but it provides for regulations on social institutional structure and the state pension system. In contrast to the Constitution, the Basic Law sets out an objective regarding the provision of humane habitat and access to public services.⁸ Nevertheless, the level of protection has been altered regarding social rights: while there had been rights derivable from the Constitution regarding the social sphere (e.g. the right to have allowances required for living), the Basic Law refers the power to freely regulate these matters (namely if there is a right or not) to the competence of the legislation.

d) It must also be noted that the chapter on fundamental rights also relies on the European Charter of Human Rights. The chapter on fundamental rights of the Basic Law – just like the Charter of Fundamental Rights of the European Union (hereinafter: the Charter) – commences with the declaration of the sanctity of human dignity. Respect for private and family life, which has been

missing so far as a normative requirement, were also introduced in the Basic Law – with similar wording to the regulation of the Charter. The exercise of rights related to the protection of private and family life had been reliant on the practice of the Constitutional Court, which derived them from human dignity.⁹ Several requirements regulated in the Charter under the title of Solidarity are also included in the Basic Law. Notably, elements incorporated from the Charter include prohibitions connected to human dignity, such as prohibitions of the practices aimed at eugenics, any use of the human body or any of its parts for financial gain, and human cloning. Certain provisions of the Charter regarding the protection of employees are also present in the Basic Law, such as the right to collective bargaining and the right to healthy and secure work conditions. The Charter is one of the sources of the ideas for the provisions for the protection of youth and parents in labour relations. The Constitution failed to expressly mention the right to due process and the obligation to close cases within a reasonable time,¹⁰ but this failure was corrected by the Basic Law, also borrowing wording from the Charter. The above are express evidence of the impact of the European Charter of Human Rights on Hungary's Basic Law.

Our position is that the above four points – namely the emphasis on the community along with the individual, the special approach to labour, the conditional social

allowances, and the observation of European constitutional trends – are all factors determining the identity of the Basic Law. These identity-elements will most probably affect the exercise of rights as well. As for the traditional freedoms, two parallel tendencies may be observed. On the one hand, the catalogue offered by the Basic Law preserved the level of protection (subjective rights and the material right to exercise rights); on the other hand it increased the role of the State in enforcement, which means that a stronger emphasis is laid on the obligation of the State to protect these institutions related to rights.¹¹

2. The regulation of freedoms in the Basic Law

2.1. General issues regarding constraints on fundamental rights

The catalogue of fundamental rights commences with the declaration of rules applicable to all fundamental rights. This part mainly codifies normatively the practice of the Constitutional Court, as clarified in the last two decades. It regulates the negative and positive obligations of the State related to fundamental rights protection, namely its obligation to respect and protect these rights. The substantive and formal criteria of establishing constraints to fundamental rights are also defined here. Any fundamental right can only be limited by statute, and only to the

necessary and proportionate extent possible while still respecting its essential content. The Basic Law thereby also clears the dogmatic uncertainty emerging from the question of “constraints on the essential contents” as derived from the Constitution.¹² It also identifies the possible “necessity reasons” of such limitations as the protection of another fundamental right or a constitutional principle. Therefore, abstract public good in itself is not acceptable as a grounds for limitation of fundamental rights.¹³ Beyond the definition of the limitations proportionate to the achievable objective, the Basic Law expressly mentions the respect of the essential contents of the fundamental rights. In other words it can be understood that fundamental rights have a dimension subject to no limitations at all: human dignity, which is inviolable. No limitations of fundamental rights may result in violating human dignity.

Another lacuna has been filled by the Basic Law by setting regulations on the fundamental legal capacity. According to the fundamental rights, those rights that by nature do not refer to individuals only may be exercised by subjects of law established by a statute. Up to now, fundamental rights protection of legal persons has been granted for certain rights by the practice of the Constitutional Court.¹⁴ In the future it is possible by virtue of the Basic Law.

2.2. Right to life and human dignity

Certain changes may be observed in relation to the right to

life and human dignity. While the Constitution regulated the right to life and human dignity (the latter as a right, too) jointly, the new Basic Law regulates the right to life after the declaration of the sanctity of human dignity. This difference may result in a significant dogmatic change, as it is assumed that the monist doctrine of the relation between life and dignity will be transformed into the dualist one.¹⁵

The protection of human dignity pervades the Basic Law. The National Avowal declares that the human existence is based on human dignity, while the Basic Law opens the chapter on fundamental rights with the aforementioned form: "human dignity is inviolable". Protection of human dignity played a central role in the last twenty-year adjudication of the Hungarian Constitutional Court. The Constitutional Court relied on human dignity from which to derive and protect a number of rights missing from the text of the Constitution. Such were, for example, the right to learn the ties of kindred, freedom of self-determination, including the right to marriage, self-determination of parties in civil litigations, self-determination in healthcare or the protection of privacy: all became protected rights in the Hungarian constitutional law through human dignity.¹⁶ The Basic Law maintains and reaffirms such significance of dignity; its function to protect the individuals and equality is upheld therein. Absolute prohibitions in connection with human dignity are also listed by the Basic Law, such as the prohibition of torture, inhumane and degrading treatment, human trafficking, medical experiments without consent

and, as was already stated, the prohibition of the practices aimed at eugenics, any use of the human body or any of its parts for financial gain, and human cloning.

The protection of foetal life is also mentioned in relation to the right of life. This rule fully complies with the earlier practice of the Constitutional Court established by its abortion case. Both the first and the second abortion decisions were based upon the idea¹⁷ that in the triangle formed by the right to life, human dignity and legal capacity, determining the legal status of a human being is questionable in relation to a foetus. If the Constitution or the legislation fails to decide on the matter of personality (that is, they do not recognise the personality of the foetus, taking into account different phases of pregnancy), then the foetus does not have a subjective right for protection, but the protection of foetal life falls within the range of the state obligation to protect life. Though this objective obligation of the State to protect life may be similar to the subjective right to life of the foetus, there is a profound difference, namely that the right to life (along with human dignity) enjoys an absolute protection, while the other rights may be subject to discretion regarding the objective obligation of the State (such as, for example, self-determination of the mother). This practice of the Constitutional Court has been “written out in score” by the Basic Law in the phrase “embryonic and foetal life shall be subject to protection from the moment of conception”. Thus the Basic Law does not provide for the personality of the foetus,¹⁸ yet it refers the

protection of foetal life under the obligation of the State to protect life. Therefore it does not alter the pre-existing theory and practice regarding the protection of foetal life, according to which the legislator can decide how strict rules it applies for the sake of the protection of the foetus.

2.3. Freedom and personal safety

The Basic Law provides for the right to freedom and personal safety. In relation thereto, the wording of the *nullum crimen sine lege* and *nulla poena sine lege* principles and the *habeas corpus* rule is unchanged. The practice of the Constitutional Court developed regarding the principles will most probably survive, along with the interpretation applied by the Court suggesting that the right of personal liberty can not only refer to cases when the State exercises its criminal powers, but it can also be applied to other instances of deprivation of personal liberty.¹⁹

The novelty in this area was introduced by the rule referring to life imprisonment – already a subject of significant debate. The text reads: “Life imprisonment shall only be imposed for committing an intentional and violent criminal offence.” Our position holds that this rule is not more than a constitutional option, from the outset subject to a limited range of applications by its wording. It is also apparent that this rule does not offer an exemption from other rules of the Basic Law – *inter alia* those on human dignity or prohibition of inhumane penalty. It must also be noted that “genuine life

imprisonment” as a term may cover several solutions.²⁰ According to the Hungarian Criminal Code in force today, genuine life imprisonment is an existing punishment option,²¹ and its compliance with the Constitution is subject to an ongoing examination by the Constitutional Court. In our opinion, an important interlocutory question of such a decision should be if there is even the slightest chance of freedom for a person sentenced to such imprisonment. As for the time being, such person may be freed only by pardon from the President of the Republic if the court has ruled in a way to exclude the possibility of probation. Therefore the actual content of this rule is rather a question of criminal instead of constitutional law. Moreover, the wording of the rule of the Basic Law regulating genuine life imprisonment does not place constraints on the Constitutional Court in determining the character of the relevant criminal regulation to be enacted by the legislation through a test based on fundamental rights.

A lacuna regarding freedom and personal safety is filled by the Basic Law in its declaration that not only the unlawfully detained are entitled to indemnity, but also those persons whose liberty have been restricted without a well-founded reason. Therefore, according to the Basic Law those may claim indemnity whose personal liberty had been limited by the State in a lawful procedure, yet their innocence is proven later. As there was no clear practice of the Constitutional Court regarding this matter, it has been settled by the Basic Law itself.

The right of self-defence is also noted in relation to freedom and personal safety. The Criminal Code grants impunity to those who use a defensive instrument – provided it is not lethal – in the protection of their own or some other person and the property thereof, against an unlawful attack.²² The Basic Law grants a right to repel attacks against our persons or property, or in the case of a direct threat thereof, but the Basic Law consists of the formulation “as according to law”. Therefore this rule of the Basic Law – as a precondition of the exercise of its special right – presupposes a separate legal regulation on the matter, which for the time being can be found in the aforementioned rule of the Criminal Code. Legal regulation of the right of self-defence is subject to international legal obligations, therefore apparently protection of property itself may not offer a grounds for the destruction of life.

2.4. Protection of privacy

As stated above, the Constitutional Court derived protection of privacy from self-determination resulting from human dignity, as there was no respective rule in the text of the Constitution.²³ The new Basic Law offers an additional justification for the protection of privacy by granting the right to respect private and family life, home, communication and good reputation. The formulation of the text of the Basic Law at this point, in our opinion, clearly offers an option to base claims against others than the State itself in the case of a violation of privacy. Other rules of the Basic Law

support this too. According to the practice of the Constitutional Court, the Constitution protects privacy primarily from the State,²⁴ yet violations of this right can be subject to general claims, such as the right to physical and mental integrity.

The Basic Law regulates the right to protection of personal data at this point. As for this latter – data protection – there are two new additions in the Basic Law compared to the Constitution, one technical and one institutional. The technical alteration is that in the Constitution the right to access public data was regulated as part of the freedom of expression, while in the Basic Law the right to access and disseminate data of public interest (in this form no longer a right related to the protection of private life) is regulated along with the protection of personal data. As for the institutional change, formerly the enforcement of these rights have been controlled by the commissioner for data protection, but in the future it is going to be in the capacity of a separate authority.²⁵ This authority is to be established by a cardinal statute. The Basic Law, therefore, poses qualified majority legislation related to the enforcement body; in the Constitution such criterion existed in relation to rights (right to protection or personal data and the right to access data of public interest).

2.5. Freedom of religion

The Basic Law regulates freedom of thought, conscience and religion jointly. The Basic Law and the Constitution

alike list the particular fundamental rights within the range of freedom of religion – such as the right to the freedom to choose or change religion or any other persuasion, and the freedom for every person to proclaim, refrain from proclaiming, profess or teach his or her religion or any other persuasion by performing religious acts, ceremonies or in any other way, whether individually or jointly with others, in the public domain or in private. The text of the Constitution implemented the formulation of the International Covenant on Civil and Political Rights, and this was maintained in the new text, with minor clarifications. Although no major constitutional problems have emerged – except for the financing of ecclesiastical institutions performing certain tasks of the State²⁶ – the existing tests of the Constitutional Court will most probably remain applicable in relation to the freedom of religion.

As for the relation between state and church, the Basic Law describes the pre-existing connection. Although there is a textual modification (state and churches shall be “separate” instead of “separated”), but this wording refers to the co-operative practice that has evolved in Hungary. The Basic Law thus declares that churches shall be autonomous and also that the State shall co-operate with the churches for community goals. This grants a constitutional foundation for recognition and support by the State of educational, charity and social functions of the churches.

Just as it was mentioned in connection with data protection, qualified majority legislation is not required to the definition

of the right, but to the “institution”. According to the Basic Law the detailed regulation on the churches is to be issued in a cardinal statute. This was the first such act related to fundamental rights to be enacted.²⁷

2.6. Right of assembly

Article VIII of the new Basic Law regulates not only the right of assembly but also freedom of association and as part thereof the free establishment and operation of political parties and the right to establish and join organisations. Para 1 reads: “Every person shall have the right to peaceful assembly.” It is notable that there is no reference made to any cardinal (qualified majority) statute in relation to this regulatory matter.

What is the extent of compliance of this solution to foreign regulations of the right of assembly? From the thirty documents covered by our examination, almost a third (six national constitutions²⁸ and three regional documents²⁹) regulate the right of assembly together with the freedom of association. Such solution therefore is not unprecedented, yet it is far from a generally accepted practice. Our personal view – strictly based on a dogmatic approach of fundamental rights – is that regulation of the freedom of association in a separate article of the Basic Law would have been more appropriate. International trends are met by the use of “every person shall have ...”, as it formulates this as a human right, granted to everybody and not only to the citizens of the State.

Just as it was regulated in the Constitution, the Basic Law does not grant a right to any assembly, but it requires the peaceful character of same. This solution complies with the tendencies of foreign documents – from those subject to our examination, twenty-two protect the right to peaceful assembly only.³⁰ This includes all international instruments and an overwhelming majority of national constitutions. Undoubtedly, a non-peaceful assembly basically meets the requirements of assembly itself, yet those do not enjoy fundamental rights protection. Taking this into account its peaceful character must be considered an essential and indispensable element of the constitutional law term of assembly,³¹ rather than a special constraint to the right of assembly.³²

The standing regulation given by statute does not attach any consequences to the disappearance of the peaceful character, nonetheless non-peaceful events obviously do not enjoy protection under the Basic Law. (This logic already allowed the dissolution of events that lost their peaceful nature.³³ Dissolution is, however, a measure of last resort, applicable only if all other instruments fail to restore the peaceful nature of the event.³⁴)

Prohibition of armed appearance is closely related to the peaceful character. The makers of both the 1989 and the 2011 constitutions decided that this criterion is not serious enough to be represented in the text of either document, in spite of the fact that eleven European and North-American constitutions³⁵ and the European Convention on Human

Rights (ECHR) expressly protects unarmed assembly only.

Notably, instead of the “recognise and grant” formulation used in the Constitution the Basic Law applies the wording “has the right to” in Article VIII. This regulatory solution is common neither in foreign constitutions nor in international documents: those regularly apply wordings like “have the right to”,³⁶ “entitled to”,³⁷ “bear the right to”,³⁸ “free”,³⁹ etc. It can be questioned whether or not the meaning has changed from the text of the Constitution. In other words: Did Article 62 para 1 of the Constitution have a meaning that is not covered by the Basic Law (not just Article VIII para 1)? The phrase “recognise” clearly has no such extended substance.

The word “grants”, however, requires separate examination, more precisely if the contents of Article VIII para 1 of the Basic Law fully substitute the regulation of the Constitution or if there are any rules in the Basic Law that render the earlier regulation unnecessary. The question is justified by seven European constitutions expressly relying on the phrase “grants” regarding the right of assembly,⁴⁰ while the Latvian constitution declares “protection” thereof.

The majority of the provisions of the Basic Law do not contain an obligation of the State to protect and enforce the particular fundamental right, such as was mentioned in the text of Article 62 para 1 of the Constitution. This is practically substituted by the phrase used in Article I para 1 of the Basic Law making the protection of fundamental

rights a general obligation of the State.

The obligation to protect these institutions poses a complex set of requirements towards the State for the enforcement of fundamental rights. The obligation of the State to protect fundamental rights is wider than “making exercise of the rights possible”. The particular fundamental right must be protected generally in an abstract way and also as a value. Theoretically speaking every fundamental right – as a bearer of constitutional values – has an institutional side, but the most prominent protected values are *inter alia* human life and dignity, plurality of opinions or the freedom of conscience. The extent and nature of the obligations of the State required for securing the exercise of the given right depend on the nature of that right itself.

As an early decision of the Constitutional Court remarked:

Beyond the subjective individual right of the freedom of expression an obligation of the State to secure the conditions of the development and sustainable operation of a democratic public opinion can also be derived from Article 61 of the Constitution. The objective side of the right to free expression does not only refer to the freedom of press or education etc., but also that side of the institutional structure, which fits this freedom among the other protected values. Therefore the constitutional limits of the freedom of expression must be determined in a way which takes into consideration the need to create

and freely form public opinion so indispensable for democracy beyond the personal right of the person expressing his opinions.⁴¹

The Constitutional Court also observed⁴² that the State is subject to positive obligations in order to grant enforcement of the right of peaceful assembly, which is a priority communications freedom. Freedom of assembly requires protection not just against unjustified interference of state organs but also against others, for example counter-demonstrators or those otherwise opposing the event. The Constitutional Court has also noted that the authorities – should it be necessary – must secure the peaceful assembly even by use of force or if they have to prevent others from interfering.

It should also be mentioned that assembly – as it is temporarily limited – cannot reach a level of institutionalisation as other rights of communication, for example freedom of press. Therefore we believe that it's not assembly itself as a kind of individual entity that enjoys protection under Article I para 1 of the Basic Law – and the last sentence of Article 1 of the Act on Assembly in compliance thereof – but the exercise of a fundamental right by the persons (organisers, leaders, administrators, participants) exercising it.

The European Court of Human Rights (hereinafter: ECtHR) has expressed a position – cited by the Hungarian Constitutional Court as well – that “the possibility of violent

counter-demonstrations or the possibility of extremists with violent intentions, not members of the organised association, joining the demonstration cannot as such take away the right of assembly". The exercise of the right to peaceful assembly must be secured "even if there is a real risk of a public procession resulting in disorder by developments outside the control of those organising it".⁴³

Therefore it can be upheld that the different wording of Article VIII para 1 of the Basic Law does not result in a modification of the exercise of the freedom of assembly or the respective tasks of the State, due to the objective obligation of the State to protect the institution, derived from Article I of the Basic Law and the practice of the ECtHR.

The provisions of the Basic Law do not require the rules on the rights of assembly or the respective constitutional guarantees to be regulated in a cardinal statute. I note that Andras Jakab also suggested omission of Article 62 para 2 of the Constitution in his private draft.⁴⁴ In his position this area would not be a matter subject to qualified majority legislation because the Constitutional Court in future would be able to sustain the existing level of fundamental rights protection in the form of posterior law review. I basically agree with Andras Jakab that the Constitutional Court can be capable of maintenance of the existing level and furthermore that the effect of the case law of the European Court of Human Rights to the Hungarian practice related to the right of Assembly can be equally important.

2.7. Freedom of association and organisation

Article VIII paras 2–5 practically rearranges and unifies the rules that have been set out in various provisions of the Constitution regarding the freedom of association and organisation. The new rules replacing the former, fragmented regulations practically recite the provisions accepted in 1989, but certain elements that were required for peaceful political transition have been omitted from the text. (For example, the prohibition of armed political organisations has been introduced because of the so-called Workers' Guard.⁴⁵) The phrase “Accordingly, no political party may exercise exclusive control over a state organ” has been removed from the text, but the contents of it are covered by para 3 of the same Article about the prohibition of the direct exercise of public power by the parties. The only remaining regulatory area in this field still subject to qualified majority is the act on the operation and finances of parties.

The Basic Law names two sub-rights of the freedom of assembly, to establish and to join organisations. Contrary to the former regulation, it does not mention the objectives of the organisation.

According to the Constitutional Court the right of association is a freedom for all:

This right is primarily about the selection of the objective, and furthermore the freedom of establishment of an organisation for a given purpose, voluntary accession thereto and the possibility of voluntary secession [...] When the Constitutional Court marked as an essential element of the freedom of association the free selection of the purpose and the voluntary accession to the organisation representing thereto, it also made a reference to the substantial connection between the freedom of association and the freedom of thought, ideas and expression. The voluntary nature of the freely established organisation, the lack of coercion, also grants freedom of beliefs, speech, conscience and expression as well.⁴⁶

The Basic Law, according to the former regulations, sets out a number of interdependent categorical prohibitions. Article C para 2 of the Basic Law declares: “No activity of anyone may be directed at the acquisition or exercise of public authority by force, nor at its exclusive possession. Everyone shall have the right and obligation to resist such attempts in a lawful manner.” Para 3 specifies the rule of monopoly of force by the State, also apparently meaning that no organisations may be established with such goals under the protection of the freedom of assembly.

Pre-existing practice of the Constitutional Court appears in the first sentence of para 2, when the freedom to establish

parties is derived from the freedom of association.

Accepting the practice followed by the Constitutional Court, the joint interpretation of the formula on the freedom of association in para 1 and the first sentence of para 2 cannot result in the establishment of parties and other organisations being subject to same conditions. For the function of the parties, as regulated by the Basic Law, it must also be considered which has an impact on the extent of the limitations to be set out by legislation.

The rule of the Basic Law on the free establishment and operation of the parties poses the unconditional requirement that state organs must not hamper the establishment and operation of the parties functioning according to constitutional standards. The right to establish and operate a party is behoved for all and for all parties, and the ground therefore is the Constitution itself.⁴⁷

According to the Basic Law the political parties shall participate in the formation and proclamation of the people's will, therefore the existence of such parties is closely related to Article B paras 3 and 4 of the Basic Law. These provisions – namely that the source of public power is the people, who exercise such power through elected representatives and the existence of political parties – include the participation in elections and the presence in the Parliament. The Constitutional Court has declared several times that the political parties are mediators between the State and the society.⁴⁸

It must also be noted that this clause – aside from summarising and clarifying the rules of the Constitution – also covers the contents of Article 12 of the Charter of Fundamental Rights of the European Union⁴⁹ and (except for the special rules on parties missing from there) Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms.⁵⁰ This regulation also fits in the terminology and regulatory models used in European constitutions, such as, for example, the right to free establishment of organisation and freedom of organisation as granted in Article 9 paras 1 and 3 of the German *Grundgesetz*⁵¹ (respectively). Article 21 of the *Grundgesetz* contains a rule similar to the provisions of Article VIII paras 2 and 3 of the Basic Law.⁵²

2.8. Freedom of expression

The practice of the Constitutional Court attached priority to freedom of expression in the system of fundamental rights. Enforcement of the freedom of expression is a precondition of democracy and an open society. Greatest protection of the freedom of expression is therefore that against political attacks. The Constitutional Court has referred to the values behind the freedoms of expressions, speech and press: democratic public opinion can be developed and upheld by these rights of communication.⁵³ The Basic Law recites the wording that appears in the decisions of the Constitutional Court: “Hungary [...] shall ensure the conditions for free dissemination of information necessary for the formation of

democratic public opinion.”⁵⁴ Continuity in this matter is therefore clear.

Freedom of expression enjoys a high level of fundamental rights protection in Hungary, due to the Constitutional Court. The matters discussed by the Court in the last twenty years have emerged primarily from four areas: hate speech, criticism on public actors, protection of symbols and constitutionality of the rules on the media. The following is a short summary of the respective practice of the Constitutional Court.

a) The Constitutional Court expressed and continuously maintained the view that the criminal legal persecution of speeches resulting only in a clear and present danger to the life or physical health of others is acceptable from a constitutional position. If the speech is only degrading, and there is no direct threat to the fundamental rights, criminal legal sanctions are unacceptable. Someone using such speech places a mark only on him or herself and also removes him or herself from the field of democratic discussions, nonetheless using the criminal powers of the State against such person would result in an unnecessary limitation of the freedom of expression.⁵⁵ Today, aside from such incitement to hatred, public denial of the Holocaust and the communist crimes are also punishable.⁵⁶ Our position is that in this area the Basic Law brings no major changes; it rather follows the earlier practice of the Constitutional

Court. The Basic Law does not contain any rule, and consequently any special limitation beyond the declaration of the rights and the identification of the values behind those.

b) As for the criticism against public actors, the Constitutional Court established a test that stated the level of criticism such actors must bear is higher than that of individuals.⁵⁷ Hungarian constitutional law – also considering the practice of the ECtHR⁵⁸ – draws a difference between criticisms of pure views or statements of facts. Views effecting the honour and good reputation of public actors are protected by freedom of expression, while a statement of facts falls out from this protection, if the person stating those facts had known, or had failed to meet minimum standards that would have caused him or her to know, that the stated facts are false. This test is applicable to the discussions of public actors amongst themselves.⁵⁹ The provisions of the Basic Law do not amend this approach, and there is no regulation of the Basic Law that would result in a consequence contradicting the practice of the Constitutional Court regarding the protection of good reputation in the private sphere.

c) According to the protection of symbols, the following practice has evolved. At the time of the millennium, Hungarian legislation enacted rules relevant to offending national symbols and the use of totalitarian symbols.

Public burning of the national flag is punishable according to the first offence, while the latter refers to the wearing in public of an SS symbol or the red star. The Constitutional Court examined both offences, and has found no violation of the Constitution.⁶⁰

The National Avowal of the Basic Law denies any statute of limitations for the inhuman crimes committed by the national socialist and communist dictatorships, and protects the national symbols, as did the Constitution.

- d) The constitutional issues of the legal regulation of the press are also related to freedom of expression. Creation of a media law meeting the high level of protection of freedom of expression and other elements of the Constitution was not without difficulties even in the beginning of the 1990s. The reform of the centralised media (written and electronic alike), a legacy of communism, was pluralised in a long process. This was more than an institutional question. The Constitutional Court was a part of this process, when, for example, it declared a violation of the Constitution by omission due to the legislative failure to enact the media law, when it destroyed the regulation on the governmental control of the TV and radio,⁶¹ and when it found that the Government deciding on the reduction of the number of employees within the electronic public media was unconstitutional.⁶² The decisions of the Constitutional

Court outlined the basic elements of a constitutional media regulation, such as the need of media plurality, its independence from the parties and the State alike, that information must be balanced, that the constitutional task of the media is to publish data of public interest and the proportionate display of the opinions present in the society, etc. After a compromise among the political parties, the first Act on Media was born⁶³ and, as long years of experience have proven, it was a bad compromise. As the representatives of the political parties participated in the board managing the affairs of the public media, a number of elements of this law have been questionable from a constitutional perspective.⁶⁴ Regardless of these concerns it remained in force for almost fifteen years, until replaced by the new media law⁶⁵ that entered into force not long before the enactment of the new Basic Law. The text of the Constitution listed the tasks of the public media and also referred to the institutional structure. The Basic Law focuses on the right and the enforcement thereof, declaring that “Hungary shall recognise and protect the freedom and the diversity of the press and shall ensure the conditions of accessing the adequate information necessary for the development of a democratic public opinion.” The Basic Law grants two significant guarantees of the enforcement of the fundamental rights, namely plurality and the obligation to prevent the creation of information monopolies. Cardinal statute is prescribed for the freedom of press as a fundamental

right and also to institutional issues, such as the organ supervising media services, press products and the information communication market.⁶⁶

Finally, in this article about fundamental rights of communication and freedom of expression, reference must be made to the freedom of scientific and artistic life. The Basic Law grants the right and the institutional guarantees required by the enforcement thereof and declares the regulatory affairs related to the right. The guarantee of this right, as it was also regulated by the Constitution, is that the State shall not be entitled to decide on questions of scientific truth, and scientists shall have the exclusive right to evaluate any scientific research. Freedom of learning and teaching is also declared in the Basic Law. The former is subject to a goal of the State, namely obtaining the highest possible level of knowledge, while the latter can be exercised according to conditions regulated by statute.

The practice of the Hungarian Constitutional Court was to view the freedom of scientific research and artistic creation as fundamental rights, as well as freedom of education. The subjective side of the exercise of these rights is not modified by the Basic Law. The modification – or rather the change – is perceivable in the field of the obligations of the State required for the enforcement of these rights (e.g. support of education of a certain quality, or the introduction of stricter conditions required for teaching). The Basic Law stipulates that institutions of higher education shall be autonomous in terms of the contents and methodology of

research and teaching, and their organisations and financial management shall be regulated by a special Act. The practice of the Constitutional Court regarding autonomy of higher education institutions was not consistent. In its early decisions, the Court understood that the issues of the organisation and financing were also part of the autonomy,⁶⁷ yet it later reduced the width of such interpretation.⁶⁸ The Basic Law clarified this situation. It is also important to mention here that neither the Basic Law nor the Constitution grant that higher education is free of charge, but grant access to higher education according to personal abilities.

Finally, the Basic Law mentions the protection of the Hungarian Academy of Sciences and the Hungarian Academy of Arts.

2.9. Property

The rules on property in the Constitution reflected the temporary nature of the era of the Transition. The Constitution mentioned property in ten different contexts, all aimed at the dissolution of the state property structure inherited from the past and the establishment of a property system suitable for market economy conditions. The equality granted between private and public property – at that time – was in contrast to the prior exclusiveness of state property. The Transition was reflected in the rule on co-operatives, which was inserted in the Constitution (as a sort of compromise) to save the existing co-operatives

after the Transition.⁶⁹

The mixed regulations on property have been unified by the work of the Constitutional Court. In the very beginning of its work, the Court declared that the right to property is a fundamental right, the constitutional protection of property is functional: it depends on the subject, object and function of property, and also on the method of the limitation thereto. The constitutional concept of property is different from the perspective of civil law. Limitations due to public needs allow for far-reaching interferences into property (land reforms, settlement reconstruction, and infrastructural development). Constitutional law protection can also be wider as it covers, for example, expected public law benefits such as pensions.⁷⁰

As the historical objective in 1989 had been the dissolution of social property, in 2011 the goal of the State represented in the Basic Law mainly countered the impacts of this process (significantly, privatisation) harmful to the national economy. Therefore the Basic Law introduces a special rule on the preservation and protection of national assets, and the responsible management thereof.⁷¹ Moreover the Basic Law – according to the requirements set out by the Constitutional Court – considers the protection of property unified. As was already stated in the introduction, the Basic Law mentions that property entails social responsibility, which in our opinion only strengthens the functional protection of property as enforced by the Constitutional Court.

The Basic Law attaches the right to inherit to the right to property but it fails to list the sub-rights of property, namely to own, use and bequeath.⁷² This leads us to the conclusion that the Basic Law did not intend to deter from the practice of the Constitutional Court, stating that the essential contents of the right to property are embodied in the sub-rights thereof. Rather, as was the case with other fundamental rights, an examination of necessity and proportionality of the given interference can decide if the essential contents of this right have been violated or not.⁷³

The Basic Law provides for an option of expropriation in a similar way as was done in the Constitution, namely expropriation is possible in exceptional cases and in the public interest, in legally defined cases and ways and subject to full, unconditional and immediate indemnity.

The set of terms used in the practice of the Constitutional Court for expropriation was also used to describe constitutional evaluation of state interferences not reaching such level. The examination of the enforcement of the guaranteed value is aimed at uncovering if the State compensates for losses resulting from the public law interference. There are also instances where this is not applicable, when the owner must endure without indemnity the interference. Constitutionality of such situations can be justified by the social functions of property, which is strengthened by the rule on social responsibility as defined in the Basic Law.

2.10. Right to education

The right to education traditionally referred to schooling, which has different levels and forms that make different demands on the State. Recent elements have also been formed that can typically be evaluated among the state obligations to protect the institutions.⁷⁴

Article XI of the Basic Law practically implements the provisions of former Article 70/F of the Constitution. A novelty regarding the right to education is granting that secondary education shall be free of charge. This was only mentioned earlier in the Act on Public Education, although it was obvious and self-evident as a condition of the fulfilment of compulsory education.

Granting free higher education is still not an obligation under the Basic Law, and the precise definition of the financial support of the students is missing as well. That is subject to regulation by a statute. Accordingly, our position is that for educational fees and subsidies the decision of the Constitutional Court remains applicable.⁷⁵

The practice of the Constitutional Court related to the right of education as a constitutional right also remains applicable for future references.

The right of education of citizens is realised in higher education, if it is accessible to everyone according to their abilities, and those being educated receive financial subsidies. [...] The

constitutional task of the State is to secure the objective, personal and material conditions of the participation in education, and to grant the exercise of this right to every citizen by the development of these conditions.⁷⁶

The Constitutional Court has also observed that “a complex set of regulations, organisations and subsidies burdens the State regarding the creation of operational conditions of state and non-state higher education facilities”.⁷⁷ In another decision it was also pointed out that “participation in higher education, as part of the right to education, can only be granted if the State arranges the conditions of higher education studies”.⁷⁸

Challenging questions can be raised regarding Article XI para 1 of the Basic Law that grants higher education expressly to Hungarian citizens. We are convinced that certain international instruments and the Hungarian EU membership set out a wider range of subjects. Free movement and stay of persons can surely be exercised by citizens of EU and EEA member states, as well as citizens of non-EU or EEA states who enjoy equal treatment under international agreements to the citizens of EEA member states. This right is also accessible to family members of the said persons. Article 13 of the UN Covenant on Economic, Social and Cultural Rights declares:

The States Parties to the present Covenant recognize the right of everyone to education [and

also that] the States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right [...] primary education shall be compulsory and available free to all.⁷⁹

Considering all this we believe that everyone has a right to primary and secondary education, and that higher education must be accessible to persons bearing the right of free movement and stay⁸⁰ as well as Hungarian citizens.

2.11. The right to free choice of employment

Article XII para 1 of the Basic Law – besides breaking from a clause of the Constitution that was a remnant from the era of state socialism, the strict understanding of the right to work, which can only be enforced among full employment conditions – practically implements Article 70/B of the Constitution. This means no real modification, because the persistent practice of the Constitutional Court identified the right to work as the freedom of choice of profession and employment.⁸¹

The second phrase of Article XII para 1 of the Basic Law formulates the right to enterprise as a fundamental right. It sets out that the right to enterprise is an aspect of the free choice of employment, which means that there is no hierarchical relation among the right to work, freedom of choice of employment and the freedom of enterprise, consequently they are not different from each other as

fundamental rights.⁸²

The second sentence of Article XII para 1 is completely novel. It is surely not a fundamental right, due to its structure, but it remains unclear from the wording what content was intended here by the legislator: “Every person shall have the obligation to contribute to the enrichment of the community through his or her work, in accordance with his or her abilities and possibilities.” It can refer to an obligation to work for the benefit of the community according to one’s abilities and potential, but also to the general and proportionate sharing in taxation in connection with work. Our position is that this rule can serve as the constitutional ground for a public work programme designed to ease unemployment. It definitely cannot refer to any coerced work, as that would be contrary to international instruments binding to Hungary.

Para 2 reflects the social side of the right to work according to the practice of the Constitutional Court, which pointed out that there must be a distinction made between the fundamental right to work and the social right to work, particularly the institutional side thereof, the obligation of the State to present employment policy and to create jobs, etc.⁸³

2.12. Article XIV

Article XIV of the Basic Law is the summary of several constitutional provisions. There are some rights of

citizenship (the right to stay in Hungary, leave and return). These status rights are for protection in the case that a citizen's lawful staying abroad is regulated partly in Article G and partly in Article XVII para 2 of the Basic Law. The right to participate in public matters is also regulated separately, in Article XXIII on the electoral rights – certain elements there can be gained as status rights of citizenship. The prohibition of expatriation – along with the free choice of residence – emphasises the voluntary nature of leaving the country.

The Basic Law makes significant progress over the Constitution by stating that a foreigner staying in Hungary, without prejudice to the lawfulness of his or her stay, can only be expelled from the country by a legal resolution. The Basic Law also attached constitutional power to the prohibition of collective expatriation of foreigners as defined in Article 4 of the Fourth Protocol to the ECHR.

Para 2 of this Article adds constitutional power to “*non-refoulement*” protection of foreigners.⁸⁴ It must be emphasised here as well that in this rule there is an implicit prohibition of the death penalty, contrary to the rules of the Constitution: no person may be expelled or extradited to a state where he or she faces the danger of a death sentence.

Para 3 of Article XIV basically implements – as the Constitution did – the reasons of refuge listed in the 1951 Convention on the Status of Refugees,⁸⁵ but granting

refugee status is subject to a formal request.

2.13. Non-discrimination

Equality before the law, legal capacity, the prohibition of discrimination and tasks related to equal opportunities are all regulated in the same part of the Basic Law. Equality before the law, legal capacity borne by all, and the prohibition of discrimination are different aspects of the same equality principle; these could also be derived from the human dignity provisions.

The Basic Law follows the tradition set out by the Constitution (which is an unusual solution in constitutions) and grants every person legal capacity in Hungary, according to the text of Article 6 of the Universal Declaration of Human Rights and Article 16 of the Covenant on Civil and Political Rights.

The prohibition of discrimination is a principle overarching the whole legal system and it has been examined by the Constitutional Court and the ombudsmen by the “necessity–proportionality” test and a standard of reasonableness. The prohibition according to the Basic Law primarily refers to discrimination regarding fundamental rights. According to the standing practice, discrimination not related to a fundamental right will be found unconstitutional, if human dignity is also violated by such regulation.

Discrimination is unconstitutional if the legislation

differentiates without constitutional causes between legal subjects being members of a homogeneous group from the perspective of the given question. The discrimination is unconstitutional if a fundamental right is violated by it or it violates the requirement of equal treatment regarding personal rights, thus the distinction is arbitrary.

The following should also be noted in this regard:

- a) Not only those grounds listed in the Basic Law may be tantamount to discrimination, but in any other case when the discrimination fails at the “necessity–proportionality” test or it fails to meet the requirement of reasonable cause.
- b) Protected types mentioned in the Basic Law are not exhaustively listed, because the reference to “other situations” widens its scope to further characteristics.
- c) The harshest criticisms against the Basic Law have been formulated because of the lack of any reference to discrimination based on sexual orientation. In this regard it can be noted that no European constitution marks sexual orientation as a protected attribute and, according to what was stated above, such reference is not even necessary.⁸⁶ We note here that, according to the persistent practice of the Constitutional Court, discrimination based on sexual orientation falls within the scope of the aforementioned discrimination based

on “other situations” and its evaluation requires an examination of the existence of a “reasonable grounds upon impartial consideration”.⁸⁷

The position of the Constitutional Court is still applicable to para 4 of this Article in the following:

... equality of opportunities of various social groups will not be created by a single legal rule or a measure of the State, but by a system of legal regulations and state measures, or rather the State can contribute in such a way as to diminish the existing inequalities.⁸⁸

The possibility of enacting regulations diminishing or terminating inequalities does not result in a constitutional duty thereof. Nobody has a constitutional right to formally determined positive discrimination – the application of such is at the discretion of the legislation.⁸⁹

Regulatory measures to counter inequalities are placed on a wide scale. The best available solution can be freely chosen by the legislation.⁹⁰

Para 5 of the Article lists several of the most vulnerable social groups protected by special state measures. In this regard we mention that according to Act CXI of 2011 on Securing Fundamental Rights – based upon international agreements – the ombudsman pays particular attention to

the protection of the rights of children, future generations, ethnic minorities living in Hungary and the most vulnerable social groups.

2.14. The rights of children for protection and care

A preliminary remark at this point should be made, namely that Article XVI does not regulate rights of the children in general. Children, just like adults, are undoubtedly the subjects of fundamental rights. The provision to be discussed here, however, has additional and therefore different meanings. As declared by the Constitutional Court in its decision 995/B/1990:

a child is a human being and is entitled to all the constitutional fundamental rights like anybody else, but in order to enable him to exercise all these rights, all the conditions of his growing up must be secured according to his age. Therefore Article 67 paragraph (1) of the Constitution primarily refers to the fundamental rights of the children, meanwhile it also outlines the fundamental obligations of the State and society.

Article XVI para 1 of the Basic Law therefore – just like Article 67 para 1 of the Constitution – refers to “the fundamental rights of the child, while it also declares the general requirements and tasks of the State related to the

protection and care of children”.⁹¹ Rights of children can also be understood as reasonable grounds for a kind of preferential treatment or even affirmative actions based upon their age.

The Constitution specified the obliged actor – i.e. the family of the child, including parents, the State and the society – of this fundamental right. The Basic Law, on the contrary, does not provide a similar list of those who are obligated to uphold these rights different from the general ones. However, it would be mistaken to suggest that the children can only rely on protection and care from the State, or from state and municipal bodies. Para 3 identifies looking after the children expressly as a task of parents.

Bearing in mind that the provision does not contain any limitations (i.e. it is not a right of citizenship), we believe that all children in the territory of Hungary are entitled to this right, without prejudice to their nationality, citizenship or even the legality of their stay in the country.

We consider the practice of the Constitutional Court applicable, that para 3 outlines the constitutional obligations of the parents as part of the parental custody as defined by Act IV of 1952 on Family, Marriage and Guardianship.

We have already mentioned the legal obligations of the ombudsman regarding the protection of the constitutional rights of the children.

The considerations, suggested by the Constitutional Court,

as those to be accounted for in the evaluation of the limitations based upon the rights of children for protection and care are still applicable:

- a) The fundamental freedoms and the exercise thereof cannot be limited generally, but only in that regard which is required for the protection of the child or the rights of others.
- b) Limitation of a fundamental right must be subject to the necessity–proportionality test,⁹² so an abstract threat to the physical, mental or moral development of the child is not a sufficient justification.⁹³ In such cases evidence is required for proving that the particular activity is limited or prohibited by the law, because that activity bears actual threats to the given age group; the extent of such threats determines the proportionality of the limitation.
- c) In all cases where the State prevents a high risk by its intervention, in the evaluation of the gravity of the risk the positive, educational impact must also be considered, as the participation in a debate can improve the personality, since the clash and acceptance of new ideas is part of democracy.

No constitutional grounds can be named for a general limitation of a fundamental right of a child. Constitutional questions – like the age of the child until which the parent is entitled to exercise rights on behalf of him or her, and when

the child is ready to decide in his or her exercise of a fundamental right; or the instances where a parental agreement (co-decision) is required due to the risks involved in the exercise of a given fundamental right; or those cases where the law finds the risk so high that it completely takes the power to decide from the discretion of the child or parents – must be decided separately for each type of risk.

We are convinced that parents mean not only biological parents (including here the biological parents in a sociological sense), but also foster parents or, in certain cases, other legal representatives of the child. There is no relevance in this regard to whether the parents are married or they live in a partnership: in these cases they exercise parental control jointly, meaning that they mutually exercise the right to choose the education their child receives.

The plural used in the wording of paras 2 and 3 suggests that – as a general rule – parents can exercise this right jointly. If parental control is limited, suspended or terminated by a court, it bears particular importance: in these cases the parent has only a limited right under para 2.

We may state that the Basic Law offers a somewhat narrower protection for the children than the Constitution did – youth protection has been removed from the state objectives – but we believe that the former constitutional practice remains applicable or sustainable. The Basic Law

widened the scope of the general obligation of parental care and there is a reference – so far present only in law – to the obligation of adult children to look after parents in need.

A special case of the protection of children is stipulated for in Article XVIII para 1, when as a new element based on Article 32 of the Charter, it prohibits employment of children.

2.15. Social rights

As mentioned in the introduction, one of the cornerstones of the chapter on freedoms is the regulation on social rights. The Constitution (textually) considered social security as a fundamental right and it defined as rights the allowances required for living in the case of old age, illness, disablement, widowhood, orphanage and unemployment through no fault of one's own. Social security is defined as a state objective in the Basic Law: Hungary shall strive to provide social security to all of its citizens and allowances for the aforementioned situations are defined as statutory subsidies.⁹⁴

The Constitutional Court has interpreted several times and in several ways the provision of the Constitution offering social security. This interpretation has not considered social security as a fundamental right but granted a larger protection than a simple state objective. According to constitutional legal dogmatism, social security is a right

embodied in the constitution that lays an obligation on the State to provide social allowances, but the details cannot be derived from the Constitution (e.g. the name of the allowance, whether it will be financed from the budget or from social security, etc.). As for the extent of social allowances the Constitutional Court defined a constitutional standard – since it was defined as a right. Accordingly, “the right to social security consists of securing a minimal standard of living by all social allowances, which is inevitable for exercising the right to human dignity”.⁹⁵ Therefore, the State granting the right to a minimal standard of living (as the content of the right to social security) was derived from the Constitution in every situation. Beyond this, however, the State enjoyed rather great freedom in the determination of the details of social security.

The Basic Law, besides setting the allowances required for living as a state objective, does not grant it to every situation but only secures “living conditions of the elderly”. The future question for the interpretation of the Basic Law seems to be if granting the minimum living covers every crisis situation (as was the case so far). We believe that it is supported by the above decision of the Constitutional Court, as it derived the state objective to provide minimum living standards in all situations not only from the right to social security, but also from human dignity. Human dignity is the leading provision of the chapter on freedoms of the Basic Law.

The Basic Law also declares that in given cases social allowances may be subject to the condition of work performed for the benefit of the community. This rule was preceded by several local regulations setting conditions to the payment of allowances, that the long-term unemployed should take part in cleaning the settlement, should make children go to school, to keep their homes decent. These rules, however, were widely varied and the constitutional conformity was debated several times. According to the Basic Law, such rules can be declared by statutes of the Parliament and, according to the usefulness to the community of the beneficiary's activity, the law may differentiate the nature and extent of social measures. This falls into line with the provision of the Basic Law discussed in connection with the right to work that mentions a contribution to the community's enrichment with one's work to the best of his or her abilities and potential.

The Basic Law also mentions securing the conditions of humane housing and access to public services as a state objective.⁹⁶ Such provision has not existed in the Constitution and the Constitutional Court once ruled that sub-rights, such as the right to housing, cannot be derived from the right to social security.⁹⁷ The Basic Law is thus progressive, but does not formulate housing as a right, only as a state objective.

Regarding the institutional guarantees of social security, the Basic Law mentions social institutions and the state pension system (also the voluntary pension funds). This is

also a modification, since the Constitution marked the social insurance as an institutional guarantee beyond social institution. The practice of the Constitutional Court is unclear as to the existence of a right to social insurance under the Constitution, but social insurance can be considered an important institutional guarantee of social security in relation to both pension and health insurance. The Basic Law at this point mentions only the state pension system and that the State helps voluntarily established social institutions serving the elderly. The Basic Law practically terminates any possibility for the recreation of the compulsory private pension funds, obliterated a year ago, but it does not affect the existing operation of state-run social insurance.

The Basic Law finally allows for a lower pension age for women, although this has existed earlier at the level of acts of the Parliament.

2.16. The right to health and to a healthy environment

The right to health includes the right to physical and mental health. The Constitution – by a wording implemented from the Covenant of the Economic, Social and Cultural Rights – referred to “the highest possible level of physical and mental health”, but it had no practical relevance. According to the Basic Law this right covers all. The Constitution listed labour safety, organisation of health-care institutions and medical care, securing regular physical exercise and the

protection of natural and constructed environments. The Basic Law adds to these that agriculture remains free from any genetically modified organism and provides access to healthy food and drinking water and supports sports. Institutional guarantees of the Basic Law thus have been broadened according to the challenges of our time.

The practice of the Constitutional Court has not considered the right to health as a fundamental right but – as with social security – it has been considered a constitutional right that requires several legislative obligations to secure its exercise. The Basic Law does not alter this dogmatic classification.

The protection of the environment is present in connection with the right to health but the Basic Law also features an environmental clause. The right to a healthy environment is a fundamental right according to the practice of the Constitutional Court. It is special, because it poses no subjective rights (since the subject is mankind), but the objective obligation of the State to protect the institution is the guarantee of the enforcement. The Constitutional Court declared the requirement of environmental status quo in 1994 and it prescribed that the State cannot decrease the level of protection offered by the existing regulations as a main rule. Such decrease is only possible if the conditions of limitation of the fundamental rights exist, namely necessity and proportionality.⁹⁸ The prohibition of a lower level of protection covers nature preservation and the protection of the natural and constructed environment as

well. The Basic Law sustained the fundamental nature of the right to a healthy environment and even added further guarantees therein. The Basic Law declares the “polluter pays principle” and it prohibits importing pollutant material to the territory of Hungary with sole objective of disposal.

2.17. The right to due process

The Basic Law regulates due process regarding administrative and judicial proceedings in articles XXIV and XXVIII.

A) The right to fair administration

article XXIV para 1 of the Basic Law fills a lacuna uncovered by the practice of the Constitutional Court by the formulation of the right to fair administration. This adds a general meaning to the right to and requirement of a due process and the elements thereof, exceeding the range of criminal procedures. This right has not been mentioned in the Constitution in relation to administrative proceedings, but the Constitutional Court derived it from the right to a fair and impartial court hearing and the procedural guarantees emerging from the notion of rule of law.

The impact of the Charter is rather obvious on this provision because the last phrase of Article 41 paras 1 and 2 item C are textually present here (administration in an impartial, fair and reasonably timely manner, and the obligation to justify decisions). Equal contents can be found in para 2 of the Basic Law and Article 41 para 3 of the

Charter, both regulating compensation of the damages from unlawful conduct.

B) Fair trial

With a slight difference in the wording, the Basic Law maintains the contents of the regulation provided by the Constitution.

i) The right to hearing by a court

Although Article XXVIII para 1 does not contain an equality clause, that is to be found – not limited to judicial proceedings – in Article XV. This means that the practice of the Constitutional Court is applicable also in this regard, namely:

The rule of law requirement of material justice can be achieved by staying within the institutions serving legal certainty and guarantees. [The Basic Law] grants the right to a procedure, which is necessary and in most cases appropriate to the realisation of material justice.⁹⁹

The obligation of the State emerging from Article XXVIII para 1 is *inter alia* to grant judicial settlement of disputes related to civil law rights and obligations (civil law dispute).¹⁰⁰ In relation to the right to hearing by a court, the Constitutional Court, however, ruled that a temporal limitation of the submission of claims is justifiable, as the above-mentioned rule of law requirements are met. Its

reasoning stated that the right to hearing by a court (just like other rights granted by the Basic Law) is not an absolute right, but it can only be exercised in the framework established by legal certainty as appearing in a rule of law:

Regarding the judicial supervision of resolution of an association, the general requirement of legal certainty is concreted in priority objectives of company law, like security of trade and protection of creditors. If legal certainty is realised in one of the most important areas of company law in the realisation of these two requirements, then temporal limitation of the right to submit claims cannot be considered either unnecessary or disproportionate.¹⁰¹

The Constitution set out the requirement of a fair trial but this was removed from the text of the Basic Law according to the standing procedural regulations. However, it enables no interpretation that would state that the procedure is not aimed at uncovering material justice. Instead, Article XXVIII para 1 regulates “fair” trial. It must be noted that fairness is not applicable to the trial only, but to the whole procedure and to each and every element therein.

ii) Public trial

Publicity of trials is granted by the Basic Law by the same regulation that was to be found in the Constitution. Public trials are held as a main rule but this can be overruled by

the court. Courts are obliged to publicly deliver their decision reached at a trial, even if the preceding trial was not public.¹⁰²

iii) Reasonable time

The Basic Law prescribes the obligation to conclude judicial proceedings in a decision delivered within a reasonable time. Article 6 of the ECHR and the former respective practice of the Constitutional Court has been implemented in the text of the Basic Law. Earlier the phrase “reasonable deadline” was used in the Constitution only in regard to the justification of a limitation to the right to remedies. Deadlines are elements of the legally regulated proceedings that prescribe the conclusion of the procedures, and particularly certain procedural acts and the performance of certain rights and obligations within a reasonable time. These are designed to avoid never-ending procedures, while granting for the exercise of fundamental rights.¹⁰³

The ECHR has a well-known and sophisticated practice in the matter of “reasonable time”, which is applicable here.

iv) Presumption of innocence

The presumption of innocence is present in the Basic Law with same content as it had in the Constitution. Presumption of innocence was originally connected to criminal procedures, but it must now be extended to other procedures just like the right to fair trial. Such other procedures could include – inasmuch as this presumption

is feasible there – administrative,¹⁰⁴ disciplinary and misdemeanour procedures.¹⁰⁵

According to the presumption of innocence nobody is to be considered guilty until proven otherwise in a final decision of a criminal court. According to the Constitutional Court this formula does not mean that the authorities could not take certain measures – even limiting fundamental rights – against the accused.

This approach and practice complies with the norms of international law. Article 6 paragraph (2) of the European Convention on Human Rights declares the presumption of innocence, but in light of Article 5 the accused may be deprived of personal liberty if that is necessary. According to this approach, the presence of custodial arrest, remand, temporary coerced medical treatment and prohibition to leave the place of residence in the Hungarian law does not violate the Constitution. All these measures limit a fundamental right under the Constitution, but naturally, in a due way, by appropriate judicial guarantees.¹⁰⁶

The consequence of the presumption of innocence is that the burden of proof is on the authorities prosecuting a criminal case.¹⁰⁷

v) Right to defence and the “equality of arms”

The right to defence was connected primarily to criminal

procedures, more precisely the judicial phase, and it covered the right to defend and the choice of a defence counsel. Today it covers the whole procedure and each and every one of its phases. The text of the Basic Law – beyond textually implementing the Constitution – reflects this stage of the right to defence. Nevertheless – according to the aforementioned practice of the ECtHR – we believe that the correct interpretation makes it applicable not just in criminal procedures, but in any proceeding conducted regarding an activity of criminal nature.¹⁰⁸

According to the practice of the Constitutional Court – in compliance with the Strasbourg case law – fair trial is a feature that can be evaluated only by consideration of the whole procedure and all the circumstances thereof. Therefore in spite of some details missing or in spite of obeying all detailed rules the procedure may become unjust or unfair.¹⁰⁹

The ECHR considers the right to remain silent as an important element of fair trial, though this right is not absolute, and no violation of the European Convention on Human Rights occurs if the court draws conclusions from the silence of the accused.¹¹⁰

vi) Nullum crimen sine lege et nulla poena sine lege

According to the Constitutional Court these principles are not just about the obligation of the State to prohibit and make punishable offences in law, but these also refer to the right of the individual to be found guilty and sentenced only

according to law. The principle of *nullum crimen sine lege* is part of the constitutional legality of criminal law, but it is not the exclusive criterion of such.¹¹¹

Article XXVIII para 4 of the Basic Law stipulates that no person shall be found guilty or be punished for an act which, at the time when it was committed, was not an offence under the law of Hungary or of any other state by virtue of an international agreement or any legal act of the European Union. Para 5 then adds that these rules shall not exclude the prosecution or conviction of any person for an act that was, at the time when it was committed, an offence according to the generally recognised rules of international law.

vii) The principle of ne bis in idem

The principle of *ne bis in idem* is declared as a new element among the constitutional guarantees of judicial procedure. This principle means the prohibition of double jeopardy, which was already a general principle of the legal system.¹¹² Article 50 of the Charter reads: “No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.” According to the Basic Law, except for extraordinary cases of legal remedy determined by law, no person shall be prosecuted or convicted for any offence for which he or she has already been acquitted or convicted by an effective court ruling, whether in Hungary or in any other

jurisdiction as defined by international agreements or any legal act of the European Union.

viii) The right to remedies

The right to remedies may take different forms, as was pointed out by the Constitutional Court in several decisions. The right to remedies means the possibility to seek the same organ or a higher level within the same organ regarding decisions on merits, therefore it includes the right to be heard by a court.¹¹³

The right to remedies substantially covers decisions of the authorities only. As decided by the Constitutional Court, it does not cover decisions of non-state actors, such as those of the employer or the owner. It also does not cover decisions of state representatives who are not acting as authorities, such as decisions of the military superior.¹¹⁴

The Constitutional Court – partially based on international documents – describes the general requirements of the right to remedies. It is realised within the administrative hierarchy, primarily in the course of authoritative actions, and also within the judiciary in civil and criminal procedures; these two areas are connected by the judicial review of administrative resolutions.

The Basic Law basically maintained the text of the Constitution. However, it omitted the provision on the possible limitation of this right in an act accepted by a two-thirds majority of the members of the Parliament, in order to adjudge legal disputes within a reasonable time, supposing

such limitation was proportionate.

2.18. Right of petition

Two major elements are different in the Basic Law compared to the rules of the Constitution. On the one hand, the right to submit a proposal is inserted beyond written applications and complaints. On the other hand, the addressee is not “the competent state organ” but “any organ which exercises public power”.

This right of petition can be exercised by anybody who is entitled by rights from the Basic Law and is entitled to participate in public affairs. This means every natural person without prejudice to their nationality and residence. This right extends to Hungarian citizens, foreigners and stateless persons, regardless of their being in Hungary or abroad. Right of petition can also be exercised by legal persons and other entities without legal personality.

The right to submit an application, complaint or proposal demands that the organs exercising public power do not prevent or hamper such submission. Accordingly, if the competent organ denies accepting a complaint, this right would be violated.

However, the right of petition does not only cover submission of petitions to competent state organs. It also covers a decision on the merits of the petition by the competent state organs having jurisdiction. Such decision on the merits also means that it must be exhaustive – thus

they adjudge each and every element within their competence. Any interpretation contrary to this one – namely when this requirement is not met – is suitable for violating the essential contents of the right of petition.

The addressee can be any organ (state or municipal alike) exercising public power and not only those that bear the function under a separate legal regulation to examine and adjudge complaints.¹¹⁵

It must be noted, however, that it does not violate the right of petition that an important institution of parliamentary control, the ombudsman, is not entitled to adjudge a certain range of complaints, despite the fact that his domain is considerably widened by the new regulation.

2.19. Right to freely choose residence (free movement)

According to the Constitutional Court this means:

the right to freely move to other locations. The Hungarian Constitution does not explicitly name freedom of transport, but free movement includes shifting from one place to another by vehicles or without vehicles and the freedom of transport.¹¹⁶

Every person lawfully staying in the territory of Hungary shall have the right to freedom of movement and to freely choose residence.

Notes

- 1 Special thanks to Tamás Ádány for his remarks to this chapter.
- 2 According to Article O: “Every person shall be responsible for his or herself, and shall be obliged to contribute to the performance of state and community tasks to the best of his or her abilities and potential.”
- 3 Article 153 para 3 of the Weimar Constitution declared it for the first time: “Property obliges. Its use must also serve the public good.”
- 4 See Article XIII.
- 5 See Article XIX para 3.
- 6 See Article XII.
- 7 See Article XIX.
- 8 See Article XXII.
- 9 Article VI and Decision 56/1994 CC.
- 10 The case law of the Constitutional Court filled these gaps, and therefore these rights have been enforced in the last twenty years. Article XXIV of the Basic Law, however, lists these rights expressly.
- 11 See, for example, the right to work and employment.
- 12 The Constitution prohibited limitation of the essential contents, but it failed to regulate the necessity and proportionality of the limitation of fundamental rights. This was resolved by Decision 30/1992 CC. According to certain understandings, the essential contents have two elements: an intransgressible essence of the fundamental right (which is human dignity in the case of all fundamental rights) and the realm of essential contents beyond that. The necessity-proportionality test is a standard applicable to this later element. Other interpretations suggest that there is no such dichotomy regarding the essential contents, and the necessity-proportionality test is applicable to the whole.
- 13 The Constitutional Court ruled in its Decision 30/1992 CC that it would not accept abstract public good in itself as a ground for limitations of a fundamental right. Limitation of fundamental rights can only be possible if there is a direct threat of violation of personal rights. The Basic Law cites this decision by stating “A fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary in proportion to the desired goal and in respect of the essential content of such fundamental

right.”

[14](#) Decision 64/1993 CC and Article I para 4 of the Basic Law.

[15](#) The Constitution failed to mention prohibition of the death penalty, and the decision of the Constitutional Court terminating the death penalty reflects a monist approach in the interpretation of right to life and human dignity. The Basic Law mentions the prohibition of the death penalty (regarding extradition in Article 14).

[16](#) For a summary see Decision 58/2001 CC.

[17](#) Decisions 64/1991 CC and 48/1998 CC.

[18](#) Legal capacity is regulated by Article XV, stating that “Every human being shall have legal capacity.” This, however, does not solve the question of the legal capacity of the foetus.

[19](#) See, for example, (in relation to psychiatric patients) Decision 32/2000 CC.

[20](#) In Germany this sentence is subject to subsequent increase (*Sicherungsverwahrung*).

[21](#) According to Article 47/A para 1 of the Criminal Code, in the case of life imprisonment, the court also decides on the earliest possible time of probation, or that probation is not applicable. Para 2: If the court applies life imprisonment with probation, its earliest time shall be set not less than twenty years; in the case of a crime not subject to statutory limitations, it shall be not less than thirty years.

[22](#) See Article 29/A of the Criminal Code.

[23](#) Decision 20/1997 CC.

[24](#) See, for example, the cases on declarations on assets owned.

[25](#) See the chapter on the ombudsman.

[26](#) Decisions 22/1997 CC and 15/2004 CC.

[27](#) See Act C of 2011.

[28](#) The Constitutions of Cyprus, Finland, Ireland, Malta, Sweden and Slovenia.

[29](#) The Universal Declaration of Human Rights, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

[30](#) The constitutions of Belgium, Cyprus, Czech Republic, Estonia, Greece, Ireland, Lithuania, Latvia, Luxembourg, Malta, Germany, Italy, Portugal,

Romania, Spain, Slovakia and Slovenia; the Universal Declaration of Human Rights; the American Convention of Human Rights; the ECHR; the EU Charter and the International Covenant on Civil and Political Rights (ICCPR).

³¹ Rényi considers it that way, too, when stating: "it would be less of a problem, if an act would miss the word "peaceful" than the prohibition of "armed" assembly would be missing. Peaceful assembly [...] derives voluntarily from the correct interpretation of the freedom of assembly." Rényi, József, *A gyülekezési jog. Tanulmány a rendőri közigazgatás köréből* ("The Right of Assembly. A Study from the Sphere of Police Administration"), Budapest, Lampei R., 1900, p. 155.

³² See to the contrary: Drinóczi, Tímea, and Petréttei, József: *A gyülekezési jog a Magyar Köztársaságban*, Jura, 1/2002, p. 29; Kniessel, Michael, and Poscher, Ralf, *Die Entwicklung des Versammlungsrechts*, 2000 bis 2003, *Neue Juristische Wochenschrift*, NJW, 7/2004, p. 424.

³³ Decision 55/2001 CC.

³⁴ VerfGE 69, p. 315.

³⁵ Belgian, Danish, Greek, Irish, Lithuanian, Luxembourgish, German, Italian, Portugese, Romanian and Spanish constitutions.

³⁶ EU Charter, American Convention, ECHR, Estonian, German, Portugese, Danish, Finnish, Belgian, Italian, Greek, Lithuanian constitutions.

³⁷ Danish and Finnish constitutions.

³⁸ Canadian and Cypriot constitutions.

³⁹ Romanian and Spanish constitutions.

⁴⁰ Czech, Irish, Luxembourgish, Polish, Swedish, Slovak and Slovenian constitutions.

⁴¹ Decision 30/1992 CC.

⁴² Decision 55/2001 CC.

⁴³ *Christians against Racism and Fascism v. United Kingdom*. No. 8440/78, 21 DR 138.

⁴⁴ Jakab, András, 2011. évi ... törvény. *A Magyar Köztársaság Alkotmánya. Magántervezet, szakmai álláspont kialakítása céljából*, PPKÉ JÁK, 2011, január 10. <http://www.jak.ppke.hu/tanszek/alkotm/letolt/alkt.pdf>

⁴⁵ The monopoly to coerce appears, however, in Article C para 3 of the Basic Law.

[46](#) Decision 22/1994 CC.

[47](#) Decision 2179/B/1991 CC.

[48](#) See, for example, Decision 22/1999 CC.

[49](#) 1. "Everyone has the right [...] to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests." 2. "Political parties at Union level contribute to expressing the political will of the citizens of the Union."

[50](#) "Everyone has the right [...] to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."

[51](#) Article 9 [association]: 1. "All Germans have the right to form clubs and societies." 2. "Associations, the purposes or activities of which conflict with criminal statutes or which are directed against the constitutional order or the concept of international understanding, are prohibited." 3. "The right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and for all professions. Agreements which restrict or seek to impair this right are null and void, measures directed to this end are illegal. Measures taken pursuant to Articles 12a, 35 II & III, 87a IV, or 91 may not be directed against industrial conflicts engaged in by associations to safeguard and improve working and economic conditions in the sense of the first sentence of this paragraph."

[52](#) Article 21 [political parties]: 1. "The political parties participate in the forming of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They have to publicly account for the sources and use of their funds and for their assets." 2. "Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany are unconstitutional. The Federal Constitutional Court decides on the question of unconstitutionality." 3. "Details are regulated by federal statutes."

[53](#) Decision 30/1992 CC.

[54](#) See Article IX para 2 of the Basic Law.

[55](#) Decisions 30/1992 CC, 12/1999 CC, 18/2004 CC, 95/2008 CC.

[56](#) According to Article 269/C of the Criminal Code: "The person who

publicly denies the genocide and other crimes against the humanity committed during the National Socialist and Communist regimes, call it into doubt or present it as insignificant, shall be punishable for a felony with imprisonment up to three years." The Constitutional Court has not examined this regulation.

[57](#) Decision 36/1994 CC.

[58](#) *Lingens v Austria*, No. 9815/82 8 ECHR 407.

[59](#) Decision 34/2004 CC.

[60](#) Decisions 13/2000 CC and 14/2000 CC.

[61](#) Decision 37/1992 CC.

[62](#) Decision 31/1995 CC.

[63](#) Act I of 1996.

[64](#) Decisions 22/1999 CC, 60/2003 CC, 1/2007 CC, 46/2007 CC, 37/2008 CC, 57/2009 CC.

[65](#) Act CIV of 2010 on the Basic Rules of the Freedom of Press and Media Contents and Act CLXXXV of 2010 on Media Services and Mass Communication. Both acts are being examined by the Constitutional Court.

[66](#) Issues related to the public media objectives thus have been removed from the Constitution.

[67](#) Decision 41/2005 CC.

[68](#) Decision 62/1999 CC.

[69](#) It basically failed to do so. According to the interpretation given by the Constitutional Court, the rule on cooperatives had no normative content, and this rule did not prevent the transition of property.

[70](#) Decisions 64/1993 CC, 43/1995 CC.

[71](#) See Article 38.

[72](#) Article 17 of the EU Charter lists these sub-rights, and it also mentions the protection of intellectual property.

[73](#) Decision 64/1993 CC.

[74](#) Particularly maintenance of museums, public collections, libraries, state support given to theatres.

[75](#) Decision 79/1995 CC.

[76](#) Decision 1310/D/1990 CC.

[77](#) Decision 35/1995 CC.

[78](#) Decision 51/2004 CC.

[79](#) See Statutory Decree 9 of 1976 on the Proclamation of the International Covenant on Economic, Social and Cultural Rights.

[80](#) Act I of 2007 on the Stay of Person Entitled to Free Choice of Residence and Free Movement.

[81](#) Decision 21/1994 CC.

[82](#) Decision 21/1994 CC.

[83](#) Decision 21/1994 CC.

[84](#) Such provisions of the Constitution have been removed by Act LIX of 1997, because there was an appropriate regulation by law following an international agreement.

[85](#) Statutory Decree 19 of 1989.

[86](#) The Venice Commission CDL-AD(2011)016 *Opinion on the New Constitution of Hungary* cites ICCPR (Article 2 and Article 26) incorrectly, because they prohibit sex discrimination and not discrimination on sexual orientation.

[87](#) Decisions 20/1999 CC and 37/2002 CC.

[88](#) Decision 725/D/1996 CC.

[89](#) Decision 1067/B/1993 CC.

[90](#) Decision 422/B/1991 CC.

[91](#) Decision 79/1995 CC.

[92](#) Decision 30/1992 CC.

[93](#) Decision 21/1996 CC.

[94](#) See Article XIX.

[95](#) Decision 32/1999 CC.

[96](#) See Article XXII.

[97](#) Decision 42/2000 CC.

[98](#) Decision 28/1994 CC.

[99](#) Decision 9/1992 CC.

[100](#) Decision 59/1993 CC.

[101](#) Decision 935/B/1997 CC.

[102](#) Decision 58/1995 CC.

[103](#) Decision 23/2005 CC.

[104](#) Decision 60/1994 CC.

[105](#) *Belilos v. Switzerland*, No. 10328/83, Judgment of 29 April 1988.

[106](#) Decision 3/1998 CC.

[107](#) Decision 793/B/1997 CC.

[108](#) The ombudsman examined the enforcement of the right to defence by citing the case of *Öztürk v. Germany*, No. 8544/79 (Judgement of 21 February 1984, Series A, no. 73, § 46–56) in his procedure AJB 4721/2009.

[109](#) Decision 6/1998 CC.

[110](#) Also cited by the Constitutional Court in Decision 793/B/1997 CC.

[111](#) Decision 11/1992 CC.

[112](#) See Act XIX of 1998 on Criminal Procedure, Article 6 para 1 item D.

[113](#) Decision 5/1992 CC.

[114](#) Decision 22/1995 CC.

[115](#) Partly contradicts these: Decision 987/B/1990 CC.

[116](#) Decision 60/1993 CC.

Chapter VI

The Parliament

Peter SMUK

1. Traditions of Hungarian parliamentarism

1.1. Historical heritage

In the Hungarian political culture parliamentarism, often compared to the British type of government, has centuries-old roots. Even before Act V of 1848, which established the civil popular representation, parliaments played a central role in the fight of orders for national independence and civil reforms. From the Middle Ages until 1945, although the Hungarian Parliament had been functioning as a real counter-balance of the king's power, one could hardly define the form of government as "parliamentary". The system of the historical second chamber, together with the monarchy, was relieved in 1946 by the "little constitution" (Act I of 1946), but the republic was soon abolished by the totalitarian Constitution of 1949. According to this, refusing the principle of the separation of powers, the Parliament

became the supreme body of state power and of popular representation. Despite this regulation, it did not carry out any functions of a supreme power: because of the leading role of the communist party, real functioning of the Parliament ceased to exist for decades. At the end, in the term of 1985–1990, the parliamentary functions had a revival. The Parliament (*nota bene*, having controversial legitimacy because of the limited elections of 1985) enacted with only slight modifications the laws of the Transition formulated by the National Roundtable.¹ Despite the three mid-term government changes, each Parliament has fulfilled its four-year-term of office since 1990, which is a major achievement in the traditions of Hungarian parliamentarism.

1.2. Regulation of legislation after 1990

The second chapter of the Constitution of 1949 was fundamentally revised by the 1989–90 amendments;² later mainly technical changes were introduced by the constituent power. The Constitution still defined the Parliament as “the supreme body of State power and of popular representation” (Article 19). Maintaining this provision does not exclude the principle of separation of powers, but refers to the importance of the imprecisely copied idea of the British principle of “sovereignty of parliament” in the Hungarian constitutional and political thinking.³ Listing the competencies of the Parliament provided by the Constitution with the legislative and

constituent powers ensures the right to mark out the framework for the executive power (election of the Prime Minister, deciding on the state budget and on the Government's program) and the Government's responsibility, via scrutiny-methods and the motion of no confidence. The Parliament elects the main state officials, exercises international functions, decides the main questions in cases of special legal orders, may dissolve the representative bodies of local government that are functioning unconstitutionally, and can rule on territorial organisation and general amnesty. The Constitution granted relatively detailed provisions on the special legal orders, concerning the impact on Parliament's functions (Article 19/A–19/E).

On the level of the constitutional provisions one can also find the principles of the electoral law (Article 20 para 1; Articles 70, 71). The legal status of the representatives is established by indication of their free mandate and remuneration, involving the main cases of incompatibility and the end of the mandate.

Organisational (officials, committees) and functional (sessions, quorum, qualified majority) issues are outlined by the Constitution, details are outlined in the Standing Orders, and these are adopted by the two-thirds majority of the Members of the Parliament present.

Regarding the order of legislation, the Government, the President of the Republic, all committees and any

members of the Parliament have the right to propose a law. According to the Constitution, the president's role in legislation is to ratify and promulgate the adopted statute, or exercise his or her right to veto. Veto means that the president may refer the statute to the Parliament for reconsideration ("political" veto), but his or her veto may be overruled easily, by the same majority that was needed originally for passing the bill in question. In case the president has any reservation on the constitutionality on the law passed, he or she may initiate a preliminary review from the Constitutional Court.

As a limit of the legislative power, the Constitution includes provisions in this chapter on direct democracy, i.e. national referendum and national popular initiative. A mandatory referendum must be held in the case of an initiative of 200,000 citizens; in other cases, the Parliament has the discretion to order a referendum and to consider its result mandatory. If a referendum is ordered to confirm a bill passed by the Parliament, it shall always be mandatory. Forbidden subjects include public finances, martial issues, general amnesty, personal and organisational competencies of the Parliament and, based on the practice⁴ of Constitutional Court, amending of the Constitution.

Scrutiny function was established by the possibility of delegation of investigative commissions, the obligation of co-operation with them, and by listing the state officials who have to answer the questions and interpellations of MPs.

The mandate of the Parliament may end regularly every four years (by the inaugural sitting of the new Parliament); in special cases it has the right to declare its dissolution, and the President of the Republic may dissolve it as well. The president's right to dissolve can be exercised to solve a political impasse: when the president's candidate for Prime Minister is not elected by the deadline or motions of no confidence are passed by Parliament at least four times in a twelve-month period. In the case of dissolving the legislative, the president shall consult with other organs, and there are other limitations of this special legal order in order to protect the continuity of Parliament's functioning.

As already mentioned, detailed provisions for the functioning of the Parliament can be found in the Standing Orders, adopted in the form of a decree of the Parliament.⁵ The form of the legal norm "decree" comes from a legal-political tradition, which held that establishing standing orders is part of the autonomy of the legislative power because in this way the Parliament could adopt them without the participation of the head of state (the monarch). Standing Orders of the '50s (just like the Constitution) were formally filled with democratic content in 1989. This was so they could also survive the Transition, but in that case, the Parliament was able to adopt new Standing Orders in 1994. Democratic rules offer a regulated arena for political fights by providing the opposition with a means of influencing decision-making and controlling the executive. The Constitution empowers the Parliament to adopt further

acts – with two-thirds qualified majority – on election of Members of Parliament, their legal status, remuneration,⁶ and on the relationship between the Parliament and the Government in matters in connection with European integration.⁷ Furthermore, the two-decade-long practice of the committees interpreting the Standing Orders and the jurisprudence of the Constitutional Court are also sources of the parliamentary law.

2. Key issues of Hungarian parliamentary law

2.1. Main functions of Parliament

Legislation, controlling of the executive and elective functions are discussed here among the main functions – analysing further competencies and features would exceed the scope of this chapter.⁸

The status of laws among the legal norms has already been shown. Considering the position of the Parliament, subjects of legislation should be mentioned here. Traditionally parliaments adopt statutes (Article 19 para 3 item b and Article 25 para 2 of the Constitution) as the highest legal norms after the Constitution, although contributions from other state organs are also provided for (for instance, signature and promulgation by the president). This is a guarantee of great importance, since the Parliament has the strongest legitimacy among state organs, based on its

construction reflecting the political and social cleavages of society and its provision of parameters for open debates. The position and the powers of Parliament are established by defining mandatory and exclusive subjects for legislation. According to the Constitution these subjects are: regulating fundamental rights and obligations (Article 8 para 2), the state budget (Article 19 para 3 item d), main issues of state organs (Article 19 para 2, etc.), and other subjects where regulation requires the two-thirds majority of votes of MPs.

Since the Transition the Parliament could adopt statutes on any issues; its legislative power is open towards other state organs. This seemed to democratise legislation as a whole, but overloaded the Parliament. The burden caused by the high number of specialised rules and the need for quick changes seriously damaged the quality of law-making.

The statement that Parliament can adopt statutes on everything is true within the frameworks of legislative power. These limits are set up mainly by the general principles of rule of law, the Constitution and international law, and rarely by referendums.⁹ Here I refer to the fact that constituent and legislative powers are not separated. The Hungarian Parliament alone, by the two-thirds majority of votes of its members, can adopt and amend the Constitution, without any contribution from other organs. Referenda or other organs do not participate in constituent power, and moreover the Constitution does not contain any

eternal provisions that cannot be amended. These features maintain the illusions of the sovereignty of Parliament and the historical constitution.¹⁰

The Constitution has democratic provisions on the initiation of legislation (Article 25 para 1); only the role of the President of the Republic may be questionable, which should rather be separated from political debates. The right of all of the representatives is filtered effectively by the Standing Orders, which also require the support of a committee for the motion to be put on the order book (Standing Order Article 98 paras 3 and 5).

Since the legislative procedure is regulated in detail in the Standing Orders, the regulation on the (qualified) majority and the procedure after passing the statutes is set up by constitutional provisions.

To pass a bill, generally the simple majority of the MPs present is required; in several cases two-thirds majority is needed (Article 24 paras 2–3). The requirement of qualified majority can be set up only by the Constitution; the exclusive scope of these issues can be learned from the text of the Constitution. Qualified majority in the Hungarian constitutional system means two-thirds majority, calculated in some cases with the whole number of MPs, but usually with the MPs who are present at the time of the vote. Qualified majority aims for the broader consensus of the political forces, according to the importance of the subject (or, at least, the importance given by the constituent power).

Regarding the consensus required for the legislation, these subjects support the model of consensual democracy. These statutes relieve the Constitution from detailed and specialised provisions and, by causing a lot of inconveniences, limit the governing majority. That is why several decisions of the Constitutional Court were brought in in the last two decades concerning qualified majority requirements.¹¹ If such a majority is given to the governing parties, the requirement for a consensus is degraded to a simple procedural rule, which has pure quantitative nature. Though it is rare in pluralistic multi-party systems, the Hungarian electoral system capable of disproportional results produced this outcome twice, in 1994 and in 2010.

Among the provisions of the legislation the Constitution also regulates the contribution of the President of the Republic. The president shall sign the adopted statute and order the promulgation thereof. Having had reservations, he or she has two types of veto: referring the statute to the Parliament for reconsideration, or asking *ex ante* review from the Constitutional Court. The Court declared in 2003 that the president must choose from the two options, but left the following question open: What happens if, after reconsideration, the Parliament adopts the law with a new, unconstitutional content? In that case the constitutional type of veto should be available, but the strict verdict rules this out: the President may exercise veto only once against the same bill. At the same time, it is a constitutional requirement that the Parliament should seriously consider

the reservations of the President. Though it does not have to accept the president's dissenting opinion, it has to allow the substantive reconsideration of such.¹² It is important to note that while the President cannot use his or her limited veto right to obstruct legislation, the Constitutional Court is not bound by any procedural deadlines regarding its *ex ante* review.¹³ Previously, fifty MPs were entitled to ask *ex ante* review, but this right was abolished by the Parliament in 1998 – although requesting the Constitutional Court's decision is a generally known right of the opposition in western democracies.¹⁴

The controlling function can be introduced in light of the relation between the legislative and the executive (in Hungarian parliamentarism, the executive power is represented by the Government). Scrutiny covers the Parliament's confidence, the means of calling to account, and even the budgetary law, but these are analysed in other chapters, just like other, external controlling organs of the Parliament (ombudsman, State Audit Office). Hereby I consider only the internal controlling means for acquiring information.

In a broader sense the controlling function is also carried out by ensuring that political debates are open to the public. In particular, for acquiring information the Constitution provides the rights of questioning and interpellation,¹⁵ the scrutiny of proceedings of committees,¹⁶ and obliges several organs to report regularly.¹⁷

Scrutiny is of great importance, especially for the opposition. In regulating an investigation the key issue is the availability of scrutiny; this can be established either as the right of an individual MP or as the right of a collective. Means established this way can be misused by the governmental side as well; they can support a “governmental obstruction”. Effective control of the executive power requires the dualistic separation of the controlling and the controlled organs.¹⁸ For effective oppositional rights, it is necessary to set up rights that are available independently of the will of the governing side. The implementation of this principle has suffered some shortcomings in Hungarian parliamentary law.¹⁹

Regularity of plenary sessions is required for the appropriate fulfilment of constitutional functions. One can specify a number of sittings a year, in order to provide an open and adequate arena for political forces and public opinion.²⁰ In the case of too few sittings, control methods would be available only when considerable time had passed since the issue in question occurred, and so acquiring this information would become useless to the public. The Hungarian Constitutional Court stated that the Parliament acted unconstitutionally by not regulating adequate guarantees of regularity of sittings in the Standing Orders. The decision of the Constitutional Court requires that during regular sessions, plenary sittings shall follow each other in “reasonable periods of time”, in order to allow the “Parliament to fulfil entirely its task prescribed

in the Constitution”.²¹

According to the Constitution, Members of the Parliament may direct interpellations to the Government and to its members (and before November 2010, also to the supreme prosecutor). Questions may be directed to the Government and to its members and also to persons who do not participate in forming general policy (such as ombudsmen, the President of the State Audit Office, the supreme prosecutor and the Governor of the National Bank; earlier to the President of the Supreme Court, and for a while in 1989, to the President of the Republic as well). So parliamentary scrutiny methods exceed the scope of executive power, but questioning and the obligation to answer it have a constitutional function – they make the issues known to the public and guarantee the conditions for an open debate. The obligation of answering does not harm the independence of the persons or organs representing them; the responsibility to the Parliament is determined by further provisions. The Constitutional Court laid down that in the case of the answering of interpellation directed to the supreme prosecutor, the plan for proposed measures worked out by the parliamentary committee shall not mean that the Parliament may direct the supreme prosecutor in certain cases.²²

Scrutiny committees are specialised means for acquiring information; the Constitution regulates the expected co-operation with them: everyone is obliged to provide parliamentary committees with the information requested

and is obliged to testify before such committees (Article 21 para 3). In 2003 the Constitutional Court found that lacking further regulation this provision is a *lex imperfecta*: the legislation did not establish any sanction when these obligations were violated. The Constitutional Court called upon the Parliament to pass legislation that is adequate to guarantee the effective controlling function of committees and to protect personality rights at the same time. Legal regulation is required for the obligation to co-operate with the committees, for the legal remedies against statements included in the reports of the committees, and to institutionalise the guarantees of the freedom of debate of public affairs.²³ It is important to note that as a matter of sources of law, the functioning of committees is regulated by the Standing Orders, in the form of a decree of Parliament. This decree, as a legal norm, is not binding for everyone, only for the Members of the Parliament. "Outsiders" cannot be obliged by Standing Orders, so their contribution to scrutiny is unenforceable. The solution is to adopt an external legal regulation.

Concerning the elective function, the Parliament elects the President of the Republic, the Prime Minister, the members of the Constitutional Court, the parliamentary ombudsmen, the President and Vice-Presidents of the State Audit Office, the President of the Supreme Court and the supreme prosecutor (Article 19 para 3 item k of the Constitution). Regarding the public power exercised by these officials, democratic legitimacy is transmitted by

Parliament. For the sake of carrying out the separation of powers, it is necessary to guarantee the independence of these organs from any unbalanced²⁴ political influence. The forms of such guarantees are: supermajority requirement at election, various incompatibility rules, term of office different from the Parliament's term, or exclusion of competencies for direction. The Hungarian Constitution provides different constructions of these guarantees.²⁵

2.2. Matters of organisation and functionality

Parliaments are bodies of popular representation with relatively high numbers of members, so the principle of effective functionality is achieved by the principle of democratic organisational structures and functionality.

Regarding the organisation, the Constitution mentions the speaker, deputy speakers, notaries, committees (Article 21) and in other provisions, without any legal definition, the factions. Factions play an important role in the functioning of Parliament, but their detailed regulation is provided by the Standing Orders.

The speaker is traditionally a representative from the biggest faction of the governing side; he or she shall represent the Parliament and may determine its functionality. In certain cases the President of the Republic is substituted for the speaker, but the speaker cannot be regarded as a "deputy president".²⁶ The Parliament is

unicameral, although traditionally, the bicameral model prevailed in Hungary. Since the Transition, scholars and political forces claimed to re-establish the bicameral model, in order to institutionalise the representation of corporate interests, national minorities and local governments.

The constitutional requirement of democratic organisation implies that at the election of Parliament's officials, setting up committees and regulating procedural rights, Standing Orders shall apply not only to the democratic majority rule. The principle of equality requires that every MP and every faction shall be treated as having equal legal status²⁷ (e.g. at the House Committee, or regarding the timeframes for speeches), and as concurring principles proportionality and parity shall be applied as well²⁸ (e.g. in case of certain committees). As I have already mentioned, the Constitution has *lex imperfecta* provisions on the controlling function of the committees.

Inadequate regulation on the order of sittings has been mentioned, too. The Constitution provides that there are two sessions a year, in spring and in autumn, and during them the speaker shall convene plenary sittings in reasonable periods of time. Convening of extraordinary sittings is not adequate to compensate this periodicity.

The Parliament has a four-year term of office; regular elections shall be held in April or in May. The legislative may declare its dissolution prior to the completion of its

term, exercising the *destructive* type of motion of no confidence, since with simple majority, without nominating a new Prime Minister it can terminate the mandate of the Government. The president's rights of dissolution are rather unrealistic. If the head of state nominates a candidate from the minority, waiting for the refusal and the forty-day deadline for the dissolution, then he or she can be overruled by the majority. They can elect the minority candidate and replace him or her immediately by the constructive motion of no confidence, which does not require any contribution from the president.

Even though they are not expressly mentioned in the Constitution, provisions ensuring a multiparty system and democracy unambiguously refer to the protected status of the opposition. Specified elements of this status are the rights to make procedural proposals (e.g. a scrutiny committee shall be set up if at least one-fifth of the Members of Parliament support such a motion), the provisions protecting the equality of MPs, and the controlling and political functions of the Parliament.²⁹

2.3. Legal status of representatives

The Hungarian Parliament consists of 386 MPs who are elected by direct, secret ballot by voting citizens, based on their universal and equal right to vote. Every adult citizen residing in the territory of Republic of Hungary has the right to vote. The Hungarian electoral system has a mixed feature, MPs get their mandates from single-member

constituencies and from party lists. It is a frequent criticism that compared to the number of citizens of the country, the Parliament has too many members. To “correct” this, transformation of the whole electoral system, and the consent of political parties would have to be achieved. It is a similar old controversy whether or not other forms of representation should and might be introduced. In the unicameral Parliament neither corporate bodies nor ethnic and national minorities have specific representation. The discussion about the establishment of representation of minorities began during the Transition in Hungary. Since the legislation to guarantee any form of it would harm the equality of suffrage and/or MPs, or at least the principle that the representation is based on party politics, the necessary consent of political elites was not reached. The amendment to the Constitution in May 2010 already envisaged the mandates of the recognised minorities in the cut-back Parliament, but this provision has never entered into force.

The Hungarian political community exercises its supreme power primarily through elected representatives; the mandate of the representatives is equal and free, irrespective to the type and location of the election. Through these features of mandate, the principles of modern representative democracy and popular sovereignty prevail.³⁰

Although representatives on the governing side obviously have more chance to influence decisions, the rights and duties of MPs are equal. Their mandate shall be equal,

regardless of the governing or opposition forces, the type of election, and whether they belong to factions or are independent. As modern parliamentary law favours factions for the sake of calculable operation of the legislative, non-aligned MPs' procedural rights and their chances to obtain places in committees and among officials is secured with particular attention.³¹ Further rights provide special protection for the opposition in order to let them participate in the operation of the Parliament.

Representatives cannot be recalled. They carry out their work regarding the public interest, and not the interests of their constituency, party or any particular consideration – the Constitution simply provides that Members of Parliament shall carry out their duties in the public interest (Article 20 para 2).³² The substance of the free mandate is that MPs are legally independent of voters. The representatives cannot be directed and legally are not obliged to consult with their voters on any question. In the Parliament, MPs may take part and vote freely, according to their conscience and conviction; they cannot be accounted on such grounds. The mandate is valid for the whole term of the Parliament, and cannot be cut off by voters.³³ The freedom of the mandate is challenged mainly by the party and faction discipline, but the source of this political alignment is the choice of the individual representative. Joining the factions is not mandatory, and MPs cannot be obliged legally to resign from their seats by factions or parties.

Immunity and incompatibility ensure the independence of the Parliament indirectly, and the undisturbed activity of the MPs directly.

The two forms of immunity regulated by law are exemptions from inviolability (proceedings can be conducted against him or her for a criminal charge or misdemeanour with the prior approval of the Parliament) and liability (an MP cannot be held accountable for any statements, speeches or votes). These are not privileges of MPs, traditionally they protect the Parliament from abusing influences. Representatives cannot resign from their immunity, for suspension two-thirds of votes of present MPs is needed.³⁴ The Constitutional Court connected the right to speech of MPs with freedom of expression (Article 61 of the Constitution), and ruled to protect their defamable speeches this way in the frame of immunity.³⁵

Incompatibility supports the prevailing of the principle of separation of powers, but also exceeds it in certain economic cases. Some issues of incompatibility are specified by the Constitution,³⁶ but it empowers the Parliament to pass legislation on further cases. In Hungarian regulations membership of Parliament and in the Government are not incompatible (like in France), and winning a mandate in Parliament is not a precondition to become a minister in the Government (like in the UK). Serious controversy arose in 1994, when the position of MPs and local mayors became compatible. The Constitutional Court declared that in this case the violation

of the principle of separation of powers cannot be deduced from the Constitution.³⁷ Incompatibility rulings are valid for the term of the mandate, but in some cases even after the end of it. Anyone who during the four years preceding the proposal for election has been a Member of Parliament shall not be elected ombudsman; professional members of the Hungarian Armed Forces, the Police and the national security services may not be nominated in parliamentary elections while in active service and for a period of three years following the termination of their service relationship.³⁸

The aim of remuneration of representatives is to secure their professional and uninfluenced activity. These payments provide privileges and so have caused rather political debates. According to the Constitution, further – qualified majority – legislation can specify the details.

The elected candidates enjoy some rights (immunity, remuneration) before the inaugural session of the Parliament. The mandate is confirmed only when the mandate is verified and the oath is taken. The mandate ends with the end of the term of the Parliament. Certain personal reasons that could mean the end of the mandate before that time include death, resignation, and loss of the right to vote by judicial resolution or by a legal fact, while in the case that one of these occurring facts is not enough, the Parliament must declare the end of the mandate with a two-thirds vote.

3. The Parliament and the representatives in the new Basic Law

The Basic Law regulates the Parliament at the beginning of the section titled “State” (Articles 1–7), basically maintaining the subjects of the Constitution. This chapter of the Basic Law can be considered the least controversial one. Below I draw attention to the changing rules, highlighting their reasons. By way of introduction I shall note that the Basic Law already explicitly declares the principle of separation of powers (Article C para 1), and Parliament is not considered as the supreme “state power” (Article 1 para 1) – albeit any other state organ may participate in the constituent power (see below).

3.1. Competencies

There are only a few novelties regarding the Parliament’s powers (Article 1). One slight change is that the Parliament will not vote on the program of the Government anymore, but still elects the Prime Minister. This program does not play any legal role in reference to the legal status of the Government. The Basic Law regulates briefly international functions, budgetary law, and competencies regarding special legal order and military operations. It maintains the right to dissolve a representative body that operates unconstitutionally (see also Article 35 para 5). The reason for this competence is questionable, since the Parliament is a political decision-making body, and adjudging of

unconstitutional operation might result in a not purely legal deliberation. Election of the President of the Constitutional Court has been added to the elective function. Constituent power is still not divided from the legislative, maintaining the simple two-thirds voting rule.

Concerning the legislative function, the Basic Law still regulates the – unchanged – initiative rights, and the significantly reshaped procedure following the adoption of a bill (Article 6). The subjects of legislation and the openness of the legislative power are not notably altered, although the position of the executive power and the Prime Minister is strengthened.

Following the adoption of a bill, the President of the Republic still has the right of “political veto” (referring to reconsideration), only once if he or she did not refer the bill to the Constitutional Court (but if *ex ante* review had been asked by the Parliament, after the Court’s decision, the veto is available again). The political type of veto can be still overruled. If the Parliament changes the text of the bill due to its reconsideration, the president’s right to refer the bill to preliminary review is also available. (As I have mentioned, this case was not clarified earlier by the Constitutional Court decision.) One can find new actors in the Basic Law who are entitled to ask the *ex ante* review. The President of the Republic is obviously among them, but his or her right can be preceded by the Parliament. The Basic Law entitles the proponent of the bill, the Government or the speaker of the House to submit a motion before the

final vote for the Parliament to send the adopted bill to the Constitutional Court to examine its conformity with the Basic Law. Parliament shall decide – by simple majority – on the motion after the final vote. In that case not only certain provisions, but the Act as a whole is the subject of the review (according to the textual interpretation of the Basic Law). Following this, the president cannot propose a preliminary review, since the constitutionality of the whole Act has been adjudicated, but he or she can still send it back to the Parliament for reconsideration. Notably, the Constitutional Court has thirty days to decide a case. If the Constitutional Court holds that the Act does not conflict with the Basic Law and does not refer it to reconsideration, the president has to sign the bill and order its publication. If the Constitutional Court establishes the violation of the Basic Law, the Parliament has to reconsider the Act and eliminate the violation. Following this, it is possible to propose the examination again, since new text may raise new questions – but the Constitutional Court has only ten days for this procedure. This may be very limiting, if Parliament has significantly amended the bill.³⁹ Following the political veto and reconsideration, preliminary review can be proposed only about the amended provisions, and on the grounds of failure to meet the Basic Law's procedural requirements for the drafting of such Act. The latter reason is applicable in the case that Parliament did not amend the Act. The Basic Law has only a few requirements for drafting acts, like proposing bills, specified majority necessary at the final voting, president's

veto, and the above-described motions for preliminary review. Between proposing and adopting the bill, numerous procedural provisions may be violated (MPs right to participate, etc.).

The complicated rules of proposing *ex ante* review imply that if the majority of the Parliament is uncertain about the bill concerned, it may ask for the position of the Constitutional Court about the constitutionality of the legislation. In this case the Constitutional Court becomes the advisor to the Parliament, which is the role the Constitutional Court strongly tried to avoid, referring to the principle of separation of powers. The Basic Law's provisions seem to meet the Constitutional Court's requirements, when the Basic Law makes it possible for the Constitutional Court to be asked not during the drafting of the bill and to decide between alternatives (i.e. in political issues), but about an end-product of the legislation after the final voting.⁴⁰ For the sake of supporting the opposition, proposing such a review could have been established as a minority right.⁴¹

For the controlling function (Article 7) the Basic Law maintains the MPs' right to acquire information concerning questioning and interpellation (as well the addressees). It has new provisions on the controlling function of committees, ruling that this activity and the obligation to appear before committees shall be regulated by a cardinal statute. This is, at least, a solution for the above-mentioned problem of legal sources, that Standing Orders as decrees

of the Parliament cannot legally oblige others but MPs. (At time of writing, further official legislative concepts are not known.)

National referenda can still be held on any matters belonging to the competencies of the Parliament (Article 8). The motion for this is not aggravated (the right of the one-third of MPs has been abolished, but as yet the majority of the Parliament decided it), and the list of excluded subjects is drawn more professionally. To hold a referendum to confirm legislation was not a realistic option in the past. Refusals of initiatives aimed at amending the Constitution were based on Constitutional Court decisions;⁴² now they are also grounded in the Basic Law.

I consider as a significant novelty the new validity requirement; a referendum may be valid if the turn-out exceeds 50 percent of all electors – such a high result was rather extraordinary in the history of Hungarian referendums. It is furthermore a sensitive issue that the Act on the specific regulations of referendums is not among the subjects of cardinal statutes already. Though the Basic Law provides important regulations, specific issues, like the term of the binding force of referendum, will be revisable by simple majority.

3.2. Organisation and functionality

The term of office of the Parliament is maintained but regulated by a clearer wording (Article 3). The President

still has the right of dissolving – although its cases have changed. Four successful motions of no confidence in a year cannot entitle the President to dissolve the legislative, but he or she can still “appeal to the people” if there is an unsuccessful nomination of a candidate for the Prime Minister. It is a new rule that if the Parliament fails to adopt the annual State Budget Act by 31 March of the given year, the president has the right to dissolve it. This may be interesting in light of the veto right of the Budget Council: such a long delay has not occurred so far, but the veto of the Council may achieve it. The Basic Law provides that if the president delays dissolution, the Parliament can remedy its neglect in order to avoid early elections. The president shall – as according to the Constitution – consult with the Prime Minister, the speaker and the leaders of parliamentary factions, but he or she does not have any further obligations beyond listening to their opinions. By early elections, the new Parliament shall be elected in ninety days, which is a slightly shorter period than the three months defined by the Constitution.

The Basic Law has not changed the principle of open sessions, and the President of the Republic is not entitled to propose the ordering – two-thirds needed – of a sitting *in camera*. Regulation of officials, setting up committees and quorum has been retained. One may welcome the new provision defining the parliamentary factions (groups). MPs form factions in order to co-ordinate their activity, and further specific regulations may be laid down by the

Standing Orders.

To pass a decision simple majority is needed, but qualified-majority rule can be set up by the Basic Law and Standing Orders. In the proceedings of the Parliament several issues require qualified majority (two-thirds, four-fifths), but until now Standing Orders, objectionably, had not had a constitutional mandate to establish these requirements.

The norms of parliamentary law can be summed up as it follows. The first chapter of the "State" section of the Basic Law contains the basic provisions and empowerment of particular legislation that requires qualified majority or cardinal statutes in every case. Specific regulation concerning organisation and operation shall be established by the Standing Orders. Formally, a decision of the Parliament contains Standing Orders, and since the Basic Law does not call it "cardinal statute", and one cannot find it among the legal sources that establish generally binding rules of conduct (Article T); maintaining the form of "decision" is reasonable. Cardinal statutes can specify the rules of the electoral system, nationalities' contribution to the Parliament's work, the legal status and the remuneration of the MPs.

It is a special novelty that a cardinal statute shall set up provisions on the supervising activity of committees and also the regulation of the regular sessions of the Parliament. These are, as I mentioned above, answers to

the decisions of the Constitutional Court that established unconstitutionality by omission, but it is not clear why an Act shall lay down the rules concerning regular sessions, and why the Standing Orders would be insufficient or inappropriate. The provisions on the sittings determine only the operation of the Parliament; persons besides MPs are not affected. Along with this regulation, former constitutional provisions pertaining to sessions, including extraordinary sessions and adjournment of sittings, are all left out of the Basic Law.

3.3. The Members of Parliament

Parliamentary elections are carried out on the basis of generally accepted, democratic principles, as the Basic Law has changed neither the four-year terms nor the spring dates of regular elections. It does not fix the number of MPs or the number of representatives of nationalities, contrary to the already mentioned amendments to the Constitution of May 2010. Instead, it allows legislation on the contribution of nationalities to the Parliament's work by cardinal statute. Serious social and scholarly debates have emerged in reaction to the suggestion from the governing parties that residence in Hungary should not be a prerequisite of the right to vote. The Basic Law opens the door: "Cardinal statute may connect the right to vote or its completeness to Hungarian domicile and the right to be elected may be bound to further conditions" (Article XXIII para 4).

Other features of the mandate are regulated in more detail.

MPs shall have equal rights and obligations, perform their activities in the public interest, and may not be instructed in that context (Article 4 para 1). The Basic Law establishes immunity and remuneration in order to promote the MPs' independence, but the determination of the criteria and the rules of incompatibility are completely transferred to a cardinal statute. Contrary to the Constitution, it does not list the offices that may not be held by MPs; the only references in the Basic Law to this are in the provisions pertaining to other state organs.⁴³

Cases of terminating the mandate are changed in two ways. Firstly, the Basic Law refines the criteria of "losing the right to vote" as "if the conditions for his or her election no longer exist". Secondly, the mandate also ends if the representative has failed to participate in the Parliament's work for one year. There is not any further regulation on this matter, but the Parliament shall declare it with a two-thirds majority of the votes of the MPs present.

4. Open issues and main directions for further legislation

The new Basic Law maintains the parliamentary form of government, and establishes a state organisation based on principles of rule of law and separation of powers.⁴⁴ In the frame of this constitutional system the Parliament's positions have not changed significantly. As I mentioned, I regard the regulation on the Parliament as the least

problematic part of the new Basic Law, which can be demonstrated by the fact that the Venice Commission did not find it necessary to append observations to Articles 1–7.⁴⁵ As MPs took a great part in the constitutionalisation process, several practical problems concerning parliamentary law have been solved; nevertheless new questions have emerged as well.

Levels of regulation of parliamentary law are worth mentioning. The Basic Law provides a foundation for further legislation, and its sources will be the Standing Orders and cardinal statutes. At the time of writing, the contents or regulation concepts are unknown.

The restraining of the competences of the parliamentary majority is a special issue concerning the cardinal statutes that require qualified majority of two-thirds of the MPs present for their adoption and amendment, as the Venice Committee has warned.⁴⁶ It is true that subjects that require qualified majority for regulation seem to strengthen the concept of consensual democracy, but some simple public-policy issues are also among these subjects (e.g. pensions and family policy, but at the same time, the detailed regulation of referendums can be laid down in ordinary statute). As qualified majority is hard to achieve for the governing side, these rules necessitate coercing a consensus with the opposition, and so winning the elections may become meaningless. This way, according to the Venice Commission, the principle of democracy itself is at risk. Accepting these reservations, we also

recommend restricting the regulation by cardinal statutes to a strictly necessary scope.

The Standing Orders and the two other subjects for cardinal statutes (scrutiny function of committees and the guarantees of regular sittings) could be regulated in one single law. This would change the Standing Orders' legal source, but also simplify the system of regulating norms appreciably. Restricting the Standing Orders into an Act is objectionable in the above-mentioned constitutional tradition, the protection of the autonomy of the Parliament. They are likely to remain in the form of decisions, and the Parliament will adopt a cardinal statute for itself, laying down provisions on scrutiny committees – e.g. applying rules similar to criminal procedures⁴⁷ – and on regular sittings as well. It may provide regulations on legally neglected matters such as the legal personality of the Parliament, its building and surroundings, etc.

It does not concern the Basic Law, but it is worth noting that there are several issues of the Standing Orders that the Parliament should tackle, such as the order of speeches in committees, disciplinary competences of the speaker, the huge number of amendments proposed just seconds before the final voting, etc.

Concerning dissolution I mentioned the State Budget Act, which needs to be adopted by the end of March in the given year. The veto right of the Budget Council may lead to the dissolution of the legislative. The Parliament will probably

be able to avoid dissolution by passing the State Budget Act in conformity with the Basic Law, and then it will be easier to amend it according to the policies of the governing parties. The limitation of legislative power in this case will be discussed further in chapter seventeen on public finances.

The incompatibility of offices of mayors and MPs is still open. Since the number of MPs will be reduced significantly, probably the political forces will accept the introduction of a new case of incompatibility with less resistance. The Hungarian scholars' general position is that the principle of separation of powers should be applied in that matter by dividing the two offices.

The electoral system and the participation of nationalities in the work of the Parliament may determine the functioning of the legislative indirectly, deciding key issues (like the number of MPs, whether representatives of nationalities will have equal mandate or not) that are of great importance. The Basic Law has not answered the second question, leaving room for deliberation before legislation, and does similarly concerning the right to vote of citizens living outside Hungary's borders. For the sake of the protection of the political community of the inhabitant citizens, the requirement of residency in Hungary is reasonable – but deciding this remains one of the gravest political questions of the near future.

Notes

¹ In this term, Parliament adopted other acts that were functioning for decades, such as the act on legislation (1987), the acts on the rights of assembly, association, trade unions (in early 1989), the basic acts of the Transition (on the Constitutional Court, on political parties, on election of MPs and on the State Audit Office, in autumn 1989), the Act on the right of freedom of belief and religion (early 1990), etc.

² Act XXXI of 1989 and Act LX of 1990.

³ See Körösényi, András, *Government and Politics in Hungary*, Budapest, CEU Press, 2000, pp. 146–147, 229. The sovereignty of parliament is also a fiction in the British system, as in the political reality the cabinet is ruling the legislative power: von Beyme, Klaus, *Parliamentary Democracy: Democratization, Destabilization, Reconsolidation, 1789–1999*, Palgrave Macmillan, 2000, p. 38.

⁴ Decision 25/1999 CC.

⁵ Decree 46/1994 of the Parliament.

⁶ Act XXXIV of 1989 on the election of Members of the Parliament, Act LV of 1990 on the legal status of the Members of the Parliament, Act LVI of 1990 on the Emoluments of the Members of Parliament.

⁷ Act LIII of 2004 on the co-operation of the Parliament and the government in European Union affairs.

⁸ For further details, see Smuk, Péter, *The Hungarian Parliament 1990–2010: Functions and Development Trends* in *Časopis pro právní vědu a praxi*, 2010/2, pp. 151–162.

⁹ In cases of special legal order, some state organs may deviate from certain laws; these situations are analysed below.

¹⁰ Paczolay, Péter, *Hungarian Constitutional Law, 1989–2005* in Jakab, András; Takács, Péter; and F. Tatham, Alan (eds), *Transformation of the Hungarian Legal Order 1985–2005*, Alphen an den Rijn, Kluwer Law International, 2007, pp. 19–25.

¹¹ Decision 4/1993, 1/1999 and 31/2001 CC.

¹² Decision 62/2003 CC.

¹³ The out-of-turn proceeding of the Court sometimes lasted longer than a regular proceeding in *posterior* review.

¹⁴ Act I of 1998. See also Schneider, Hans-Peter, *Keine Demokratie ohne Opposition* in Buckmiller, Michael, and Perels, Joachim (eds), *Opposition*

- 15** Article 27 of the Constitution: Members of Parliament may direct a question or interpellation to the ombudsmen for civil rights and the ombudsmen for the rights of national and ethnic minorities, to the president of the State Audit Office, the attorney general and the governor of the National Bank of Hungary, to the government or any of the members of the government on matters that fall within their respective sphere of competence.
- 16** Article 21 paras 2–3 of the Constitution: The Parliament shall establish standing committees from among its members and may delegate a committee for the investigation of any issue whatsoever. Everyone is obliged to provide Parliamentary Committees with the information requested and is obliged to testify before such committees.
- 17** For instance, in the case of the government see Article 35/A and Article 39 paras 1–2 of the Constitution.
- 18** Gehrig, Norbert, *Parlament – Regierung – Opposition*, München, Kluwer Law International, 1969, p. 28.
- 19** Adopting the final report of a scrutiny committee needs a majority decision, although these are parity committees – according to Standing Orders Article 33 para 4 and Article 36 para 5.
- 20** Beyme expects at least a hundred plenary sittings in a year, see: von Beyme, Klaus, *Die parlamentarische Demokratie. Entstehung und Funktionweise 1789–1999* (vol. 3), Westdeutscher Verlag GmbH, Opladen/Wiesbaden, 1999, pp. 187–188.
- 21** Decision 4/1999 CC made it possible for the speaker to call the Parliament for sitting in three weeks, in the session of 1998–2002. The (ineffectual) deadline for legislation expired on 15 December 1999.
- 22** Decision 3/2004 CC. Parliament abolished the right to direct interpellation to the prosecutor general in autumn 2010.
- 23** Decision 50/2003 CC. The (ineffectual) deadline for legislation expired in March 2004.
- 24** Election by the Parliament is a political influence itself.
- 25** Decision 38/1993 CC.
- 26** Decision 7/1990 CC.
- 27** By co-operating, Members of Parliament transfer their equality to the

legal status of the parliamentary factions. Forming of factions is based on political conscience, and belonging either to the governing or the minority side, they represent a part of the people's will expressed in the latest election. Only their equal legal status can guarantee that Parliament represents the people and its sovereign rights. Haberland, Stephan, *Die verfassungsrechtliche Bedeutung der Opposition nach dem Grundgesetz*, Berlin, Duncker & Humblot, 1995, pp. 69–71.

²⁸ See, for example, the Standing Orders of the German Bundestag, Article 28 para 1.

²⁹ For theoretical foundation of the rights of opposition, see Haberland, *op. cit.*

³⁰ For comparison visit the “Mandate” module of the “PARLINE” database of the Inter-parliamentary Union: <http://www.ipu.org/parline-e/mod-mandate.asp>.

³¹ See Decision 27/1998 CC.

³² German *Grundgesetz* is more precise (Article 38 para 1): MPs “shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience”.

³³ Decision 2/1993 CC.

³⁴ Act LV of 1990 Articles 4–6. There are exceptions as *flagrante delicto*, violation of state secret, defamation or libel.

³⁵ Decision 34/2004 CC.

³⁶ Article 20 para 5: A Member of Parliament may not be the President of the Republic, a member of the Constitutional Court, the ombudsman for civil rights, the President, Vice-President or accountant of the State Audit Office, a judge or prosecutor, the employee of an administrative body – with the exception of the members of the Government, state secretaries and appointed government officials – nor an active member of the Hungarian Armed Forces and law enforcement agencies.

³⁷ Decision 55/1994 CC.

³⁸ Act LIX of 1993 Article 3 para 3; Article 40/B para 4 of the Constitution.

³⁹ For reservations in this regard, see the Venice Commission, Opinion no. 618/2011, item 100.

⁴⁰ Decision 16/1991 CC. This decision also mentions that European constitutions establish preliminary reviews similarly, see France: Article 61, Portugal: Article 278, Ireland: Article 26, Italy: Article 127.

⁴¹ This design is supported by Helms, Ludger, *Politische Opposition. Theorie und Praxis in westlichen Regierungssystemen*. Opladen, Leske&Budrich, 2002, p. 117; and, because of the political dangers, criticised by Koopmans, Tim, *Courts and Political Institutions: A Comparative View*, Cambridge, Unity Press, 2003, pp. 73–74.

⁴² Decision 25/1999 CC.

⁴³ E.g. Article 12 para 2, the office of the President of the Republic shall be incompatible with any other state, social, economic and political office or assignment.

⁴⁴ Venice Commission, Opinion No. 618/2011, item 89.

⁴⁵ Indirectly, in the competencies of the Constitutional Court, the short deadline for preliminary review is mentioned, see Venice Commission, Opinion No. 618/2011, item 100.

⁴⁶ Venice Commission, Opinion No. 618/2011, items 22–27.

⁴⁷ E.g. see the references to the criminal law in Appendix 1 of the Czech Standing Orders.

Chapter VII

The President of the Republic

Lóránt CSINK

1. The nature of the power of the head of state

The institutions of head of state and the state itself are much the same age. In ancient state organisations, the heads of states were the possessors of sovereignty, exercising all powers on their own. During legal development the status of the head of state has been modified in many ways and now modern constitutions differentiate two kinds.

In the first, the head of state links to the executive, significantly influencing it. In countries following this model, the head of state is either the sole possessor of the executive branch (like in the United States), or the executive power is shared between the president and the government (like in France).

The other model is the neutral head of state who is outside the classical branches of power.¹ These heads of states

have utterly different roles. They have a small number of direct and independent competences but they also have an essential role in situations when some kind of disorder emerges at one of the branches. In this model, the head of state plays an important role in exerting a certain influence on the operations of the parliament and the executive power,² and its main task is to balance the political powers. So the basic function of neutral heads of state is “to reign but not to rule”, as Benjamin Constant says.

Either the head of state is neutral or is the possessor of the executive, it still has a large role in state organisation. But none of the pure forms of the described models have come to reality. Besides the said functions, the head of state is traditionally the representative of the state, constitutions delegate several competences to him/her, in which the head of state acts “in the name” of the state. Consequently, all heads of state have a dual nature. For one, they have a significant role in state organisation (either as a possessor of the executive branch or as a balancing power) and secondly, they perform classical tasks that do not pertain to the operation of the political powers (e.g. to grant pardon, to confer titles).

In the nature of the power of heads of state there is a significant difference between realms and republics. Until the end of World War I, every country dominating Europe was a monarchy, except for France, which repeatedly altered its form of state. However, since the middle of the twentieth century the idea of the republic has spread and

even in countries that have remained monarchies, the constitutional role of the monarch has been reduced. By now, it is a general fact that monarchs have a greater symbolic role and smaller constitutional competences than the presidents of parliamentary states. In realms, the monarch represents the continuity of the governance and he or she has a legitimising force, as the office is not based upon political contest.³ As a guarantee of democracy, the constitutions have minimised the monarch's competences connected to the legislators and to the government.

2. The institution of head of state in Hungary

2.1. Creating presidential status at the political transition

In Hungarian history, the form of the state has not been a question for centuries. Until the end of World War II Hungary had been a kingdom since the formation of the state, with short intermissions. Although the status and the competences of the monarch had varied, the institution itself had not been questioned except for the freedom fight in 1848 and for the Council's Republic after World War I.

In 1946 Hungary proclaimed a republic. This did not prove long-lasting; in 1949 it was replaced by the People's Republic, under Soviet pressure. During the decades of

socialism, Hungary's constitution was based on the model of the Soviet constitution that did not allow separation of powers according to Montesquieu's theory. On the contrary, state power was united; there was only a division of labour among the leading persons and institutions of the country. The presidential power was exercised by a corporative body, the Presidential Council of the People's Republic. Besides the classical presidential functions, this body also substituted the Parliament in the legislation.

Although the constitution technically remained in force in 1989 during the political transition, the constitutional continuity was not maintained. Hungary broke with the former regime's heritage and set new basis of constitutional order.

During the Transition, the Act of 1946 proclaiming the republic inspired the Constitution of 1989 in many ways. The president's election, substitution, abdication and the right of veto were quite the same and there were a lot of similarities in the competences, too.

However, there was a fundamental difference between the two documents. The Act of 1946 stated that "the president exercises the executive power via his/her ministers being responsible for the National Assembly". Formally the president was the head of the executive branch, even though the government had a greater part in it.

During the political transition, the Constitution also regarded the experiences of other states at the creation of

state organisation. The relationship among the parliament, government and the president became regulated upon the pattern of the German *Grundgesetz*, which gave all the serious political competences to the parliament and to the prime minister (chancellor) responsible to it.

In 1989, the Constitution was not willing to create a strong position for the president. Considering the comparative analysis, one might come to the conclusion that strong presidential power emerges when the society is not organised enough to create a parliament through general elections. In grave crises, the society is rather apt to give the crucial competences to the president; naturally, with the full respect of democracy. On the other hand, societies where problems can be handled more easily are likely to be parliamentary.⁴

Besides the historical heritage and the foreign examples, one cannot neglect the role of political considerations at the constitutionalisation in 1989. The main purpose of the Roundtable of the Opposition (a new forum for anti-communists in 1989) was to obstruct the creation of strong presidential power. They found they had more chance to achieve the free elections (that they were likely to win) than to influence who the president would be. Therefore, they intended to give the main power to the Parliament.

The Roundtable of the Opposition took this line also at the National Roundtable talks. During the negotiations, the Communist Party pleaded for strong presidential power,

and they wanted to strengthen the competences of foreign politics the most, in order to have the transition accepted by the other Eastern European states, especially by the USSR.⁵ On the contrary, the Roundtable of the Opposition intended to weaken the presidential power, as they feared that the former regime wanted to regain political power with arms, with the help of a president delegated by the Communist Party. Therefore they forced guarantees for the introduction of a state of emergency and the dissolution of the Parliament. They wanted the Parliament to have an indispensable part in public affairs. On 4 September 1989 the National Roundtable decided on the most basic restriction of the presidential power: they accorded that the significant competences of the president require the countersignature of a minister.

Finally, in the aspect of legitimacy it became a crucial question whether the president was elected by the Parliament or directly by the people. The question was not out of serious debates. A referendum was held on the issue, and the Constitutional Court gave its view (Decision 1/1990 CC), but the question was cleared only after the first free elections in 1990, upon the agreement between the governing party and the biggest party in opposition.

2.2. The development of the institution of the president until the Basic Law

The Transition stabilised the constitutional regulation on the president's status and competences. Until the adoption of

the Basic Law, the pertaining regulations of the Constitution had hardly changed: the smaller modifications had not concerned the role of the head of state in the Hungarian state organisation.

Besides the text of the Constitution, the decisions of the Constitutional Court influenced the competences of the president. Concerning presidential status, the Constitutional Court had several landmark decisions between 1991 and 1992. In this period, because of a political debate between the prime minister and the president, the Constitutional Court interpreted in three decisions⁶ how the president was allowed to be involved in the affairs of the executive branch and whether the president can decide freely on the appointment to a certain position or not. The Court's answer for the latter question was a definite no. It pointed out that the president was not part of any of the branches of power. Its mission deriving from the Constitution was to balance the legislative and the executive; according to the words of the Constitution the "president shall ... guard the democratic operation of the State".⁷ Consequently, according to the Constitution the president is obliged to appoint someone to a certain position upon the recommendation of the prime minister, unless the democratic operation of the state organisation seems to be endangered.

The Constitution explicitly declares the inviolability of the president who, in political terms, is not accountable to the Parliament at all. Therefore, the legal conditions for the

shared exercise of governmental power are absent. The president has narrow, independent and direct powers; and the majority of the direct decision-making powers require countersignature by the prime minister or a minister.⁸ Countersigning – besides bringing political responsibility back to the Parliament – has the significance that in a scope of decisions designated in the Constitution it ensures conformity guaranteed in the general politics of the Government. The independently exercised powers of the president are mainly of an initiating type.⁹

As a result of the decisions, the president has little direct influence on state organisation. But in 2007, the Constitutional Court had to consider presidential competences not concerning state organisation.¹⁰ In the petition it was questioned whether the president is bound by the initiation at granting pardons and at conferring titles. The Court declared that these competences had no connections to the state organisation, so the constitutional phrase “guarding the democratic operation of the state” could not be applied as a standard. Instead, the president should regard the “constitutional values” in the awards procedure, and upon them the president could decide the worthiness of a person to receive an award. So practically, as a consequence of the decision, the president was free to decide whether to confer an award or not.

3. Regulation of the Basic Law

3.1. The status of the head of state

In general, the Basic Law does not concern the role of the president in the state organisation described above. The institution still has a dual nature (expressing the unity of the nation and guarding the democratic operation of the State) and there was no basic change in its competences.

It is noteworthy that during the creation of the Basic Law, there emerged ideas that would fundamentally change the status quo. The ad hoc committee responsible for the preparation of the new Constitution raised the following option: “the president may dissolve the Parliament in case of constitutional-political crisis caused by grave loss of confidence”.¹¹ As “grave loss of confidence” has plenty of possible interpretations: this solution would have presented a possibility to the president that would greatly strengthen his or her influence towards both the Government and the Parliament. Although the president’s right to dissolve the Parliament is not unknown in European constitutions, for two reasons I find it fortunate that the Basic Law finally disregarded this option. Firstly, this competence would not fit the role the Hungarian president has in the State; according to the comparative analysis, this right is delegated to rather “strong” presidents possessing executive power.

Secondly, and even more importantly, normally the president dissolves the Parliament when there is a tension between the government and the Parliament, resulting in

the inability to govern the country (i.e. the government does not have the requested majority in the Parliament to force its will). But the suggestion of the ad hoc committee would have delegated such a right to the president even when the government and the Parliament are in accord. I presume the dissolution of the Parliament in a way the ad hoc committee has opted would finally have led to a dual leadership in the executive, in which both the government and the president have enough power to enforce their will in the governance.¹²

In other respects, the regulations on the dissolution of the Parliament have changed. The Basic Law has not maintained the regulation of the Constitution allowing the president to dissolve the Parliament when “the Parliament expresses its lack of confidence in the Government on no less than four occasions in a period of twelve months during the course of one parliamentary term”.¹³ Such a possibility would hardly turn to reality. Instead, the Basic Law introduced a new grounds for the dissolution: if the Parliament fails to adopt the state budget for the current year by 31 March.¹⁴ This competence links to the “guarding” of the democratic operation of the State. The aim of the dissolution must always be to keep the country going, which is indeed hardly possible without an approved state budget.

Implicitly, the adoption of the Act on the state budget is a vote of confidence. In constitutional terms, neither the government nor the Parliament questions the confidence,

but politically the issue is so essential to the government that it would be unable to govern any longer.¹⁵ However, concerning the possibility of the dissolution of the Parliament, one should also consider the regulation of Article 44 para 3. As a result of this section, the Budget Council has a right to veto concerning the Act on the state budget. Consequently, the Budget Council will be able to force the Parliament's dissolution if it continuously refuses the draft budgets.

3.2. Changes in the text

The Basic Law explicitly intended to maintain the Constitutional Court's view on the status of the president and implied the essential parts of the decisions to the text of the Basic Law.¹⁶

Two problems come up for consideration. The first is that Article 9 para 6 sets the same standard for all appointments, although there are huge differences in the kind of positions the president appoints. For instance, the president appoints both the ministers and the university professors. It is a significant difference that the appointment of university professors little affects the state organisation. The Basic Law made no distinctions among the appointments, so this task is left to the jurisprudence. It is noteworthy that the decisions of 1991 and 1992 only made it possible for the president to refuse the appointment if it resulted in a serious malfunction of the State's democratic operation, and the Basic Law made it

obligatory in such a case.

Article 9 para 7 pertains only to the competence of conferring titles and that it should be refused if it violates the values enshrined in the Basic Law. But it is left open in other competences not concerning state organisation (e.g. cases of citizenship, pardons) what the degree of discretion is. It would be nonsense that in other competences the president has no discretionary power (and he or she is always bound to the recommendation), just as the opposite would be, that the president's discretionary power is unrestricted. Therefore, the constitutional adjudication should find the limits of these competences, based on the status of the president and the abstract rules of the Basic Law.

The Basic Law also changed the termination of the president's mandate in two aspects. According to Article 12 para 3 item c the president's mandate terminates if he or she is unable to perform his or her responsibilities for over ninety days. Interpreting it literally, this means that the mandate terminates on the ninety-first day. Whatever happens after, the inability to perform the official tasks for the defined period terminates the mandate.

On the contrary, Article 12 para 4 states:

The Parliament shall decide with a two-thirds majority of the votes of the Members of Parliament present on the declaration that the president has been unable to perform his or her duties for over

ninety days, or that the conditions of the election are no longer fulfilled, or on incompatibility.

The contradiction seems to be that if the president happens not to perform his or her official duties for ninety-one days, according to Article 12 para 3 item c, his or her mandate terminates even if he or she becomes able to perform the tasks again on the ninety-second day. But according to para 4, the mandate does not terminate unless the Parliament decides so. It is even worse that para 4 sets the same procedure for this scenario and for a declaration of incompatibility: the former is a question of facts and the latter is a question of law.

A possible solution of the contradiction could be to interpret para 4 so the Parliament *is obliged* to make a decision on the termination of the mandate when the criteria are fulfilled. In its decision, the Parliament declares the termination of the mandate but the decision itself does not terminate it.

Because of an alteration in word order, the removal of the president from office has textually changed. According to the Constitution,

The President of the Republic may be removed from office on the basis of an intentional violation of the Constitution or any other statute committed while performing presidential duties.¹⁷

In the Basic Law, the pertaining regulation says:

Should the President of the Republic infringe the Basic Law or another statute regarding performing his or her duties, or commit a crime intentionally, one-fifth of the Members of Parliament may initiate the removal of the President of the Republic from office.¹⁸

Consequently, the president can be removed when infringing the Basic Law, irrespective of whether or not the violation was connected to the presidential office. This alteration would result in a real difference only if the president could violate the Basic Law *outside of* his or her presidential office. I am not maintaining that it is impossible to infringe the Basic Law as an individual, but the alteration does not have a serious significance. However, considering the evaluation of the president's infringements, there is a noteworthy difference to the Constitution: while formerly it was the Constitutional Court's duty to adjudicate, on the grounds of the new Basic Law this process belongs to the ordinary courts.

There were also modifications concerning the election of the president; the Basic Law reduced the rounds of the election from three to two.

3.3. That could have changed ...

The Basic Law also maintained the regulations of the Constitution in issues that could have changed. One of them is the correct place of the chapter in the Basic Law.

In 1989, the Constitution got a new essence, but formally, in its structure, it remained a document from 1949. At the Transition, the constitutional amendment did not change the order of the chapters. One of the major criticisms was that the Constitution regulates the fundamental rights only at the end of the document. In 1949, the section introducing state organisation, as it could not be based on the separation of powers as an organising principle, started with the Parliament, which was the supreme body of state organisation. The second institution was the Presidential Council, as it substituted the Parliament in the legislation. In 1989, the title of the chapter changed (to the president), but its place in the Constitution did not. There was no conceptual ground to maintain this order; since 1989 the president had not substituted the Parliament. Therefore, the Basic Law should have preceded the chapter on the president for the first place in the section of state organisation (as a “guard” of it), or it should have been inserted after the government, which is the general body of executive power.

4. Beyond the text

To summarise, one may see that the constitutional basis of the institution of the president has not changed much. However, this does not mean that the presidential power has not changed.

The real power of the president depends on four elements:

(1) the content of the Constitution, (2) tradition and the particular circumstances, (3) the composition of the majority of the Parliament, and (4) the president's relation to the majority of the Parliament.¹⁹ In parallel, beyond the text of the Constitution there is a significant factor: the president's mission with the office. This influences whether the president interprets his or her competence in a broad or in a narrow sense and how he or she intends to fulfil his or her office. There have been serious differences among the presidents in Hungary in this aspect.

In parliamentary systems, the president is not a political balance of the government. The outline of general policy is the exclusive task of the government. However, the president should be a legal balance who has to step in when any disorder emerges. For this purpose, the Constitution has to ensure the necessary tools.

The Basic Law makes this role possible for the president. Beyond this, it is a question of politics how the president exercises his or her competences and what kind of role he or she intends to play in relation to the Parliament and the government.

Notes

¹ I do not mean neutrality in a political sense but in a legal one: in this model the head of state is not necessarily out of political parties but of political branches.

² Dezső, Márta *et al.*, *Constitutional Law in Hungary*, the Netherlands, Kluwer Law International, 2010, p. 101.

- ³ Bogdanor, Vernon, *The Monarchy and the Constitution*, Oxford, Clarendon Press, 1995, p. 301.
- ⁴ Holmes, Stephen, *A Forum on Presidential Powers in East European Constitutional Review*, 1993–1994 Fall–Winter, p. 37.
- ⁵ See further details in Elster, Jon, *Bargaining over Presidency in East European Constitutional Review*, 1993–1994 Fall–Winter, p. 96.
- ⁶ Decision 48/1991 CC, Decision 8/1992 CC, Decision 36/1992 CC. The summary of Decision 48/1991 CC can be found in English at the website of the Constitutional Court (www.mkab.hu).
- ⁷ Article 29 para 1.
- ⁸ Dezső.op. cit., p. 101.
- ⁹ Holló, András, *The Law of State Organization in the Jurisprudence of the Constitutional Court in Paczolay, Péter (ed.), Twenty Years of the Hungarian Constitutional Court*, Budapest, 2009, p. 118.
- ¹⁰ Decision 47/2007 CC. The decision can be found in English at the website of the Constitutional Court (www.mkab.hu).
- ¹¹ <http://www.parlament.hu/biz/aeb/resz/iii.pdf>.
- ¹² Concerning the nature of dual leadership see Blondel, Jean, *Dual Leadership in the Contemporary World* in Lijphart, Arend (ed.), *Parliamentary Versus Presidential Government*, New York, Oxford University Press, 1992, pp. 166ff.
- ¹³ Article 28 para 3 item B of the Constitution.
- ¹⁴ Article 3 para 3 item B of the Basic Law.
- ¹⁵ Norton, Philip, *Government Defeats in the House of Commons: Myth and Reality* in Marshall, Geoffrey (ed.), *Ministerial Responsibility*, Oxford, Clarendon Press, 1998, p. 40.
- ¹⁶ (6) The president of the republic may refuse to perform competences stipulated in items B–E of para 4 if the legal conditions are missing, or it would result in a serious disorder of the operation of the organisation of the state.
(7) The president of the republic may refuse to perform the competence stipulated in item F of para 4 if it infringes on the values of the Basic Law.
- ¹⁷ Article 31 para 4 of the Constitution.
- ¹⁸ Article 13 para 2 of the Basic Law.
- ¹⁹ Duverger, Maurice, *A New Political System Model: Semi-Presidential*

Government in Lijphart, Arend (ed.), *Parliamentary Versus Presidential Government*, New York, Oxford University Press, 1992, p. 146.

Chapter VIII

The Government and Public Administration

Norbert Kis and Ákos Cserny

1. Historical development of the government system

In Europe the modern forms of government and special administration developed at the time of the feudal absolute monarchy. The power and the household of the king were centralised, but public administration had already taken hold. In Hungary until the middle of the 19th century the highest organs of the executive power were the counsel bodies and national authorities operating partly in the country and partly in the Hapsburg Court. The monarch exercised his power through these bodies and authorities, however, the bodies were not responsible for the quality of their official procedures before the National Assembly as it was covered by the king's unaccountable authority. The regulations of the monarch and his court were executed by the high authorities and their offices – non-rank central

government organs subordinated to the monarch, dicasteriums – operating in the country; they took measures as a common body.

1. The historical antitype of the modern government system, called the Independent Hungarian Responsible Ministry, was formed in the middle of the 19th century due to the development of civil society. The executive power was exercised by the head of state but through the government with parliamentary principles; majority governance was achieved in the process of development. The leaders of the executive power and their procedures were accountable to the National Assembly (they were subject to reporting, answering and providing information to both houses of the National Assembly in both directions), through which the starting point was not only the violation of specific rules but the political judgment of governmental measures and their compliance to public interest.

In the 19th century the government did not have the power of legislation. In order to fulfil government tasks the prime minister had the power to issue regulations, which broadly affected economic and social relations. In the course of subsequent practice, however, the Parliament empowered the government several times – e.g. in 1924 in economic issues and in 1939 in home defence issues¹ – to issue regulations in order to fulfil tasks of legislature competence.

2. The socialist Constitution² of Hungary enforced the socialist state system model and the principle of the state power unity in regard to the government. Thus the governments acted as subordinate to the state-popular representative organs and to their alternative organs (presidiums). This was reflected in the government's activity under the general control of the highest state-popular representative organ, actually functioning as its executive power (at least according to the Constitution). Its realisation in the constitutional regulation was achieved so that the highest state-popular representative organs selected the highest organ of the executive power and could recall the government or its members in case their operation "was not appropriate". Dependency at the same time (theoretically) supposed a defined responsibility, which due to the government's shared operation was primarily collective, however, the members were individually responsible to the highest authority (actually to the party).

In the socialist state organisation the government operated as a body in which the status of the head of government and the ministers was hardly different: they had nearly the same rights and obligations.³ Behind the shared responsibility of the Council of Ministers – in the absence of explicit regulation – the leading role of the party prevailed, which resulted in the fact that during the socialist era the highest body of the executive power

was not able to determine its own governmental policy. This – among others – was institutionally realised so that the mandate of the Council of Ministers was generally not linked to the term (time period) of the Parliament.⁴ Due to the party governance the government actually did not function according to the classical view, and the minister himself was the executive authority governed indirectly or directly by the party, whose responsibility – which legally might not even be determined – was to enforce the party policy within the whole state organisation. Consequently in the socialist era the activity of the government can be evaluated as mere administration rather than governance.

3. After the period of the political transition in 1989 and onwards, the values and elements of a democratic governance system were revived through restoring the parliamentary government form in Hungary.⁵ A chancellor-type government model was formed according to the German model where the previous equality between the head and members of the government ceased to exist due to the primacy of the prime minister. The constitutional position of the government has been constant over the past twenty years. The Basic Law adopted in 2011 has not changed the fundamental regulations on the Government either. It has merely updated and clarified the former text of the Constitution.

2. General status of the Government

1. In Hungary the legal status of the Government is defined by its double functions stated in the Constitution and in the Basic Law as well.
 - a) On the one hand it is the highest organ of state administration: it is responsible for its activity. In order to establish the efficient and rational organisation necessary for its operation it has the freedom to form an organisation and is eligible to take measures and make decisions in state administration issues.
 - b) On the other hand it fulfils governmental scope on the basis of the separation of powers.
2. The Government consists of the prime minister and the ministers – constitutionally the ministers have equal status. According to the “prime ministerial” government model, the existence and operation of the Government is bound to the prime minister himself: in case the Parliament declares censure against the prime minister or the prime minister resigns his office the mandate of the entire Government is terminated. The prime minister chooses the ministers who are appointed and dismissed by the head of state and the ministers are politically responsible to the prime minister. The prime minister determines the direction of the general policy of

the government; he convenes government meetings, signs their decisions and bears the responsibility thereof.

3. The Government – as the depositary of the executive power – has legislative authority in performing its functions both in peace and in case of special legal order. Acting on a subject not settled by the Parliament the Government can issue regulations with original authority, otherwise its regulatory authority shall be granted by law (secondary regulatory power). The Government is entitled to issue extraordinary regulations in preventive defence situations, unexpected attack and emergency, with which it can introduce the necessary extraordinary measures in the event of specific legal orders. The members of government can issue regulations, individually or with the agreement of other ministers, acting in secondary legislative authority granted by higher-level legislation.
4. In the Hungarian parliamentary system the government is formed by the majority party or parties of the Parliament. Consequently there is a close connection between the Parliament and the government. This is also true in the sense that recently in civic parliaments the government is the driving force of the legislation. In order to approve its proposal the government relies on the factions of the parliamentary parties that are interested in keeping the parliamentary majority.

3. The Government in the Basic Law

The constitutional status of the Government is primarily defined by its relation to the Parliament, which is regulated by the Basic Law and other laws. The determining element of the relationship between the two is based on political confidence, which at the same time – different from other areas of state operation – does not mean a hierarchy. The legislation shall not direct the highest organ of the executive power; it cannot take over its responsibility. With regard to this relationship and the prime ministerial government model the new Basic Law does include more accurate, up-to-date and renewing regulations than the Constitution when it regulates:

- the governmental responsibility towards the Parliament based on confidence,
- the position of the prime minister within the government, and
- the relationship between the government and the Parliament in EU decision-making.

3.1. Parliamentary responsibility of the government: Historic models and new trends

The individual and collective responsibility of the

government and its members – as the essential element of the parliamentary form of government – ensures that they act according to the confidence and in the spirit of those in power, ultimately in line with the citizens' will and interest.⁶ In historic models the majority of the highest popular representative organs can question, sanction and remove the government and its members from their office for their official activities through procedures based on legal regulations stated in the Constitution and defined by statutes.

Slight methods and warning means of enforcing responsibility of governmental policy are present. We can consider the questions, interpellations, reports or statements following committee hearings as the parliamentary forms of control. The strongest means, the absolute sanction of control is the motion of no-confidence. These days the regulations that set the opportunity of removing the government or the minister from office through votes of confidence, and the “destructive”⁷ motions of no-confidence⁸ can be found in the constitutions of most democratic European countries.⁹ In the parliamentary systems of two chambers generally the chamber based on popular representation, the lower chamber, has the right to withdraw confidence since it is the house of representatives that is the depository of the national will and – contrary to the upper houses, which were generally not organised on the basis of popular representation – has full legitimacy.¹⁰

a) With the appearance of the government or cabinet, and with the basic institution of the ministers' collective having political responsibility before the Parliament,¹¹ the government's responsibility broadened in the 20th century. The responsibility becoming collective, on the one hand, is connected with the narrowing of the ministerial scope of duties and authorities, and with the weakening of the authority, which can be observed nowadays. On the other hand, this tendency also results from the fact that due to the complexity of modern society the governmental decisions are inevitably more and more complex, thus a great many efforts of interest and wills have to be considered in the course of the policy-making. All these, however, sideline the application of the "resort principle". Consequently, instead of the decisions of individual ministers, the shared decisions of the government are becoming more and more important.

This is established by the ministers' solidarity with each other and their joint political liability. A government's will means the will of the majority of the members, for which the body as a whole is responsible. Due to the established governmental collective responsibility it is now the prime minister who gets a dominant role in the elaboration of government policy. Behind the decisions of the prime ministerial government not the collective will but the will of the head of government shall be

presupposed, thus henceforth the responsibility of the ministers cannot be distinguished from that of the prime minister within the political responsibility of the government, i.e. they constitute a unity. Regarding the enforcement of responsibility the government becomes identical with the prime minister, who embodies the government and, as a result, the European constitutions often indicate the prime minister – or besides the government also the prime minister – as addressee of motions of censure against the government.¹² In every case when there is a motion of no confidence against the head of government – based on the principle of political solidarity towards the prime minister – the government is due to fall.

The tendency of governmental responsibility becoming collective can be observed in the constitutional practice of the European countries, even if some constitutions, laws or, for example, the British constitutional or parliamentary practice, enable the enforcement of the ministers' individual responsibility before the Parliament, besides setting the political responsibility of the government through the formal withdrawal of confidence.¹³ Despite such regulations the experiences show that the minister cannot be removed from office against the prime minister's will even in countries following the "traditional way" of ministerial responsibility since the political-confidential relationship between the head of government and his minister is in this case

ensured by political means – through parliamentary majority.¹⁴

- b) The expansion of suffrage – and as a result the more and more intensive involvement of different social classes and groups in politics, and the diversity of the emerging pursuit of interest – inevitably resulted in changes in the way parliaments function and the basic modification of the relationship between the legislation and the executive branches. Due to the appearance of the political parties and the extreme overvaluation of their roles, the traditional European practice of parliamentarism and of the government's parliamentary responsibility has changed significantly. The minister's responsibility now also includes responsibility before his party – regarding the fact that the period and content of office are bound to the will of the parties – which, after all, is realised through parliamentary forces. While the legal institution in its original, classic form was enforced within the frame of a two-party system, in the continental European countries the differences in the party structure – first of all due to the appearance of modern political parties and then the practice of coalition governance – justified the change in the mechanism of political responsibility before the Parliament, mainly because of increasing governmental stability.

From the first half of the 20th century there was growing interest in the strengthening of the executive power. In the

spirit of rationalising parliamentarism, the European constitutions on regulating political responsibility almost unanimously reflected that in case the proposals of the government were not passed, it did not result in the termination of the government's office anymore.¹⁵ However, the application of parliamentary tools on withdrawing confidence were narrowed by the constitutions respectively and in some cases were even abolished, thus limiting or preventing the enforcement of the government's political responsibility before the Parliament from the motions of censure, which were not duly considered.

This is the aim of the guarantees – rather the type of procedural law: to set the terms that a defined number of parliamentary representatives' support is needed for a motion of censure.¹⁶ The consideration of the motion is bound to a “cooling-down period”¹⁷ and the decision – in order to avoid governmental vagueness – to an extremely short time limit.¹⁸ In the course of decision-making on the motion an increased majority of votes¹⁹ – compared to a simple majority – is needed and sometimes a special voting form.²⁰ Governmental stability is brought into focus by the provisions according to which after the unsuccessful – or the successful in a lesser extent – motion of censure, a new one with similar content can only be submitted after a definite period of time.²¹

3.2. Regulating the responsibility before the Parliament in the new Basic Law

The new Basic Law is in line with the above-mentioned European tendencies. The ministers are responsible to the head of government for their activities, and the government is responsible to the Parliament. We note that the Constitution, included a provision (Article 39 para 2) on the ministers' responsibility to the Government, which actually meant the survival of a regulation coming from the communist era. Regarding the vagueness on the subject of responsibility, the method of accountability, the procedure and the application of the possible legal consequences made, however, the respective regulation of the Constitution was merely a formality.

- a) The Basic Law – in line with the regulations of the Constitution of 1998 – originates from the principle of shared responsibility of the government when it provides for the form of the enforcement of parliamentary confidence, i.e. the constructive motion of censure (Article 21) – which can be submitted specifically against the head of government, but at the same time against the entire government. During the regulation of the legal institution by the Basic Law the procedural guarantees serving governance stability prevail.

The constructive censure is the unity of two procedures. The negative procedure is the withdrawal of the confidence from the prime minister. The positive procedure is the consent of the initiators on the new candidate for the prime minister's office.²² The legal

construction uses the prime minister as the focus of governmental accountability. The stability of government is ensured so that the removal of the government from office and the election of the new head of government take place at the same time. The continuity of the government depends on the Parliament; in the case of a successful motion the crisis in the governance is solved without the intervention of the head of state.²³ The constructive motion of censure is the guarantee to avoid frequent government crises. It also aims that the stability of governance shall not be jeopardised by the cooperation of two parliamentary parties of the opposition (a “negative coalition”) if they are unable to form a government on their own.²⁴

In Europe the first application of the legal institution took place in 1972, and a “sound” motion was carried out in Germany on 1 October 1982 when Helmut Schmidt, then interim Chancellor, was replaced by Helmut Kohl in the office of the head of government as a result of a successful motion of censure. The institution of the motion of censure only had a symbolic and theoretical significance in Hungary for a long time. On 14 April 2009 the government that had lost confidence “left” its office as a result of the practical application of the constructive vote of censure. The legal institution in this case was not applied by the parliamentary majority to enforce political responsibility but to change the head of government by the governmental parties. It was an advantage on the

government's side because the future prime minister could avoid the proposal of a new government program. With the help of this tool, with "restraining" the head of state, the procedure of changing the head of government was faster and more predictable.²⁵ The extraneous character from its aim was justified by the fact, among others, that the motion was also signed by several ministers in office, who voted in favour of it together with the failed head of government. Not even the idea of joint responsibility of the government prevailed in the course of this Hungarian example of "accountability", since several members of the previous body got an office in the new government. Based on the constitutionality of applying the motion of censure this way and in connection with it, the further legitimacy of the highest organs of the executive power were questioned.²⁶

b) In Hungary Act XLIII of 2010 reintroduced²⁷ – besides the constructive motion of censure against the prime minister, which is ensured by the Basic Law – the "destructive" motion of censure against the prime minister, which can be initiated by any member of the Parliament. According to the Basic Law the statement of censure against the prime minister results in the fall of the government, consequently the motion against the prime minister shall be considered as the motion against the whole government, of which the support of the majority of the members of Parliament is needed in order to be effective. The prime minister cannot resign

office within three working days from the announcement of the initiation at the speaker of the house, or from the submission of the motion until the close of voting – but within a maximum of fifteen days. With this regulation the legislator protects the prestige of the parliamentary institution of political accountability so that in this case it prevents the “escape” of the head of government.

In international practice we have not found any examples of the “cohabitation” of the constructive and destructive motion of censure regarding the prime minister. As far as we are concerned the starting point of the regulation might have been that the maintenance of the constructive censure, which was introduced by the German model, within the domestic parliamentary forces seems to serve to over-insure the present government. Therefore in the Basic Law the institutionalisation of the destructive censure in Hungary – as the “easier” way to withdraw confidence from the prime minister (government) by the Parliament – can be considered as the increasing counter-balance of the Parliament against the government, and as the enhanced enforcement of opposition rights in the Parliament, which, after all, helps to decrease the power of the executive arm. At the same time regulating the government’s parliamentary responsibility this way abolishes the function of constructive censure – meaning its essence – as stable governance. In other words, destructive censure against the head of government questions the maintenance of

constructive motion in the same relation.

- c) These days raising the question of parliamentary confidence cannot only be tied to the initiation of the Parliament. Recently the constitutions²⁸ have several provisions according to which the government – possibly through the prime minister – can initiate the statement of confidence against itself, independently or attached to a draft statute, a specific issue, or to the government's program.²⁹ Measuring the parliamentary support through votes of confidence has developed with a different aim and form from the motions of censure in parliamentary law, so in practice it mainly does not function as the enforcement of political responsibility but as “governance-technical” means. The government can judge its support through this, e.g. regarding the renitent members of parliamentary majority in case of an uncertain government proposal. Regarding the fact that, in this case, the lack of confidence also results in the fall of the government, the vote of confidence, after all, is capable of enforcing the political responsibility of the government.

The Basic Law – similarly to the Constitution – also provides for these forms of enforcing parliamentary confidence, in the forms of individual votes of confidence attached to a government proposal, measuring the support that can be initiated by the prime minister but actually on behalf of the government (Article 21 paras 3–

4).³⁰

In case of losing confidence in a destructive way, the obligation of the government's resignation was also set in the Constitution (Article 39/A para 5).³¹ The Basic Law goes further and sanctions the statement of this type of censure with terminating the office of the government "automatically" (Article 20 paras 1 and 2 item C). In this case the government crisis will not be solved without the intervention of the head of state, but can perhaps be solved without the dissolution of the Parliament and setting the date of the new elections. The Basic Law does not make the dissolution of the Parliament possible – which can be generally seen in international models³² – in case of declaring censure against the government. This limitation of the dissolution of the Parliament might cause the positions of power to become "constant" by the cohabitation of the two organs even if the dissolution of the legislation was necessary.³³

I noted that earlier there was doubt about the regulation of the Constitution on the issue of what rate of majority vote was needed in the case of confidence if, according to the Constitution, e.g. a two-thirds majority was necessary to pass a law in case of a vote of confidence attached to a government proposal that was bound to majority support. The provision of the Basic Law makes it clear that in order to pass a statute of qualified majority (a "pivotal proposal") to which a vote of confidence is

attached, a qualified majority vote is needed to keep confidence, i.e. the rate of vote always equals the necessary vote of the attached proposal.

- d) The Basic Law (Article 18 para 4) – similarly to the regulation of the Constitution – sets the minister's responsibility before the Parliament. With the institution of constructive censure as the constitutional tool of governmental stability the possibility of declaring parliamentary censure against certain ministers is generally incompatible regarding the fact that the ministers' responsibility is part of that of the government. The Basic Law also takes it as a basis when it excludes the possibility of submitting a motion of censure against the ministers. So it maintains the government-stabilising function of the constructive censure, thus the minister cannot be removed from office against the head of government's will.³⁴

All this, however, cannot mean that the parliamentary responsibility of the government member ceases to exist entirely. The ministers' policy and the confidence towards them can constantly be controlled by the slighter parliamentary tools, which – based on national regulation – are not appropriate to enforce a minister's political responsibility directly. With the basic "opposition" tools at their disposal – such as speeches before the order of the day, interpellations, questions, immediate questions, periodic reports or committee hearings before appointment

– the National Assembly can inconvenience the ministers, but use of such tools does not have any consequence due to their lack of expressing censure. However, national and international parliamentary practices have proved several times that with the harmonised and planned application of control rights, with the use of publicity and with the help of the media – indirectly – the government member who has lost the confidence of the Parliament can be forced to resign from office.

3.3. The status of the prime minister in the government model

The prime minister's priority status of public law is clear from the regulations of the Basic Law, which includes that the government and ministers' political responsibility before the Parliament can only be forced through the responsibility of the head of government. On the one hand it is expressed in the fact that parliamentary censure against the government can only be realised through the motions against the prime minister; on the other hand the ministers' loss of parliamentary confidence can be manifested in the proposal of removing the head of government from office.

The ministers are appointed and dismissed by the president on the proposal of the prime minister according to the Basic Law (Article 16 para 7). The head of government is thus crucial in selecting members of government and in terminating ministerial office.³⁵ During governmental duties the ministers are accountable to the

head of government as the person determining governmental policy.³⁶ Based on the above, however, it is only the prime minister who is entitled to enforce political responsibility – through a proposal of removal from office. The minister is politically accountable directly and exclusively to the prime minister.³⁷ However, the crucial role of the prime minister does not mean that the minister is formally subordinated to the head of government in the course of governmental duties. In this relationship the scope of “governing entitlement” and its limitations are determined by the prime minister and his actual governmental importance, which can further strengthen the already significant public position of the head of government. It is important to note that the Act LVII of 2006 made an attempt to make this informal relation formal when it set out that the prime minister, in the course of indicating the general direction of governance, can define duties in normative commands and the minister acts within these frames. This ruling moderated the ministers’ individual political responsibility so that the head of government could withdraw the minister’s independence (of making decisions).³⁸ The Constitutional Court’s decision 122/2009 CC adopted a contradictory principle that did not acknowledge the hierarchical relation between the head of government and his ministers and abolished the prime minister’s right of normative command regarding the ministers. According to their justification, the normative command is the governing means of the administrative hierarchical legal relation. The special public-political

relationship between the prime minister and his ministers is not a hierarchical relation, since the minister is not directly controlled by the head of government, so the prime minister's terms of reference can only be of political nature. The prime minister, however, according to the law provided by the Constitutional Court – to define the government policy – could set duties for the ministers, which, as a matter of fact, implied the always existing power of informal command.

The Basic Law (Article 18 para 2) returned to the pre-2006 solution. It clarifies the tools of the head of government and the relationship to the ministers. The prime minister, regarding the general direction of the government's program, can set tasks for his ministers, who are obliged to govern the administrative sector in their scope and the subordinated organs accordingly (Article 18 paras 1–2). The basis of the head of government's terms of reference is that the prime minister is directly bound to the government's program, so he has political responsibility in its execution. Consequently nowadays the minister is informally still subordinate to the head of government, on whom the start and cessation of his appointment depend. It is important to emphasise that according to the Basic Law the deputy prime minister (Article 16 para 2) does not mean an intermediary governing level between the prime minister and his ministers.

3.4. The relationship between the

Government and the Parliament in the course of EU decision-making

In the European Union, due to the expansion of the authority of community organs at the expense of the national parliaments, the role of the national parliament in the EU decision-making at member-state level is an important issue for the majority of the member states. The decisions defining the citizens' lives are basically made by representative organs established through competitive elections. The organs of the executive power on the one hand depend on the Parliament; on the other hand their decisions rely on their laws. The classic role of the legislation in the hierarchy of power as well as its relationship to the executive power has formed a new aspect in the development of the EU in many ways.

The European integration is accompanied by a significant limitation of the sovereignty of member states. The member states voluntarily transfer certain elements of their national sovereignty to the community. In the case of the efficient supranational organs, and also of the European Union, we can see the development of a new sovereign power at the level of integration, which subordinates a specified part of the member states' sovereignty. Being a member of the community, on the one hand, state rights are transferred to the authority of the central organs of integration; on the other hand, due to the above there is a significant decrease in the possibility of national decision-making on issues previously traditionally considered home affairs.

Consequently besides the classic horizontal level of the separation of powers, its vertical reflection also appears when the member states, waiving a part of their own decision-making competence and transferring it to the central organs of the community, acknowledge the limitations of their sovereignty. In the decision-making of the EU the “democratic deficit”³⁹ is also manifested at member-state level so that the national parliaments often cannot properly control the integration decisions. It has become a general view that the democratic deficit is a phenomenon also at the national level, which can be considered as the executive power’s forging ahead at the expense of the legislative power.

The Constitution sets controls on the rights of the Parliament and, as its basis, the obligation of providing governmental information (Article 35/A). Nevertheless the detailed act on the regulations of the Constitution⁴⁰ includes provisions that the Parliament can adopt resolutions on EU drafts it has received, and the Government takes its stand in the course of EU decision-making, taking the parliamentary stand into consideration. In spite of this in the EU decision-making procedure the Government is not bound by the stand of the legislative organ, it can differ from it with an obligation of *ex post* justification and information. This actually means that, although providing information for the Parliament “on time”, and the possibility of substantive consultation with the government in integration issues being stipulated by law, in the Hungarian system the prevalence

of the stand of the Parliament is not guaranteed in the course of EU decision-making. In Hungary it is not regulated either. Thus in the course of the EU decision-making procedure the relationship between the Parliament and the government resulted in the weak position of the Parliament, which has aggravated the negative effects of the democratic deficit.

The Basic Law aims at involving the Parliament more intensely in the preparation of EU issues, and in forming the governmental policy on European issues. It is based on the fact that the government is only able to enforce national interests in the EU if it takes its stand built on the support of the parliamentary parties.

Article 19 of the Basic Law further ensures that the Parliament shall have the possibility to get acquainted with the government's stand on drafts on the agenda regarding the EU institutions that operate with governmental participation, and that it shall be entitled to take an individual stand on integration issues on the agenda. At the same time it strengthens the role of the Parliament so that in case the Parliament takes its stand on an issue on the agenda of the EU, the Government is obliged to proceed on the basis of the stand in the course of the EU decision-making. The Basic Law thus provides a substantially stronger influence for the legislation in the EU decision-making procedure compared to the previous constitutional regulations.⁴¹

3.5. Conclusions

With the Basic Law the constitutional position of the Government has not been modified substantially compared to the Constitutional regulations set in 1989. However, the relationship of the government to the public authority has changed significantly. The above-mentioned destructive motion of censure that can be submitted against the prime minister or the possibility of a greater parliamentary influence in EU issues increases the role of the Parliament and the opposition as a counter-balance of the government. In Hungary the substantial element of the parliamentary government form, the government's political responsibility before the Parliament, which is stipulated by the Basic Law, prevails exclusively through the prime minister. The primacy of the prime minister within the government was established by having embedded it in parliamentarism. The constitutional regulation – mainly due to the institution of the constructive censure – intensified the stability of governance and the independence of the government and the government members from the Parliament. The prime minister's strong position of public law increased the role of the ministers' political loyalty towards the head of government.

4. Public administration in the Basic Law

Public administration is a constitutionally defined activity that supposes the regulation of the parameters set by the

Basic Law. It is also characteristic that the European constitutions generally do not or rarely provide independent public administration details (i.e. in a separate chapter);⁴² its regulation is carried out on the basis of organisational, management and functional principles set in the constitutions.⁴³

The Constitution determined public administration on the restructuring right of the government (Article 40 para 2), on the governing and managing entitlement of the government and the ministers (Article 35 para 4, Article 37 para 2), on the specification and provision of the administrative duties and scope of municipal leaders and officials (Article 44/B paras 3–4), and on the judicial control of the operation of public administration (Article 50 para 2), as well as on the right for legal remedy against administrative decisions (Article 57 para 5).

Compared to previous documents the Basic Law provides more detail for public administration in certain constitutional matters:

- on the requirement and right of fair procedure in terms of basic rights (Article XXIV), and on the right of legal remedy (Article XXVIII para 7),
- on the right of restructuring regarding the government (Article 15 para 2) and on the authority of the ministers' organisation management (Article 18 para 2),
- on government offices as the regional organs of the

government (Article 17 para 3), and on the legal supervision of municipal (local government) operations and regulations (Article 34 para 4, Article 32 para 4), as well as on entitlements in case of failure to legislate based on the Local Government Act (Article 32 para 5),

- on autonomous regulatory bodies fulfilling administrative duties (Article 23),
- on judicial supervision on administrative operation regarding justice (Article 25 para 2 item B), and on entitlement to establish (special) court for administrative legal cases (Article 25 para 4),
- on the specification and provision of the administrative duties and scope of municipal leaders regarding local governments (Article 34 para 3).

The novelty of the Basic Law is that it sets the basic institutions of central public administration and its areas. The central public administration establishes autonomous regulatory bodies as its special institutions. Public administration provides for county government offices as its administrative territorial (micro) basic institution.

4.1. Autonomous regulatory bodies

Article 23 of the Basic Law established a new administrative (state administrative) organ category, which was justified by the autonomous legislative scope of the organs belonging to it.⁴⁴ These organs of priority legal status, which play a special role in the separation of

powers, primarily differ from all the other central administrative (state administrative) organs in their constitutional determination, thus the Parliament is entitled to establish them with a two-thirds majority. Because their organisations and operations are regulated by the Parliament, they are accountable to the same; moreover their substantial characteristic feature is that the government does not have executive authority over them. This is the way, for example, that the National Media and Info-communication Authority and the Hungarian Financial Supervisory Authority operate.

4.2. Government offices

In the municipal system established in 1990 the local governments became independent from the central authority so the state needed organs at local/regional level that perform state administrative duties as local/regional organs of central organs. Gradually the deconcentrated organs of the ministries and other central administrative organs were established. They were generally established at county (territorial/regional) level, but deconcentrated organs operated and operate at local (town) level as well.

The characteristic features of the deconcentrated state administrative organs are as follows:

- they have special authority (except for the government office in Budapest and the county government offices),
- regional (eventually local) organs of some central state

administrative organ,

- they have official authority thus they can give license, prohibit and fine,
- their personnel consists of government officials.

The first deconcentrated organs with general authority were established by Act LXIII of 1990 on the amendment to the Constitution, and the Act on Local Governments of 1990. Their operational areas were regulated so that they were established in seven regions – which generally covered two or three counties – nationwide and in Budapest. The regional units were not organised in the aspect of economy but of administration. These offices were replaced by the administrative offices as deconcentrated organs with general authority in Budapest and in the counties in 1994, which also fulfilled state administrative duties with “general” authority as micro state administrative organs with intersectoral features. From 1 January 1997 for nearly ten years the offices operated as the micro state administrative organs of the Government and practically had double governance: the general governance was performed by the Government with the participation of the minister responsible for public administration, and the professional governance and the exercise of supervisory rights fell within the authority of the minister of the particular sector. The minister responsible for public administration conducted the legal control of local governments, the control of the deconcentrated organs with special authority regulated in

law, as well as the tasks of the administrative offices on the operation of the central civil service registry and the education and training of civil servants, and exercised the rights of sectoral ministers respectively.

The internal organisation was structured in two ways: on the one hand, those organisational units could be distinguished that were directly under the conduct of the leader of the office; on the other hand those sectoral organs that belonged to the office primarily concerned with the common budget operated as its organisational unit.

From 1 January 2007 the administrative offices functioned with regional territorial competency (in seven regions), and from 1 January 2009 with the name of “state administrative offices” and with limited duties and authority. Due to the “regionalisation” of the territorial level, which was tied to the counties in a cardinal (two-thirds majority) statute, the state administrative offices lost the authority of legal control on the local governments.

From 1 September 2010 the Government reorganised the administrative offices at metropolitan and county level according to the constitutional rules.

In order to create the territorial state administrative system in a more coordinated, controlled and cost-effective way, thus fulfilling an effective and sound governmental territorial task, the metropolitan and county government offices were established in 2011.⁴⁵ Besides the previous administrative offices at similar levels the government offices have

integrated the majority of the sectoral organs at the county level as well. The established metropolitan and county government offices have primarily united the functional duties – due to the more efficient organisational structure – with leaving the professional autonomy and the sectoral conduct untouched. The special legal status of the government office means the scope of public administration, the scope of conducting and controlling, and the participation in governance duties of the Government.

According to the Basic Law the Government's territorial state administrative organ with general authority is the metropolitan and county government office. They operate in the capital and in the nineteen counties.

The government offices are conducted by the Government through the minister responsible for public administration with the participation of the government agent. Over the offices a shared leadership prevails, i.e. besides the organic – and in certain cases professional – authority of the minister responsible for public administration, every sectoral minister or leader of another central administrative organ becomes a professional leader in the specified case groups. The head of the government office is the government commissioner (political leader) with a mandate bound to the operation of the government; to ensure the continuous professional activity the office is managed by the chief executive, who is public servant. The structure of the government office consists of organisational units (body office) directly led by the government commissioner and of

the sectoral organs.

Main administrative duties of the government offices are as follows: carrying out official activities, legal control of local and minority governments, fulfilling functional tasks regarding territorial administration, harmonising and helping territorial governance duties, and other tasks such as training administrative officers or providing administrative informatics at the territorial level. The co-ordination authority of government offices extends to the organs not involved in the integration so that the Government has an overview of the entire system of state administration through the county government offices.

The central government the integrated customer service offices created within the frames of government offices shall be highlighted, which allow the authorities easier access to participation in official procedures and administrative services, thus carrying out administrative tasks closer to the customers.

The aim of the Basic Law is to highlight the deconcentrated government organs at micro and county level, and their constitutional determination with respect to the historical tradition of territorial administration. All this is now justified by the fact that the metropolitan and county government offices have an important role in carrying out their duties; the record of their legal control over the local governments in the Basic law is justified by its abolition by the former Government between 2007 and 2009. However, in

international practice – though it is not a tendency – the constitutional determination of the administrative territorial/local government organs or the record of the legal control of municipalities in the Basic Law is not a rarity either.⁴⁶

Notes

- ¹ Article IV of 1924 and Article II of 1939.
- ² Act XX of 1949 on the Constitution of the Hungarian People's Republic.
- ³ According to this the name of the government was the Council of Ministers at that time.
- ⁴ Article III 1 para 2 of 1973.
- ⁵ Act XL of 1990 amending the Constitution institutionalised the terminology of the government of the Hungarian Republic.
- ⁶ Kröger, Klaus, *Die Ministerverantwortlichkeit in der Verfassungsordnung der Bundesrepublik Deutschland*, Frankfurt am main, Atheneum. 1972, pp. 26ff.
- ⁷ The adjective destructive in this case indicates motions that cause a crisis of constitutional life.
- ⁸ The Irish Constitution of 1937 Article 28 (10), the Italian Constitution of 1947 Article 94, the Basic Law, Bonn of 1949 Articles 65, 67, the Danish Constitution of 1953 Article 15, the French Constitution of 1958 Articles 49–50, the Maltese Constitution of 1974 Article 81, the Swedish Constitution of 1974 VI Article 5 and XII Article 4, the Greek Constitution of 1975 Article 84, the Portuguese Constitution of 1976 Article 194, the Spanish Constitution of 1978 Article 101, 113 and 114, the Turkish Constitution of 1982 116§, the Belgian Constitution of 1831, amended in 1999 Article 96, and the Finnish Constitution of 1999 Article 64, provide for the withdrawal of confidence. Regarding the constitutions of the former socialist countries, see: the Latvian Constitution of 1922 Article 59, the Croatian Constitution of 1990 Article 113, the Bulgarian Constitution of 1991 Article 89, the Macedonian Constitution of 1991 Article 59, the Romanian Constitution of 1991 Article 109, the Slovenian Constitution of 1991 Articles 116, 117, the Czech Constitution of 1992

Article 72, the Estonian Constitution of 1992 Article 97, the Yugoslavian Constitution of 1992 Articles 104, 105, the Lithuanian Constitution of 1992 Article 67 item I), the Slovakian Constitution of 1992 Article 88, the Russian Constitution of 1993 Article 117, the Bosnian-Herzegovinian Constitution of 1995 V 4§, the Polish Constitution of 1997 Article 158, the Albanian Constitution of 1998 Articles 104–105, and the Serbian Constitution of 2006 Articles 103–131.

⁹ With the exception of the effective constitutions of, for example, Holland, Iceland, Luxemburg or Norway.

¹⁰ In Italy any chamber is entitled to withdraw confidence (Constitution of 1947, Article 94 para 1), and in Romania both chambers of the parliament make a decision on the issue at a joint meeting (Constitution of 1991 Article 112 para 1).

¹¹ Esmein, Adhémar, *Éléments de droit constitutionnel français et comparé* (8th edn), revue par Henry Nézard, Paris, Recueil Sirey, 1st edn 1927, p. 258.

¹² For example, the Irish Constitution of 1937, the Basic Law, Bonn of 1949; among the former socialist countries, the constitutions of Latvia of 1992, Croatia of 1990, Bulgaria and Slovenia of 1991, Estonia, Slovakia and Yugoslavia of 1992, and Albania of 1998.

¹³ The Constitution of Weimar of 1919, the Austrian Constitution of 1920, the Danish Constitution of 1953, the Swedish Constitution of 1974, the Greek Constitution of 1975, the Turkish Constitution of 1982, the Croatian Constitution of 1991, the Slovenian Constitution of 1991, the Estonian, Lithuanian and Slovakian constitutions of 1992, the Polish Constitution of 1997 and the Finnish Constitution of 1999.

¹⁴ Sári, János, *A Kormány alkotmányos helyzetének alakulása az elmúlt másfél évtizedben* (“pártunk és kormányunk”-tól az Unióig) (“The Change in the Government’s Constitutional Status in the Past One and a Half Centuries [from “Our Party and Government” to the Union]”) *Magyar Közigazgatás*. 6/2005, p. 322.

¹⁵ Despite the fact that the constitutional record of this can only be found in the Italian Constitution of 1947 Article 94 para 4.

¹⁶ The constitutions of Italy of 1947, France of 1958, Sweden of 1974, Spain of 1978, and Croatia of 1990 provide for one-tenth; the Greek Constitution of 1975 for one-sixth; the constitutions of Bulgaria of 1991, of Estonia and Slovakia of 1992 and of Albany of 1998 for one-fifth; the

constitutions of Portugal of 1976 and of Romania of 1991 provide for one quarter of the representatives' support; and the Turkish Constitution of 1982 provides for half of parliamentary factions' or twenty representatives' initiative that a motion can be submitted, thus excluding the obstruction efforts of a small minority.

17 This is the period that, according to the provisions of most constitutions, also strengthens the government's position so that it delays the judgment of the motion. Accordingly, the Basic Laws set a very short time limit between the submission of the motion and its voting in order to give one more chance for the prime minister to restore his parliamentary majority confidence. For example the Turkish Constitution of 1982 provides for one day after the submission of the motion, and the Basic Law, Bonn of 1929, the French Constitution of 1958 and the Belgian Constitution of 1831, amended in 1999, provide for 48 hours after the submission when the voting can take place at the earliest. According to the constitutions of Greece of 1975, Portugal of 1976, Slovenia of 1991 and Estonia of 1992 the debate can start no sooner than 48 hours after the submission of the motion. It shall be noted, however, that the Greek Constitution of 1975 also ensures the possibility of an immediate debate on the motion. According to the constitutions of Croatia of 1990, Yugoslavia and Romania of 1991 and Serbia of 2006 the term is at least five days.

18 E.g. according to constitutions of Portugal of 1976 or Macedonia of 1990 the debate shall not last longer than three days. According to the Spanish Constitution of 1978 the vote on the motion shall be carried out within five days of submission, and according to the Polish Constitution of 1997 there shall be a vote on the motion within seven days.

19 Declaring censure generally requires the majority vote of all the members of parliament. In Portugal or in Spain a simple majority is enough.

20 E.g. the roll-call vote according to the Italian Constitution of 1947.

21 E.g. the possibility of the submission of a new motion is bound to six months in the Greek Constitution of 1975, and to the next parliamentary session by the Spanish Constitution of 1978.

22 Holló, András, *A Kormány in Az Alkotmány magyarázata* ("The Government" in "Explanation of the Constitution") Budapest, Kjk-Kerszöv, 2003, p. 456.

²³ *ibid.*: the justification of Act XL of 1990 on the amendment of the Hungarian Constitution to Article 30.

²⁴ Colliard, Jean-Claude, *Les regime parlementaires contemporains*, Paris, Presses de la Fondation nationale des Sciences politiques, 1978, p. 54.

²⁵ We note that the “use” of the constructive censure with similar aim also emerged in connection with the resignation of Prime Minister Péter Medgyessy in 2004.

²⁶ *ibid.*, e.g. the essay by Béla Pokol, published in *Magyar Nemzet* (“Hungarian Nation”), 30.03.2009.

²⁷ The background was Act VIII of 1989 on the amendment to the Constitution, which introduced the motion of censure against the Council of Ministers and its members in the frame of the one-party system in the national socialist law system.

²⁸ E.g. the constitutions of France of 1958, Portugal of 1976, Spain of 1978 and Turkey of 1982; regarding the former socialist countries the constitutions of Croatia of 1990, Bulgaria, Macedonia, Romania, Slovenia of 1991, the Czech Republic, Estonia and Slovakia of 1992, Russia of 1993, Poland of 1997, Albania of 1998 and Serbia of 2006.

²⁹ This was in the case of Helmut Schmidt in Germany, in February 1982; Silvio Berlusconi in Italy, in April 2005; Romano Prodi in January 2008, when they initiated a vote of confidence against themselves and their government. Francois Fillon, the head of government, initiated a motion of confidence against the foreign policy of the country on the issue of NATO accession in France, in March 2009.

³⁰ The independent vote of confidence measuring parliamentary support took place on 6 October 2006, when the National Assembly ensured the government in power further parliamentary support.

³¹ Until the end of 2011 – theoretically – the deregulation that the Constitution did not provide for a deadline on the government’s resignation could cause governmental uncertainty. In the case of a withdrawal of confidence from the government, the demands of rational parliamentarism justify the requirement that the obligation of resignation shall be realised immediately or at least within the shortest time possible.

³² In the case of declaring censure, the constitutions of Croatia of 1990, Romania and Slovenia of 1990, the Czech Republic, Estonia, Lithuania,

Slovakia of 1992, Russia of 1993, Poland of 1997 and Serbia of 2006 provide for the head of government's entitlement/obligation to dissolve the parliament.

³³ Bragyova, András, *Az új alkotmány egy koncepciója* ("A Concept of the New Constitution"), Budapest, MTA Állam- és Jogtudományi Intézet, KJK, 1995, p. 172.

³⁴ I note that the Slovenian Constitution of 1991 Article 118, besides the constructive motion of censure against the government, maintains the parliamentary possibility of the minister's individual political responsibility.

³⁵ Holló, *op. cit.*, p. 458.

³⁶ As we have already indicated, the Constitution formally provided (in Article 39 para 2) for the minister's responsibility before the government, which obviously did not mean more than the – anyways prevailing – responsibility and accountability before the head of government.

³⁷ Müller, György, *Kormányról kormányra a rendszerváltás utáni Magyarországon. Antalltól Gyurcsányig* ("From Government to Government in Hungary after the System Change, from Antall to Gyurcsány"), Budapest, Magyar Közlöny Lap- és Könyvkiadó, 2008, p. 176.

³⁸ *Ibid.*

³⁹ For more detail see, e.g., *Resolution on the Relations between the European Parliament and National Parliaments*, European Parliament, A4-0179/97, 12.06.1997, PE260.312, pp. 74–75. Gustavsson, Sverker, *Preserve or Abolish the Democratic Deficit?* in Smith, Eivind (ed.), *National Parliaments as Cornerstones of European Integration*, London, Kluwer Law International, 1996, pp. 100–124; Györi Enikő *A nemzeti parlamentek és az Európai Unió* ("Parliaments and the European Union"), Budapest, Osiris, 2004, pp. 28–33.

⁴⁰ Act LIII of 2004 on the co-operation of the National Assembly and the government in issues of the European Union.

⁴¹ Györi, *op. cit.*, p. 430.

⁴² The constitutions of the federal states have rather detailed provisions on public administration – primarily to clear authorities – e.g. the Belgian Constitution of 1831, amended several times; the Austrian Constitution of 1920; and the Basic Law, Bonn of 1949. The Greek and Portuguese constitutions provide for the bases of administrative operation, its staff

and main tasks in a rather detailed way.

⁴³ Patyi, András, and Varga Zs., András, *Általános közigazgatási jog* (“*Administrative Law*”), Budapest-Pécs, Dialóg-Campus, 2009, p. 22.

⁴⁴ The leader of the organ – who is appointed by the prime minister or by the president on the proposal of the prime minister – has the authority of secondary legislation, i.e. based on the authority provided by law he or she is entitled to make regulations in his or her scope defined by law.

⁴⁵ According to the Act CXXM of 2010 on the metropolitan and county government offices and on the amendment of laws regarding the establishing of the metropolitan and county government offices and the territorial integration they started their operation in nineteen counties and in the capital.

⁴⁶ Also provides for the previous – similarly to Hungary, among the countries with unitary state structure – e.g. the Polish Constitution of 1997 Article 152 para 1, the Lithuanian Constitution of 1992 Article 123 para 2, for the guarantees of legal operation of municipalities, e.g. the Slovenian Constitution of 1991 Article 144, or the Polish Constitution of 1997 Article 171. We note that in the federal states or in states with autonomous regions the constitutional determination and solution of government organs at lower levels are carried out on the basis of totally different aspects.

Chapter IX

The Constitutional Court

Lóránt Csink and Balázs Schanda

1. The beginnings of constitutional adjudication in Hungary

The protection of a constitution and constitutional adjudication are closely connected. In a formal sense, constitutionality means that the rules of the constitution prevail in the whole legal system; they define the social and political life of the country in practice as well. This can only happen if the constitution has an institutional guarantee, if there exists a body to observe and uphold the application of the constitution. Therefore, at the time of the Transition in 1989, the renewal of the Constitution and constitutional adjudication were linked together.

Before the Transition no institution could emerge for the protection of the Constitution due to the nature of the *ancien régime*; in the frameworks of communism, no real control of state power was conceivable. Politicians had found the institution suspicious until the middle of the 1980s, when the idea of establishing an organ formally separated from the Parliament emerged in order to

institutionalise “efficient” protection of the Constitution. This organ was the Constitutional Council that was established in 1983. It was a new and significant step towards constitutional protection, even though it could not act as a real “protector” in the political atmosphere, Firstly, because the majority of its members were elected by and responsible to the Parliament, which could recall them at any time. Secondly, the Council was not about to clarify legal arguments, members from the field of law were in the minority.¹

The Constitutional Council cannot be deemed as a constitutional court, not even in its competences. Although it had the right to control laws, it was not about to annul them in case of unconstitutionality. The sphere of the organs entitled to initiate procedures was restricted and the independence of the Council was not emphasised.² Furthermore, the Council only “contributed” to the interpretation of the Constitution.

Although the idea of strengthening the Council emerged in the late eighties, in 1989 it was finally replaced by a brand-new institution of Hungarian public law: the Constitutional Court.

Institutionalising constitutional adjudication was not one of the direct aims of the National Roundtable talks in 1989. The National Roundtable did not intend to write a new constitution; it intended to leave this issue to the freely elected Parliament. Instead, the National Roundtable aimed to set the basis of the Transition, and first of all the political and legal conditions of the free elections. The

original standpoint of the opposition was that the establishment of the Constitutional Court would not be one of the concerns of the Transition. They stated:

the forming of statutes about the introduction of the institution of the President of the Republic and about the set-up of a constitutional court should be expected from a new Parliament assembling as the result of free general elections. But it should not mean at all that we are not willing to elaborate common principles during these inter-party negotiations, which – even without being founded on final facts – might contribute to the legislation of the Parliament to be elected.³

However, the discussion on the constitutional court was successful. The negotiations led to three significant achievements. Firstly, the competence of the Constitutional Court covers all norms (including statutes). Secondly, in cases of unconstitutionality the Constitutional Court annuls the norm in question. And thirdly, the *actio popularis*, i.e. anyone is entitled to turn to the Constitutional Court if he or she finds a norm unconstitutional, without any legal interest. With this well-intentioned and, for the formative years of a constitutional state, useful provision the overburdening of the Constitutional Court was predetermined.⁴

With the amendment to the Constitution declared on 23 October 1989, practically a new Constitution came into force. The Constitution set up the Constitutional Court with the aim of carrying out the revision of the constitutionality of

laws and the annulment of unconstitutional laws. “Little was it realised at that time that a possibility arose leading to the statement that the Constitutional Court could be the symbol of how paradox it was the transformation of the political system, namely a revolution under the control of the Constitutional Court.”⁵

2. The first twenty years of the Constitutional Court

During the Transition, the opposition thought it obvious to create a formally new constitution after the free elections. However, the political atmosphere was against a new constitution; the parties could not come to an agreement on the new basis of the society. Therefore, the adoption of the new constitution was temporarily removed from the agenda and the Government also withdrew the bills with the content covered in the course of the trilateral negotiations.⁶

Consequently, it became the task of the Constitutional Court to renew the essence of the Constitution by its interpretation. Accordingly, the Constitutional Court often referred to the “invisible constitution”, which meant the principles and values beyond the text, as the basis of its decisions.

The Constitutional Court proved to be a powerful instrument in safeguarding the text and the spirit of the Constitution; it gained a high level of public esteem. In many sensitive cases of high political impact it was the Constitutional Court that resolved the issue. Significant cases included

the abolition of capital punishment, the regulation of abortion, media issues, and borderline cases concerning freedom of expression.

In addition to these human rights cases, the Constitutional Court resolved a number of delicate political issues such as the relationship between the President of the Republic and the prime minister, the role of referenda and their affect on representative democracy, the independence of the judiciary, and the autonomy of local self-government. The Constitutional Court also played an outstanding role in making fundamental choices during the transition from communism to democracy: how to handle criminal acts committed by former rulers, how to compensate for expropriations and the denial of liberty, and what kind of consequences should ensue for collaboration with the communist secret services. Especially in the first decade of its existence, the Constitutional Court adopted an activist approach to human rights issues, whereas with regard to the state organisation it exercised more self-restraint. These early years of the Court were decisive for the fate and the character of democracy after the communist rule. The success of the Transition and its constitutional nature – including the Constitution becoming a truly living document that determines the political system and the value choices of society – are to a great extent achievements of the Constitutional Court.

The Constitutional Court has often been referred to as a force for activism. The expression “activism” in one of its uses implies that the Constitutional Court, from time to

time, transgresses its legal competence and embarks on such procedures or makes such decisions that it is not authorised to do wither by the Constitution or by the law regulating its own functions. The Constitutional Court is frequently charged with having committed an explicit transgression of competence when it annulled the ruling of an ordinary court in 1991, even though it had no such powers according to common juridical understanding.⁷

The judicial activism in constitutional interpretation has a specific end: namely, the unity of the Constitution. This means that there should be no legal gaps in the Constitution, neither can there be found contradictions among the articles of the Constitution. In this sense, the Constitutional Court is an activist indeed; there is no doubt that the Constitutional Court often crossed the borders of “negative legislation” and set positive regulations in certain fields.

3. Changes in 2010–2011

Having gained two-thirds majority at the general parliamentary elections in April 2010, the parties forming the government felt authorised and responsible for renewing the constitutional order of the society. Steps toward this end have led to conflicts between the Government and the Constitutional Court, as the Constitutional Court’s mission is to safeguard the constitutional order the Government intended to change.

In the early stage of constitutionalisation, it was not clear

whether the role of the Constitutional Court altered. The ad hoc committee responsible for preparing the new constitution did not intend to change the model of constitutional adjudication,⁸ nonetheless, the Constitutional Court itself suggested strengthening the individual complaint according to the German model.⁹

In the history of the Constitutional Court, the most apparent change seems to be that in 2010 the Parliament, referring to a “state of economic crisis”, amended the Constitution and the Act on the Constitutional Court in order to restrict the constitutional review of financial laws. The immediate antecedent of the limitation of the competence was that the Constitutional Court annulled an Act on taxes that would confiscate high severance pays and other public payments retroactively.¹⁰ The Government argued that the limitation was crucial to the financial stability of the country. It is noteworthy that the Constitutional Court’s decisions on financial issues were always disputed, as in 1995 when the Constitutional Court annulled the withdrawal of certain allowances granted for mothers to bring up children,¹¹ or in 2008 when the Constitutional Court found several Acts on taxes unconstitutional.¹²

The limitation of the scope of the Constitutional Court led to serious political tensions, which served as an immediate reason for the socialist and the liberal parties not to take part in the constitutionalisation.

According to the constitutional amendment, the Constitutional Court may only review and annul laws on state budget and taxes if they violate the right to life and

human dignity, the protection of personal data, the freedom of conscience and religion and the rights connected to Hungarian citizenship. In a theoretical aspect, this regulation is controversial. First, it infringes the formal constitutionality: without judicial review there is no guarantee that the regulations of the Constitution on financial issues prevail in practice. Secondly, it is unclear how the Constitution pointed out the four basic rights that can be the basis of the review (especially since a law on taxes can hardly infringe on freedom of religion or the right of a Hungarian citizen to return to the country).

However, it is significant that the Constitutional Court, with the broad interpretation of human dignity, has already declared a law on tax unconstitutional, even in its limited competence.¹³ Therefore, with judicial activism, it is still possible for the Constitutional Court to review financial laws.

Remarkably, several modifications concerning the Constitutional Court had been introduced by amendments to the Constitution; the Parliament did not wait until the adoption of the Basic Law. In 2010 the Parliament changed the order of the nomination of the justices, in order to make it possible for the parliamentary supermajority to decide on the justices without the participation of the parties in opposition. Another amendment raised the number of justices from eleven to fifteen. Furthermore, the president of the Constitutional Court is not elected by the justices among themselves but by the Parliament.¹⁴ The Venice Commission found that electing the president by a political

actor is a widely accepted phenomenon; nonetheless, it is a regression in the independence of the Constitutional Court.¹⁵

In parallel, the amendment lengthened the term of office from nine to twelve years but it terminated the possibility of the re-election of the justices, which may strengthen their independence.¹⁶

4. The pertaining regulations of the Basic Law

4.1. The Constitutional Court and the separation of powers

The most spectacular change in the field of state organisation seems to be that the examination of individual complaints became the role of the Constitutional Court instead of the posterior law review. According to the Basic Law, not only unconstitutional laws but also unconstitutional jurisdiction can be reviewed in the competence of constitutional complaint. Necessarily, the importance of abstract posterior law review reduces and *actio popularis* terminates. Comparative experiences show that the constitutional complaint and the abstract review cannot be “powerful” at the same time; one of them is always the general rule and the other is the exception.

Such an alteration fundamentally influences the role of the Constitutional Court in the state organisation. Until now, the Constitutional Court was linked to the legislature and

performs “negative legislation”, according to the original concept of Kelsen.¹⁷ On the other hand, if constitutional complaint becomes the main competence of the Constitutional Court, it would be a judicial organ rather than a legislative one. In this case the Constitutional Court does not decide on abstract general rules but on the application of laws in particular cases. This is the attribute of the judiciary.

Although the Constitutional Court is referred to as the supreme body for the protection of the Basic Law (Article 24 para 1), it predictably will be the protector of fundamental rights and not of the Basic Law. The Constitutional Court will have to safeguard constitutionality in particular cases and its main task will not be the maintenance of the integrity of the Basic Law (as it was of the Constitution).

Consequently, the Constitutional Court will not be a “negative legislator” any longer but a “real” court that carries out decisions in particular legal disputes – in a constitutional aspect.

4.2. The relationship between the Constitutional Court and ordinary courts

The alteration mentioned above highly influences the relationship between the Constitutional Court and ordinary courts.

According to the Constitution, the Constitutional Court

examines all norms having normative content.¹⁸ The constitutional adjudication (even indirectly) in individual cases was out of the Constitutional Court's competence. On the other hand, the ordinary courts are entitled to decide on particular matters but they cannot review normative acts. So the Constitution differentiated the tasks of the Constitutional Court from those of the ordinary courts on the basis of whether the issue was normative or individual.

The Basic Law declares that all constitutional issues are the concern of the Constitutional Court, and that besides the examination of legal regulations the Constitutional Court may also examine the conformity of judicial decisions to the Basic Law. Therefore, the Constitutional Court has competence to decide both on normative and on individual cases. In parallel, the Basic Law stipulates the competence of norm control to the supreme judicial organ, the Curia, which may examine the legality of the decrees of local governments and may annul them if they are contrary to statutes.

Consequently, the "monopoly" of the Constitutional Court breaks in examining normative regulations, and the judiciary does not have an exclusive right to decide on individual cases either.¹⁹

Despite its new competence, the Constitutional Court does not become a "supercourt". It does not examine whether the courts applied the laws correctly but whether they chose the constitutional interpretation of the laws or not. The Constitutional Court has always been entitled to define the constitutional interpretation of laws (the "constitutional

requirement”).²⁰ It is a significant difference, however, that upon the Basic Law the Constitutional Court does not define *previously* the requirements that the application of laws have to meet but it analyses *posteriorly* whether the judiciary fulfilled these requirements or not.

As a further consequence, the judiciary might create such interpretations of the laws that conform to the Basic Law. Prior to the Basic Law, courts were only responsible for applying the law, but from now on – due to the constitutional review – they also have to be careful to interpret and apply laws in a way that allows fundamental rights to prevail.

To sum up, the modification in the competences of the Constitutional Court must result in a paradigm shift both in the judicial praxis and in constitutional adjudication.

4.3. Ex ante law review

Article 26 of the Constitution entitles the president of the republic to initiate the constitutional review of an adopted statute prior to its publication. In the jurisprudence of the Constitutional Court this competence remains exceptional. This can be supported by statistical indicators as well: in 2010 the Constitutional Court passed decisions in six cases of ex ante review and in 267 cases of abstract posterior review.

Previously, the Act on the Constitutional Court allowed for the ex ante normative review of the legislative bills as well, providing a chance for the inclusion of the Constitutional Court into any phase of the legislative process as many

times as was deemed necessary. In this way the Constitutional Court's positions could influence – and even determine, by way of excluding certain solutions – the outcome of the debate, at the same time guaranteeing the constitutionality of the legislation. This situation was, however, considered by the Constitutional Court itself as incompatible with its own mission. Decision 16/1991 CC stated: “the Constitutional Court is not a consultant of the Parliament but the judge of the legislative outcome of the Parliament's work”. In the elaboration of the new constitution, putting the ex ante review to the forefront seems to be a political target. This is justified by the legal policy objective requiring the legislature to be convinced, prior to the adoption of a statute, of the constitutionality of the draft, facilitating the aim of adopting less unconstitutional statutory regulations. This, of course, is the justification for the endeavours aimed at the closer inclusion of the Constitutional Court in the legislative process.

In general, we state that the ex ante review is not an alternative of the posterior one. Ex ante review in itself cannot guarantee the sufficient protection of fundamental rights.²¹ Ex ante law review is a political competence in which the Constitutional Court has to decide on norms having no practical application.

Realising this, the Basic Law maintained the ex ante review as an exceptional competence. On the other hand, it set out the regulations concerned in detail and set tight deadlines for the Constitutional Court's procedure.

Furthermore, the Basic Law grants not only to the president the right to initiate ex ante review but also to the Parliament's majority, upon the motion of the speaker, the Government or the proponent of the bill. However, there is a different approach in the two initiations. The president is the legal balance of the Parliament, who "guards the democratic operation of the state". It is the president's constitutional obligation not to sign a statute he or she finds unconstitutional. On the contrary, if the Parliament decides on turning to the Constitutional Court, then it wishes to verify the constitutionality of the law.

It is noteworthy that the Constitutional Court's decision in ex ante review does not mean that the constitutionality of the norm in question cannot be challenged later by posterior review.

4.4. Economic constitutionality

A serious criticism of the Basic Law seems to be that it maintained the text of the Constitution according to its amendment in 2010, restricting the review of financial laws. Although Article 37 para 4 states that the restriction terminates when the state debt goes under 50 per cent of the GDP, regarding the current state of the finances, it is unlikely to happen in the near future.²² However, it is a major difference that the Basic Law set the circumstances when the Constitutional Court would regain its competence.

It is noteworthy that the restriction does not pertain to the ex ante review and to the examination of conflict with international agreements. Furthermore, as we mentioned

above, the Constitutional Court does have the power to review if it interprets human dignity broadly.

4.5. Article N

Decision 62/2003 CC defined the principle of “co-operation of constitutional organs”, deriving from the separation of powers. Article N of the Basic Law contains an interesting form of the principle:

- (1) Hungary shall enforce the principle of balanced, transparent and sustainable budget management.
- (2) The Parliament and the Government shall have primary responsibility for the enforcement of the principle set out in paragraph (1).
- (3) In the course of performing their duties, the Constitutional Court, courts, local governments and other state organs shall be obliged to respect the principle set out in paragraph (1).

Financial planning is the task of the Parliament and management of the budget is the task of the Government. With respect to the principle of co-operation of constitutional organs, other organs – as far as possible – have to assist the Parliament and the Government in performing their duties.

Naturally, this cannot lead to the denial of performing a competence. Article N para 3 is a principle. Principles have the role of filling the gaps; they help the interpretation when

the positive law is dubious. If positive law is clear, it has to be followed. Therefore, Article N para 3 and the cooperation of constitutional organs cannot be interpreted in a way that local governments and courts will never affect the state budget. It only means that they possibly help the Parliament and the Government in performing their constitutional obligations.

We agree with the Venice Commission that financial reasons “must not in any way hamper the responsibility of the [Constitutional] Court to scrutinize an act of state and to declare it invalid if it violates the Constitution”.²³ However, as far as we are concerned, Article N in itself does not restrict the competences of the organs stipulated therein.

Consequently, Article N para 3 has no normative content of its own. The Constitutional Court and the ordinary courts have to respect the tasks of the Parliament and the Government regardless and Article N does not mean that they can deny performing their competences in financial issues.

Conclusion

With the adoption of the Basic Law, the Constitutional Court remains one of the most important parts of state organisation. However, its role has changed utterly. Strengthening the individual complaint results in bringing the Constitutional Court closer to the ordinary judiciary and it is likely that not only the constitutional adjudication but also the judicial attitude is going to change.

Notes

- 1 Csink, Lóránt; Petrétei, József, and Tilk, Péter, *Constitutional Court as Positive Legislator: Hungarian National Report*, XVIII International Congress of Comparative Law, International Academy of Comparative Law, Washington, 26–30 July 2010.
- 2 Kovács, István, *From the Constitutional Law Council to the Constitutional Court in Hlavathy, Attila (ed.), Institutional Guarantees of the Safeguarding of Constitutionalism*, Budapest, Hungarian Academy of Sciences, 1990, p. 83.
- 3 Declaration of Intent submitted on 21 June 1989.
- 4 Sólyom, László, and Brunner, Georg, *Constitutional Judiciary in a New Democracy*, Ann Arbor (MI, US), University of Michigan Press, 2000, p. 70.
- 5 Paczolay, Péter (ed.), *Twenty Years of the Hungarian Constitutional Court*, Budapest, Constitutional Court, 2009, p. 14.
- 6 Rácz, Attila, *Remodelling the System of Legal Protection in Hungary*, *Acta Juridica Hungarica* 2005/3–4, p. 151.
- 7 Kis, János, *Constitutional Democracy*, Budapest, Central European University, 2003, p. 125.
- 8 Draft decision H/2057 <http://www.parlament.hu/irom39/02057/02057.pdf>.
- 9 <http://www.parlament.hu/biz/aeb/info/ab.pdf>.
- 10 Decision 184/2010 CC.
- 11 Decision 43/1995 CC. The summary of the decision can be found at [http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1995-2-004?fn=document-frameset.htm\\$f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1995-2-004?fn=document-frameset.htm$f=templates$3.0).
- 12 Decision 155/2008 CC.
- 13 Decision 37/2011 CC.
- 14 Former President of the Republic professor Ferenc Mádl regarded the changes reshaping the role of the Constitutional Court as a remedy of an imbalance of powers: Mádl, Ferenc, *Hungary – on a New Path*, *Hungarian Review*, May 2011, 11–14.
- 15 Opinion 621/2011 of the Venice Commission, CDL-AD(2011)016, Item 94. Although upon the new regulation the Parliament re-elected Péter Paczolay, who was previously elected by the justices.
- 16 Jakab, András, *The Republic of Hungary* in Wolfrum, Rüdiger, and Grote, Rainer (eds), *Constitutions of the Countries of the World*, issue 2,

Oxford, OUP, 2008.

¹⁷ Kelsen, Hans, *La garantie juridictionnelle de la Constitution*, *Revue de droit public et science politique*, XXXV, pp. 197–257.

¹⁸ Decision 4/1997 CC.

¹⁹ Balogh, Zsolt, *Alkotmánybíráskodás egykor és ma* (“*Constitutional Adjudication Then and Now*”), *Alkotmánybírásgági Szemle* 2011/1, pp. 78–79.

²⁰ See Paczolay, *op. cit.*, pp. 23–24.

²¹ This was one of the conclusions of the international conference on constitutionalisation organised by the Constitutional Court and the Academy of Sciences (Budapest, 4 March 2011).

²² Before the regression the state debt was close to 50 per cent of the GDP (c. 55 per cent) but later on it reached 70–80 per cent of the GDP.

²³ Opinion 621/2011 of the Venice Commission, CDL-AD(2011)016, item 51.

Chapter X

The Courts and the Judiciary

András Patyi

1. General framework and related provisions

The Basic Law contains the fundamental guarantees¹ of the independence of judges and the judiciary, which is and remains an inherent element of the rule of law and is indispensable to judges' impartiality and to the functioning of the judicial system. Most of the "missing" regulations will be defined by cardinal statute(s)² containing the detailed rules of the organisation and administration of courts, the legal status and the remuneration of judges.

The Basic Law defines only the framework and the basic regulations of the judicial organisation: the statutes regulate the details. Referring the most important subjects to cardinal statute itself is a guarantee, which ensures that the organisation and administration of courts, the legal status and the remuneration of judges may not be amended or re-regulated by simple majority of the Parliament. The Basic

Law does not only generally apply the regulation of the judges' legal status to the cardinal statutes, but it also emphasises two main parts: assignment³ and their removal from office.⁴ The rules in the chapter "Judiciary" of the "State" section are not the only ones concerning the judiciary, similar to the Constitution, many other regulations relate or may be related to the courts and to their activities and might help the interpretation of the rules of the judiciary.

Article B para 1 is primarily significant, as it declares Hungary as an independent, democratic state under the rule of law. The Constitutional Court proceeds from the "rule of law" when defining the nature of the judiciary and its relation to other state functions and organs. The Constitutional Court when interpreting the Constitution, has considered the principle of separation of powers as a part of the "rule of law" principle.⁵ In its practice the Constitutional Court consistently enforced the separation of powers as a part of "rule of law" determined by Article 2 para 1 of the Constitution.⁶ According to the Constitutional Court, the principle of separation of powers was confirmed by the "constitutional rules determining the duties and scope of authority of certain state bodies (branches of power), rules concerning the relations among the state bodies (organisational and procedural guarantees), and regulations of conflict of interest stated in the Constitution".⁷ Based on the reasoning above the status of courts in the Basic Law is substantially influenced by Article C para 1, which states that "the functioning of the Hungarian state is

based on the principle of the separation of powers”. This explicit rule relieves us from reasoning through “rule of law”, but it does not mean that the separation of powers, and within it the effective and independent functioning of the judiciary, is not part of the “rule of law”.⁸

The basic characteristic of the judges’ activity is the monopoly of jurisdiction (or adjudication) belonging to the courts (although not absolutely). The monopoly of jurisdiction deriving from the separation of powers beyond the state bodies is in connection with the rule in Article C para 3, namely “the State shall have the exclusive right to use coercion in order to enforce the Basic Law and legislation”. Jurisdiction means the exercise of power and to assure state force or the possibility of such. The decisions of the courts shall be enforced in case of defiance also.

The jurisdiction is tightly bound to the enforcement of laws, thus the regulations of Article R play a key role in the interpretation of the rules relating to the judiciary. The enforcement of the Basic Law, as the basis of the Hungarian legal system and along with other legal rules binding to any person, is eventually the duty of the courts. During this sort of interpreting, law-ascertaining activity, the provisions of the Basic Law shall be interpreted consistently with their objectives, including the National Avowal incorporated therein, and the achievements of our historical Constitution.⁹

Laws, as generally binding rules of conduct are enforced by the jurisdiction of courts. Article T of the Basic Law monopolises law-making and stipulates the forms listed there (in paras 1 and 2). According to Article T para 3 none of the rules shall be in breach of the Basic Law, and it is evident that the exercise of those by courts may not be unconstitutional either. According to Article T the “uniformity decisions” constituted by the Curia and the decisions of courts cannot be considered as laws or generally binding rules of conduct (as they are not listed in Article T).

I also have to mention certain fundamental rights, as the regulation of these rights is strongly connected with court adjudication/jurisdiction, as set forth in Articles IV and XXVIII. The latter are important not only from the point of view of the content of jurisdiction, but also in the definition of certain basic parameters of the judicial organisation. The detailed regulations separating the courts from and relating to other state powers apply as well to the bodies performing jurisdiction, discussed below.

The Basic Law regulates four relevant subjects directly relating to the courts. It regulates 1) the basic duties and powers of courts, the jurisdiction; 2) certain organisational rules, e.g. it designates the highest judicial authority, the Curia, and commissions it with the legal instruments necessary to guarantee/assure the unity of jurisdiction; 3) the basic guarantees of the judges’ independence; 4) the most important rules of functioning, among which the new rule of interpretation is remarkable.

2. The separation of powers and administering justice/judiciary

The Basic Law defines justice partly from a material aspect as an activity and partly from an institutional aspect as a state organisation.

Both sides are correlated to separation of powers. Such a division, along with the dual definition (material and institutional) of other powers, is regulated in the Basic Law fundamentally through rules of powers of other branches. By definition, the Parliament creates and modifies the Basic Law of Hungary and creates statutes,¹⁰ also stating that the Parliament has legislative (along with its exceptional form: constitutional) power.

Considering the Government (the Cabinet as a state organ) as a “merely” general organ of the executive, the executive power is not centralised by the Basic Law, although the government assumes duties and powers for all those matters that are not delegated to other organisations’ power or duties by either the Basic Law or other legal acts. The Government is responsible to the Parliament.¹¹ Appreciating the complexity of the executive power, the Basic Law decrees certain parts of it, stating that the Government is the main organ of public administration, and it can create governmental bodies (agencies) of public administration according to statute.¹² The Government is also a law-making organ. In addition to governance and

public administration, the Basic Law decrees that the Government's third main area of responsibility is national defence and its bodies. The Hungarian Defence Forces are directed by the Government.¹³ The Government also directs and organises the prevention and investigation of crime; the defence of public security and public order and of the national borders – that is, of the operation of law-enforcement bodies and police;¹⁴ the defence of Hungary's independence and rule of law; and the operation of the national security services.¹⁵ The Basic Law also contains provisions for the executive power that are beyond the Government's administration when allowing the Parliament to create independent bodies by cardinal law that are capable of performing and practising some areas of duties that fall under the jurisdiction of executive power.¹⁶

The president differentiates the interpretation of the separation of powers. Hungary's head of state is the President of the Republic, who, in his or her most important general function, embodies the nation's unity and watches over the democratic proceedings of the state organisation.¹⁷ He or she is the commander in chief of the Hungarian Defence Forces, who fall under executive power. However, in his or her position as commander in chief, he or she does not hold any rank or any post and is not the leader of the armed forces, but stands outside of it.¹⁸ The determination of the president's constitutional legal status does not have immediate effect on the analysis of justice administered by courts. The detailed regulations of

the powers of the other state branches in the Basic Law secure that “with the exception of decisions on amnesty, pardon or similar measures, the executive and legislative powers should not take decisions which invalidate judicial decisions”.¹⁹

The position of the Constitutional Court does have such immediate effect. According to Article 24 para 1 of the Basic Law, the Constitutional Court is the highest body protecting the Basic Law, consisting of 15 members elected by the Parliament. The Constitutional Court is not listed as one of the courts by the Basic Law, neither does it mention that the Constitutional Court should administer justice. However, the Basic Law does give the Constitutional Court the power to review and annul decisions of courts immediately. The functions of the Constitutional Court do not coincide with the functions of courts administering justice. Before analysis of this matter, the concept of administering justice has to be examined.

According to the Basic Law, the courts perform duties of administering justice.²⁰ These actions, according to Article 25 para 2, mean decision-making.

The court makes decisions in criminal cases, civil-law cases, and on the lawfulness of public administration decrees (items A–B). These are the classical areas of decision-making in legal disputes.²¹ According to the Basic Law, it is evident that legal disputes against public administration decisions form a part of the administration

of justice. The review and supervision of both the individual (concrete) public administration decisions and the regulatory (or normative) public administration acts are in the authority of the courts.²² The review of lawfulness and annulment of the decrees of the local governments and the examination and establishment of omission of law-making responsibility by the local government are both part of public-law jurisdictions, but can rather be regarded as norm control rather than classical judiciary procedures. However, the Basic Law treats them as judiciary procedures and qualifies them as adjudicating in legal disputes.

Administering justice primarily involves the adjudication of disputes (cases) brought before courts, possibly with the fullest collection of facts, according to the given material laws, within and during a fair procedure. The supervision of the conformity of the judicial decisions with the Basic Law (based on constitutional complaints) and the annulment of decisions that conflict with or are not allowed by the Basic Law have constitutional protection as set forth in the Basic Law. Laws necessarily have to be interpreted in jurisdiction. Laws are subsequently interpreted by all bodies using or executing them, such as bodies of public administration (central agencies, local self-governments, independent agencies). The higher-level bodies of public administration can issue, in their power of administration, interpretation that is mandatory for lower-level bodies as well. However, the interpretation of law by the courts has priority and the law interpretation of the public

administration has to follow that of the courts.²³ The Basic Law contains specific instructions for the courts' law interpretations, decreasing the influence of traditional methods of law interpretation. All this superficially seems to decrease the courts' independent decision-making capabilities. This only happens superficially because rule of law maintains that the law has in itself an authentic interpretation as well, which the judges must keep to. The courts, during their application of a law, must bear in mind and interpret the text of legislations in accordance with its objectives and the Basic Law. During the interpretation of the Basic Law or other legislation, the courts must presume that these laws correspond to common sense and serve ethical, economical goals for the common benefit.²⁴

Administering justice, as the prime role for the courts, contains multiple layers and fills multiple roles. First, this is a definition of tasks for the judiciary (the courts), and secondly it shows their jurisdiction (public powers), their decision-making authority in legal disputes. Thirdly, it also protects the individual's rights, although this is mostly evident from different provisions. These three layers together create and safeguard the continuous maintenance of the rule of law. Altogether, they also secure the separation of powers. Added to this as a fourth layer, the monopoly of the judiciary is guaranteed by the independence of the courts. This independence of the judiciary secures for every person the right to a fair trial and is not a privilege, but a guarantee of human rights and

fundamental freedoms, allowing every person to have confidence in the justice system. As a fifth layer, the interpretation of the law is equal for everyone, which, in addition to the adjudication of legal disputes, is completed by the Supreme Court's special jurisdiction: the Supreme Court secures the unity of the courts' interpretation of the law and makes decisions that are mandatory for all courts to create unity within the law.²⁵

Administration of justice can be more accurately defined through other provisions of the Basic Law. The guarantee of one's freedom and personal safety²⁶ is that no one can be deprived of his or her liberty in any other way but through lawful process and cause. Actual imprisonment for life can only be given as a sentence for intentional and violent crimes.²⁷ The deprivation of someone from his or her liberty through the due process of law, as a sentence of the crime, denotes a decision in the criminal case. In a larger sense, the questioning of an individual suspected of committing a crime and taken into custody – and then subsequently placed under arrest with a “warrant containing written reasons” – falls into the category of material administration of justice.²⁸

Article XXVIII describes the right to a fair trial and access to a court of law; besides defining the material aspects of doing justice it defines the institutional side as well. It defines that the judicial courts have the power to make decisions with regard to whatever accusations and the rights and responsibilities in whatever cases.²⁹ Decision-

making in a court case indicates that amongst the organs of the state, the courts can make binding (final) decisions with regard to responsibility under penalty and the usage of sanctions.³⁰ The binding (final) punitive decision is the monopoly of the courts, as made evident by the following: “no one shall be considered guilty until the court establishes the criminal responsibility in the final judgement”.³¹

Article XXVIII para 1 is identical to the Constitution’s Article 57 para 1. According to this, the Constitutional Court’s position on the penalties of criminal behaviours that are not classified as crimes (misdemeanours) are to be regarded as valid. According to the Constitutional Court, a group of facts of misdemeanours that sanction criminal behaviour is essentially similar to criminal law in its content. With the realisation of these misdemeanours, the provisions of Article 57 para 1 of the Constitution (Basic Law, Article XXVIII para 1) is authoritative: it states that everyone has the right to have any accusations made against him or her be decided upon by a court of law. In the case of criminal misdemeanours, the right to turn to a court of law creates a constitutional fundamental law for the individual to be able to turn to the courts. According to the position of the Constitutional Court, it is not unconstitutional to enact provisions that state that criminal misdemeanours fall under the authority that deals with these offenses, but the individual has to be provided with the opportunity of a full-scale overview by the appropriate court of law.³² The right to turn to a court of law (from the side of the perpetrator)

creates a responsibility (an obligation) for the courts to decide the case for the parties. The court has to make a decision on the rights and responsibilities that have been brought to the case.³³

3. The judicial review of administrative acts and the rule of law

The abolition of the Administrative Court (and the possibility of judicial review of administrative acts as well) by the Parliament in 1949 (the same year the soviet-type Constitution had been enacted) led to the question of either re-establishing that court in 1989 or enacting a new law about the judicial review, i.e. the effective judicial protection against the executive. It was the Constitutional Court that played an important and decisive role in establishing a certain level of judicial control or review of administration. Two far-reaching decisions of the Constitutional Court compelled the Parliament to enact new statutes providing for sufficient rules ensuring the citizens' rights to access to justice concerning the administrative decisions.³⁴

Problems of terminology and definition always occur concerning judicial activities over public administration. We can talk about judicial protection (from a fundamental rights perspective); judicial control (used from a division of powers perspective); judicial review of administrative acts (refers only to a certain and limited scope of review by the prerogative writs/orders); judicial supervision (sometimes

refers to the socialist version of judicial control or something similar to control). In its broadest sense administrative justice could be used as a system of all legal provisions that govern and control the exercise of official (public) power.³⁵ Among these rules the most important ones are the constitutional provisions.

In the socialist era, from 1949 to 1989, the judicial supervision of administrative decisions was either not exercised at all (1949–1957) or only exercised to a limited extent (1957–1989).

The socialist judicial supervision concentrated on the subjective legal protection, i.e. protection for the rights of the person affected by the decision. Socialist constitutions and jurisprudence refused the concept of division of state powers, since they were based on the principle of the unity of state powers.

Neither the separation of powers, nor the rule of law, which was also denied, could serve as the theoretical foundation of the institution. The principle of socialist lawfulness and its enforcement in public administrative proceedings represented the theoretical and ideological basis and justification of judicial supervision. Courts did not play a dominant role in the securing of lawfulness because in the vast majority of the decisions made, access to courts was not possible, i.e. the number of lawsuits was extremely low. The insistence on unified and undividable judiciary lasted until the end of the socialist era. This model can be

characterised by the maintenance of unified judiciary by all means, the denial of a separate administrative court or courts, the lack of constitutional regulation, subjective legal protection, the denial of access to courts in the majority of cases and the prioritising of the requirement of lawfulness instead of the rule of law.

In the socialist state, lawfulness and the protection of lawful interests were basically established and developed within the system of state administrative bodies. They believed that efficiency, lawfulness and especially the protection of lawful interests cannot be ensured satisfactorily through the judiciary (ordinary courts) that operate outside the system of state administrative bodies. Thus in the Hungarian socialist state, allowing the judicial supervision of state administrative resolutions was just one of the tools of maintaining lawfulness. By default, judicial supervision could only take place after the state administrative legal remedies had been exhausted, i.e. ex post, in order to seek remedy for the potentially remaining grievance. It was believed that judicial supervision neither makes up for nor substitutes the obligation and duty of state administrative bodies to provide for lawfulness.

Judicial protection against public administration or judicial control of administrative activity belong to the Constitution in multiple terms – in other words, they form part of the Constitution. They belong there as one of the fundamental components of the rule of law, as part of the judicial organisation and also due to judicial competences, not to

mention their relation with the fundamental right of access to courts. It is true even if a constitution does not provide for it at all or, like the Hungarian, does not write about it in a detailed manner. It is not only part of the Constitution but it is also a standard and a consequence (function) at the same time. According to János Martonyi's principle: "the method of implementation and the degree of effectiveness of the judicial supervision of state administrative resolutions depend on the general principles that prevail in the legal system of the state".³⁶ In other words, the concrete form and operation of judicial control over the public administrative activities is a consequence of the general principles in the constitution of the state and, at the same time, it indicates the presence of these principles. Its paradigmatic foundations are to be found in the Constitution.

With the 1989 amendment to the Constitution a short rule of competence was added to the chapter on the courts, providing: "the lawfulness of public administrative resolutions is controlled by court" (Article 50 para 2). This rule neither describes in detail the type of the court being entitled to exercise control, nor does it stipulate the resolutions and proceedings of the issue. According to the Constitutional Court:

The brief description indeed does not give any details. It does not mention separately the possibility of judicial supervision of administrative decisions containing only formal (procedural) infringements or

The constitutional foundations of “administrative justice” or judicial review of administration as a goal were not embodied in any other provisions. Neither provisions concerning the judiciary, nor the ones about public administration, regulate or even mention it. At the time of the amendment of the Constitution in 1989, a smaller weight and importance was attached to this subject than to the Constitutional Court, which was regulated in a separate chapter in terms of competence and from an institutional point of view, or to the institution of parliamentary commissioner, which was also provided for in a separate chapter of the Constitution.

It is not only the enactment of detailed constitutional rules that failed to take place in 1989/90 but also the reform of the limited judicial supervision that was inherited from socialist law. Since the decisions of public administration always have a legal impact on the fundamental or at least statutory rights of citizens, and given that the Constitution prescribes the judicial control of resolutions since 1989, the Constitutional Court found unconstitutional and annulled the legal rules and regulations that limited the access to courts. For this reason, the Parliament had no other choice but to create new laws. In doing so, however, it did not go back to Hungarian legal traditions (establishment of a separate administrative court), only amended the socialist regulation that was “at hand” at that time. Some of the fundamental

features were kept: legal actions against administrative decisions are reviewed by the ordinary courts, lawsuits are conducted in accordance with the Civil Procedure Act, and the courts are only allowed to nullify unlawful resolutions, whereas the modification of such decisions was only allowed in exceptional cases.

The Constitutional Court ruled in an early decision that “a state founded on the rule of law is realised through the Constitution entering into a real and unconditional force,” in other words, it is indeed applied or enforced. As the well-known quotation goes on,

it is not just laws and the operation of state organisations that have to strictly comply with the Constitution but the conceptual culture and values of the Constitution have to penetrate into the whole society. This is the reign or rule of law; this is how the Constitution turns into reality.

It is clear from the quotation that apart from formal constitutionality, the values of the Constitution must (should) also reign to the full in order to achieve substantive constitutionality, which, at the same time, means the reign, i.e. rule of law. In my view, formal compliance with the Constitution is a value and an achievement in itself and as such, it could be one of the standards of the rule of law.

The requirement of constitutionality (both in formal and substantive meaning) leads to the effective (or real) rule of

law in the course of the operation of all the functions of the state (all power manifestations), and therefore also in the course of public administrative operation, which forms a dominant part of the executive power and the exercising of power.

Modern public administration, gradually taking the place of the executive power, which is slowly turning into a fiction, and creating the public administrative state, is the “acting” state itself. It can be regarded to be the “core” of the state in view of its scope, degree of development and stability. The acting potential of public administration as a potential and often actual bureaucratic power has required limitation and control on an on-going basis. Since it is the Basic Law (previously the Constitution) itself and the legal rules enacted in order to implement the Basic Law that give authorisation for acting in a constitutional state, the judicial control of administrative actions plays an important and inevitable role in enforcement and implementation of the Constitution. Only through effective and unconditional judicial control could the real and unconditional enforcement of the Basic Law be ensured. This is how real enforcement becomes effective.

The real and effective rule of law is a matter of the predominance of law and the control of effective enforcement of the Basic Law itself. As a consequence of the rule of law, in modern constitutional states this duty is to be performed by the extensive system of legal protection in concerning administration, and particularly by the courts.

One of the fundamental requirements of the rule of law, the subordination of the executive power, and with that public administration, to law soon appeared in the terminology of the Constitutional Court:

One of the fundamental requirements of the rule of law is that organisations that exercise executive powers act within organisational structures that are defined by law, following rules of operations that are defined by law and within limits that are regulated by law in a foreseeable manner.³⁸

This text has become a real standard and is one of the most frequently quoted expressions: more than fifty Constitutional Court decisions use it as a basis for reasoning (*as ratio decidendi*), a number of dissenting opinions base their standpoint on it, and it has only got into a *obiter dictum* situation a single time in the course of quotation.

Constitutionality, as interpreted in the field of public administrative operations, has a further element, the “chain of authorisation”. The chain follows from the requirement defined in Decision 56/1991 CC. Public administration is indeed subordinated to law (or to statute – according to the phrase amended later by the Constitutional Court itself) when its actions and the results of these actions have legal authorisation and stay within the limits of this authorisation, that is the administration acts in conformity with the law and

all decisions are founded in law. Legal authorisation has to be constitutional in terms of both content and form. Obviously, the constitutionality of the authorising laws can be – and in fact, due to the separated existence of the Constitutional Court is – separated from the drawing of consequences and the compliance of the individual administrative act with the authorisation. The individual administrative acts (situated at the end of the chain of authorisations and derived from the Basic Law itself) that do not comply with the direct or indirect authorising legal rules (the latter ones are procedural rules, for example) and so are not allowed by this norm, violate the Basic Law as well. The invalidation of such acts, resolutions, decisions and the correction of their errors serve the purpose of maintaining constitutionality and the rule of law in reality.

Procedural rules can be interpreted as an indirect authorisation for acts partly because of their general characteristics. Public administrative acts and resolutions are binding to the concerned entities. It is important to meet the procedural norms in order to ensure the constitutional legality of the public administrative act or resolution and democratic legitimacy, which is interpreted as a further component of constitutionality.³⁹

It was difficult to define administrative justice on the basis of the Constitution, since several provisions refer to it but none of them actually compels the legislation to enact new laws ensuring a completed administrative jurisdiction:

- Article 70/K providing for access to court in the event of the violation of fundamental rights,
- Article 50 para 2 providing for the judicial control of public administrative decisions, which is interpreted as a separate rule of judicial competence (and a rule of division of powers) as compared to this,
- Article 57 para 1 guaranteeing access to court and a fair trial, which functions as the interpretation framework of the latter, and
- Article 57 para 5, which belongs here due to its legal-remedy function,

are the requirements of the rule of law (Article 2 para 1), which also comprises the actual enforcement of the Constitution.

The Constitutional Court interpreted Article 50 para 2 as a constitutional issue of a broader scope than the grammatical meaning of the sentence, and as part of the judicial control of public administration, administrative jurisdiction, i.e. legal protection. As Sólyom put it: the “hierarchy of legal remedies” has evolved in the practice of the Constitutional Court, at the lowest degree of which there is the right to legal remedy as a right of the least broad scope and “the scope gets broader from here” from Article 50 para 2 through Article 70/K. “Judicial control” has been placed in the broader interpretation framework of access to courts and judicial protection.

The constitutional requirement needed for interpretation is defined based on Article 57 para 1: In a case concerning the supervision of the legality of a public administrative body's decisions, it is a constitutional requirement that the Constitutional Court shall decide the case according to the rights and obligations set forth in Article 57 of the Constitution, under which all persons are equal before the law and have the right to defend themselves against any charge brought against them, or, in a civil suit, to have their rights and duties judged by an independent and impartial court of law at a fair public trial or hearing. The rule regulating a public administrative body's right to decide cases must contain provisions under which the court has supervisory jurisdiction over the legality of this kind of decision.

In my view, the best way to understand Article 50 para 2 would have been to take para 1 as a starting point. The Constitutional Court – using the requirements of Article 57 – understands under the wording of the Constitution “the court controls” as “the court (at least) nullifies”. In order to elaborate on this meaning, Article 50 para 1 is at least as suitable, since it is (also) a rule of competence. I believe that the two provisions could have been read together in the following way:

The courts of the Republic of Hungary protect and ensure constitutional order, the rights and lawful interests of people, legal entities and organisations

not having a legal entity, and for this purpose they control the lawfulness of public administrative resolutions.

Summarising the Constitutional Court's interpretation of all relevant constitutional provisions, the following requirements could be derived:

- the courts – exercising a plain jurisdiction – should review all kinds of administrative decisions (by which individual adjudicative type of decisions are primarily but not exclusively meant),⁴⁰
- they supervise the acts (decisions) on the merits, including the supervision of discretion,⁴¹
- the conformity with both substantive and procedural laws (the completeness of the chain of authorisations) is controlled by them,⁴²
- in the course of which they prevent the enforcement of illegitimate resolutions (through annulment),⁴³
- with which they provide legal protection to the parties concerned,⁴⁴
- and this is how they ensure the subordination of public administration to law.

What the paradigmatic provisions of the present Constitution concerning administrative justice do not give an answer to is the radically changing public administration

and the practically unchanged public administrative jurisdiction. The Basic Law still leaves several questions to be answered. Even if the lawful interests of the subjects of law are taken as the basis for interpretation and as a normative basis, it always would be difficult for a procedural and institutional order basically designed for subject-based legal protection (such as the Hungarian judicial review) to manage the frequent cases of the violation of the objective law.

Neither the old nor the new constitutional framework gives an answer to a number of legal disputes and legal situations that arise in the course of phenomena that are radically different from the previous ones, nor does either give an answer to the rather complex and completely original questions that are triggered by the increased utilisation of civil law (contracting out, privatisation, requirements of economic efficiency) or the new expectations raised and demanded *vis-à-vis* public administrative operations (transparency, partnership, substantial participation of the concerned parties).

Before the creation of the new Basic Law, a parliamentary committee had been set up for elaborating the concept and main principles of a possible new constitution. During the preparations, there was hope that the regulation of judicial review (administrative justice) would be more detailed and would bring about more pragmatic change. In view of this, the new constitution could have prescribed that, for the purpose of maintaining the subordination of administration

to the law, separate administrative courts will have the power to supervise the lawfulness of all public administration activities and public administrative acts. The supervision of the exercise of both regulatory and adjudicative powers of administration will not only mean the judicial control of the constitutionality and legality of these actions, but also control its compliance with the objectives that justify it.

The protection of the rights of local municipalities should be ensured, public administrative legal disputes should be judged and, in the course of this, efficient legal protection should be provided as prescribed by law, supervision should be exercised over the lawfulness of local government decrees and other normative decisions in the manner defined in a separate statute.

Finally, a simplified version was incorporated into the 20 December 2010 proposal of the *ad hoc* committee that was approved at the meeting held on and submitted under No. H/2057 (draft parliamentary resolution on the regulatory principles of the Constitution of Hungary).

A number of provisions of the Basic Law suggest a similar approach to the present one. According to Article B para 1, Hungary is an independent, democratic state under the rule of law. As we have seen, it was the provision from which the Constitutional Court interpreted the consequences of the subordination of public administration to the law. Article XXVIII para 1 (in the same way as in today's Article 57 para

1) provides for everyone's right for a fair trial and access to courts (everyone shall be equal before the law and, in the determination of any criminal charge against them or in the litigation of their rights and duties, everyone shall be entitled to a fair and public trial by an independent and impartial court established by statute). According to Article 25 para 2, however, the courts decide not only in criminal cases and civil disputes and other cases defined by law (item A) but also about the lawfulness of public administrative decisions, and have the power to decide whether or not local decrees violate any statute or other legal rules and to nullify them (items b and c). In addition, the courts decide whether or not the local municipality has failed to fulfil its obligation to regulate (omission of regulatory obligation) prescribed by law (item d).

All these judicial competences and powers could form the basis for complete administrative justice, for real judicial review of administrative acts. Article 25 para 4 also refers to this: "Separate courts can be set up for certain groups of cases, particularly for public administrative and labour law disputes."

4. The judiciary, organisation and the monopoly of justice

The separation of powers prevails, following the order of the Basic law, that – unless agreed otherwise – only courts are entitled to perform the function of administering justice.

Based on the interpretation of the Constitution, the Constitutional Court has come to the conclusion that the function of administering justice does not specify the cases in which the court should proceed. The Constitution does not specify that courts shall rule every legal dispute, nor that only courts shall rule legal disputes. It states that local government organs act in numerous legal disputes,⁴⁵ and does not find unconstitutional that it is not a court that decides on the penalty of a person in military discipline cases, where the sanction is milder than the penalty in the criminal code.⁴⁶ In my opinion these statements were not appropriate, as the Constitution, unlike the Basic Law, did not authorise other bodies to enable processes in legal disputes.⁴⁷ This authorisation from the Basic Law is required for bodies other than courts of law to process, or have the right to proceed in, certain legal disputes. "Other organs" essentially do not mean the courts, as the Basic Law contains separate provision for the processes of the clerk officers of the courts.⁴⁸

As already mentioned, the Basic Law, among the provisions about the courts, provides less than the Constitution as far as the organisation of the judiciary is concerned. It is the courts and judges (the judicial organisation), established essentially by a cardinal statute, that shall be entitled to the monopoly of administering justice delineated in the Basic Law. The opinion of the Constitutional Court may be maintained, according to which the cardinal statute does not apply to arbitration

courts (commercial, church, association courts). These are bodies created by the parties involved. Jurisdiction exercised by the arbitration courts is not identical to jurisdiction covered by the courts.⁴⁹

Article XXVIII para 1 is more informative about juridical organisation. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, established by law in the determination of his or her rights and obligations and of any criminal charge against him or her, to be done within a reasonable time. I note that law shall mean the cardinal statute. It should guarantee in detail the independence of the court and its independence from the parties. The latter is especially important in those legal disputes where the government is involved in the case, in one way or another (criminal cases, public education cases, special economic issues). The Recommendation also derives the detailed requirement of independence of courts and judges from Article 6 of the European Convention on Human Rights, emphasising that

independence of the judiciary secures for every person the right to a fair trial and therefore is not a privilege for judges, but a guarantee of respect for human rights and fundamental freedoms, allowing every person to have confidence in the justice system.⁵⁰

The Basic Law does not contain the levels of the juridical organisational and the names of each court. The only court

defined is the supreme judicial body, the Curia.⁵¹ By doing this, the Basic Law returns to the traditional denomination, the one prior to 1949, as the supreme judicial body of the Hungarian state has lost its name of many centuries by implementing literally the Soviet constitution. The National Avowal refers to this as well, by rejecting the wording of the Constitution of 1949. Further details are not defined by the Basic Law, except for stating that the Curia has a president⁵² and that this court ensures the litigation and case-law unity of the country, besides administering justice. The fact that the organisation of the jurisdiction is multi-tiered⁵³ could result from the right to legal remedy. The Basic Law opens the door for the establishment of further special courts, besides the regular (or ordinary) courts. Special courts may not violate the general principle of the rights of equality; therefore special courts should be created based on “well-defined groups of cases” and not based on persons. Out of these the Basic Law mentions two: public administration and the labour legal disputes.⁵⁴

The Basic law does not determine the administration of the courts separately and this fact suits the regulation, as it does not define the organisation in details. The Basic Law indeed should not be the organisational and operational rule of the court system. The Parliament as legislator may decide about the solutions of court administration. However, the decision is not without boundaries. On the one hand, it has to ensure that bodies of the self-government of the judges participate in the administration

of the courts.⁵⁵ Due to the application of plural (bodies), the participation of one self-government body is not sufficient (i.e. a national judiciary council), it is about multiple bodies of the self-government of the judges. These bodies must participate in the administration of the courts, i.e. they must participate in the substantial part of the administration.

On the other hand, a solution must be found that excludes the influence of the two political branches of power (the legislative and the executive) on the judicial activity of the courts. The Constitutional Court stated in 1995 that "it is anti-constitutional if legislation does not limit by effective guarantee the empowerment of the executive power to regroup budget allocations of the courts, set by the Parliament".⁵⁶ The reason for this is that the principle of the separation of powers not only means that one branch of power may not deprive the powers of the other one, but also means that

there is no unlimited or unrestricting power in democratic rule of law, and for this purpose certain branches of state power necessarily restrict the powers of other branches ... it is not necessarily the interest of the executive power that the Constitutional Court or the courts perform their tasks with the greatest efficiency.

Courts, however, are important depositaries of the rule of law and, during the execution of the budget, efficient guarantees are required in order to avoid executive power

creating financial impairment and operational paralysation of the court.⁵⁷ These statements apply not exclusively to the budget management, but to the management of the courts, too. The Parliament may not create an administrative order that creates judges' independence formally. It is also true that the administrative order needs to be efficient.⁵⁸

The monopoly of justice is broken by the new provision of the Basic Law, which introduces the real constitutional complaint. According to literal interpretation, the Constitutional Court may not proceed and decide in legal disputes as the Constitutional Court is not part of the judiciary system, namely, as it is not a "court" it may not perform direct justice. The fundamental difference of the Constitutional Court complaint is that it does not assess the legal dispute again, but decides whether in the judgement of the complaint and in the procedure prior, the Basic Law had been violated or not. It does not merely examine whether or not any person's rights granted in the Basic Law had been violated (it "protects" not only the fundamental rights), but also reviews the harmony of the judicial process, the activity of which impacts the enforcement of the whole Basic Law.⁵⁹ Article 24 para 2 item d) states that the Constitutional Court annuls the decision of a court that is contrary to the Basic Law,⁶⁰ and due to this, besides the enforcement of fundamental rights, other considerable Basic Law provisions may become the focus of examination too.

The decisions of the courts (including the Supreme Court)

will not be final in a sense that the Constitutional Court will be entitled to review them. As a consequence, the Constitutional Court becomes a real judicial organ.

5. The independence of judges and the principles of operation of the courts

The independence of the whole judiciary system and of every individual court is a constitutional requirement, although the Basic Law only declares the independence of the judges expressly, in accordance with the Recommendation: “The independence of the judge and of the judiciary should be enshrined in the constitution or at the highest possible legal level in member states, with more specific rules provided at the legislative level.”⁶¹ Judges shall be independent and only subordinated to law, and may not be ordered or instructed in relation to their judicial activities⁶² – at first sight it seems that this rule does not refer to the independence of the whole court. In fact, the independence of judges is realised in performing the function of administering justice.⁶³ All other guarantees in regard to the independence of the status and of the organisation ensure that this particular principle (the independence of administering justice) will prevail. An additional guarantee of the independence of the judiciary – compared to the Constitution – is the declaration that judges may not be instructed in their judicial activities. Consequently, in other fields of their activity – not in their

adjudication process – they may be ordered and instructed, and they are obliged to follow these orders. The independence of judges and the fact that they cannot be ordered does not mean that the laws are not binding on them, including domestic law, EU law, and those international laws that became part of the domestic law by the regulation of the Basic Law and are to be applied directly.⁶⁴ Judges interpret these laws independently (within the framework of Article 28): “eventually the courts determine laws based on their own interpretation”.⁶⁵ It must be noted that in the future the legal interpretation of the Constitutional Court will directly affect the activity of the courts also. Instead of the courts’ own interpretation – in the fields where the Constitutional Court has already set the frames of it – the interpretation of the Constitutional Court will have to be applied. Besides this, the uniformity decisions of the Curia are binding on every single judge.

A further guarantee of independence is that judges may only be removed from office on the grounds and in accordance with the procedure specified by super-majority law. This rule applies not only to the professional judges but also to the non-professional judges who participate in adjudications in cases and in the manner provided by law.⁶⁶ This rule on prohibiting the removal of judges aims to prevent their arbitrary removal from office. Judges may not be members of political parties and may not engage in political activities.⁶⁷ This rule aims to ensure that judges keep due distance from state powers of a political nature,

but allows them to join or lead associations (of a non-political nature) based on the right to freedom of peaceful assembly. A further guarantee of political independence is that professional judges will be appointed by the President of the Republic – as set forth in super-majority law.

There is no relationship between the rules on judges' independence and the rules of minimum and maximum age limits for judges in the Basic Law.⁶⁸ According to the Basic Law, only those may be appointed as judges who have already reached the age of thirty prior to the date of the appointment. This rule clearly applies to future appointments only; those who have already been appointed before reaching the age of thirty cannot be removed from their positions based on this rule. More problematic is the rule setting forth that the judges' legal relationship – except the legal relationship of the president of the Curia – may only exist until they reach the general retirement age. This rule applies to those judges also who have been appointed under the previous legislation and who would have been able to work until reaching the age of seventy. Naturally, the Basic Law does not determine the general retirement age, thus making the situation even more difficult. As judges may only be removed from office on the grounds and in accordance with the procedure specified by super-majority statute, the Act on the legal status of judges has to determine the retirement age also.

This provision raises several problems, mainly subjective ones: e.g. the possible violation of Convention rights of

judges that are not dealt with in this section. It also raises the question of withdrawal of the cases from the judges. If a judge is not entitled to work further, the cases at his or her hands are also withdrawn. According to the Recommendation, a

case should not be withdrawn from a particular judge without valid reasons. A decision to withdraw a case from a judge should be taken on the basis of objective, pre-established criteria and following a transparent procedure by an authority within the judiciary.⁶⁹

The conflict between the Basic Law and the Recommendation is only virtual, as the new retirement-age rule (prior to it judges were entitled to work until 70 years of age) and its effects do not simply withdraw a case from a judge (or cases from judges), who still serve further as judge(s), but terminates the position of the judge as such.

The courts, unless provided otherwise by law, shall adjudicate in panels. Only professional judges may proceed alone or act as president of a panel. In matters that fall within the jurisdiction of a single judge, defined by law, the clerk officer of the court may also proceed, who shall act in accordance with Article 26 para 1.

Notes

¹ Standards and guarantees of the independence of judges and the

judiciary are incorporated into Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies). This recommendation replaces Recommendation Rec(94)12 of the Committee of Ministers on the independence, efficiency and role of judges.

2 Article 25 para 7.

3 Article 36 para 2.

4 Article 26 para 1.

5 Decision 38/1993 CC.

6 See, for example, Decisions 41/1993 CC; 17/1994 CC; 55/1994 CC; 28/1995 CC.

7 Decision 2/2002 CC.

8 Decision 38/1993 CC.

9 Article R para 3.

10 Article 1, para 2, items A–B.

11 Article 15, para 1.

12 Article 15 para 2.

13 Article 45 para 2.

14 Article 46 para 2.

15 Article 46 para 4.

16 Article 23 para 1.

17 Article 9 para 1.

18 Decision 48/1991 CC.

19 Chapter II, point 17 of CM/Rec(2010)12.

20 Article 25 para 1.

21 According to Article 25 para 6, these “cases” may be evidently viewed as judicial cases. The Basic Law permits the participation of other bodies in “some judicial cases”.

22 The Constitution specified administration of justice as decision-making on civil and criminal cases (Article 50 para 1). Judicial supervision concerning lawfulness of public administrative acts (Article 50 para 2) did not fall into this category (i.e. administering justice).

[23](#) Decision 121/2009 CC.

[24](#) Article 28.

[25](#) Article 25 para 3.

[26](#) Article IV para 1.

[27](#) Article IV para 2.

[28](#) Article IV para 3.

[29](#) Article XXVIII para 1.

[30](#) Decision 45/2009 CC.

[31](#) Article XXVIII para 2.

[32](#) Decision 63/1997 CC.

[33](#) Decision 39/1997 CC.

[34](#) Decisions 32/1990 CC and 63/1997 CC.

[35](#) Jeffrey, Jowell, *The Universality of Administrative Justice? in Matthias, Ruffert (ed.), The Transformation of Administrative Law in Europe*, Munich, Sellier European Law Publishers, 2007, p. 55.

[36](#) Martonyi, János, *államigazgatási határozatok bírósági felülvizsgálata* ("Judicial Supervision of Administrative Decisions"), Közgazdasági és Jogi Könykiadó, Budapest, 1960, p. 7.

[37](#) Decision 994/B/1996 CC.

[38](#) Decision 56/1991 CC.

[39](#) Decisions 38/1993 CC and 16/1998 CC.

[40](#) Decision 32/1990 CC.

[41](#) Decision 39/1997 CC.

[42](#) Decision 2/2000 CC.

[43](#) Decision 953/B/1993 CC; Decision 54/1996 CC; Decision 42/2004 CC.

[44](#) Decision 62/1992 CC.

[45](#) Decision 71/2002 CC.

[46](#) Decision 71/2002 CC.

[47](#) Article 25 para 6.

[48](#) Article 27 para 3.

[49](#) Decision 95/B/2001 CC.

[50](#) Preamble of CM/Rec(2010)12.

[51](#) Article 25 para 1 second sentence.

[52](#) The president of the Curia is elected upon the nomination of the president by the Parliament from among the judges for nine years. Two-thirds of the votes of the MPs are required for the election of the president of the Curia (Article 25 para 3).

[53](#) Article 25 para 4.

[54](#) Article 25 para 4.

[55](#) Article 25 para 5.

[56](#) Decision 28/1995 CC.

[57](#) *ibid.*

[58](#) Article XXVI of the Basic Law clearly refers to the requirement of efficiency in connection with the operation of (state) public services. The working of the courts belong to public services.

[59](#) Article 24 para 2 item D.

[60](#) Article 24 para 3 item B.

[61](#) Chapter I, point 7 of CMRec(2010)12.

[62](#) Article 26 para 1.

[63](#) Decision 38/1993 CC.

[64](#) According to Article Q para 3 “Hungary shall accept the generally recognised rules of international law.” The Basic Law declares that only in the case of “other sources of international law” shall they “become part of the Hungarian legal system by promulgation”.

[65](#) Decision 38/1993 CC.

[66](#) Article 27 para 2.

[67](#) Article 26 para 1.

[68](#) Article 26 para 2.

[69](#) Chapter I, point 9 of CMRec(2010)12.

Chapter XI

Prosecution Service

András Zs. Varga

1. Historic milestones of regulation

1.1. Historic prospect

The roots of the Hungarian prosecution service go back to the institutions protecting the royal assets of the feudal state (the director of legal affairs, *fiscales Sacrae Coronae Regiae*) and advising the local authorities of the county assemblies (*fiscalis comitatis*).¹ During their activity protection of public interest gained increasing importance.

Following the model of south-western Europe in the nineteenth century in establishing the Napoleonic model of prosecutions mostly fulfilling tasks within the criminal law field,² after the conciliation of the nation with the monarch (King Franz Joseph von Habsburg-Lotharingen), Act XXXIII of 1871 on Royal Prosecution Services established a modern prosecution service organised in a central system. The dominant officers were the royal prosecutors general, leading the county services subordinated directly to the Ministry of Justice. In the proceedings of the Royal Curia (the Supreme Court), the crown prosecutor and his deputies represented the punitive interest of the State. The royal prosecutors general had no direct relations with the crown prosecutor. (The legal status, organisation and functioning were similar to that observed in Austria today.)

1.2. The Bolshevik transformation

After World War II the new concept facilitated by Soviet influence led to reorganisation of the prosecution service. The new prokuratura-type of organisation was based on the former amalgamation of institutions of the Napoleonic prosecution and of the Swedish ombudsman organised by

Tsar Peter I in Russia.³ The Soviet-type of procuratura was supposed to achieve a general control over the state, economy and the whole "civil" society. These goals needed a hierarchical organisation led by a procurator general formally responsible to the Parliament and subordinated informally to the Communist Party. Such an organisation was extrapolating from the original text of the Constitution of the People's Republic of Hungary, Act XX of 1949. However, the new system was built up only by the Statutory Decree 13 of 1953 on the Prosecution of the People's Republic of Hungary. The new regulation focused on the control (supervision) as divided into four sectors: supervision of criminal investigations, of courts, of public administration and of the "rest" – the "general supervision", which included almost anything: labour relations, private law contracts, etc. The procurator general leading and governing the Prosecution Service was effectively responsible to the Parliament: besides election and reporting (as public law institutions) the opportunity of being removed due to political distrust made him an extremely powerful but at the same time politically subordinate office-bearer of the People's Republic.

The changes of goals were represented within the original text of the Constitution, which had identified the procurator general as the guardian of legality. His functions were rather circumscribed than defined: his general task was to look after observance of law by ministries, other central or local public authorities, institutions, bodies and last but not least the citizens, while he also had a special task, that of consequent persecution of misdeeds breaching or endangering public order, security or independence of the People's Republic. After the extensive redrafting of the text in 1972, the regulations concerning the topic did not lose their abstract shape. The supervised text prescribed to the procurator general and to the Prosecution Service how to ensure protection of rights of natural and legal persons and consequent persecution of misdeeds breaching or endangering the constitutional order or security and independence of the country. However, some new functions were specified within the text: the Prosecution Service was supposed to supervise the legality of criminal investigations, to represent criminal charges before the

ordinary courts and to contribute in observance of law by the different official and private bodies and citizens. The new text eased the consequent supervisor function of the Prosecution Service, but did not break with it, and the public-law position of the procurator general remained the same.

1.3. After the Transition of the 90s

The constitutional reform of the democratic transition made a single but extremely important change in the text. Since the negotiations of the National Roundtable (1989)⁴ left the reorganisation of the institution to the new constitution,⁵ which was supposed to be drafted after the free elections in 1990, the two main questions of whether the Hungarian Prosecution Service should be returned to the Napoleonic model or headed henceforward by a general prosecutor not subordinated to the executive, and the necessity of a non-penal role of prosecutors, were left open. Unfortunately, Hungary had to wait more than two decades for the new Basic Law.

However the “provisional” Constitution abolished the right of the Parliament to recall the head of the Prosecution Service due to political considerations. This formally short change in the text was an important reform. Since then the Prosecution Service headed and governed by the supreme prosecutor⁶ gained effective independence: it was still not subordinate to the executive but it was subordinate to the Parliament.⁷ Prescription of functions remained practically unchanged in the text (which mentioned, of course, the Republic of Hungary instead of the People’s Republic of Hungary), but the detailed functions fulfilled by prosecutors – mostly those of non-penal character – were limited (in some cases essentially) or interpreted in conformity with the constitutional, international and European principles of law by several decisions of the Constitutional Court.⁸

Although the goal of this essay is to compare the unique qualities of the new Basic Law to the former Constitution from a European perspective, and not to serve as a detailed examination of lower regulations, I have to make one exception. Functions of prosecutors are regulated meticulously by the different codes of procedures. This is

an important explication of the abstract (closed) formulation of functions in the Constitution (and lack of detailed regulation concerning prosecutors in constitutions of certain states).⁹ However, neither the Constitution nor the amended Act V of 1972 on the Prosecution Service tackle changes of the procedural laws. Consequently the regulations of Act XIX of 1998 on Criminal Procedure Code, judicial supervision of administrative acts becoming general and ordinary, and establishment of ombudsman-institutions, which restructured the effective role of prosecutors, were not reflected in the Constitution. Abstraction of the constitutional text was advantageous on this point since the text of lower regulations did not cause direct collision, but the constitutional clauses were “floating” over other acts and over the everyday practice predominated by criminal law tasks.

2. Frames given by the Basic Law

By virtue of the history of the institution the essential change of constitutional regulation is probably not surprising. The new Basic Law has given an – expectedly – final answer to the almost quarter-century-old questions concerning the Hungarian Prosecution Service.

2.1. Prosecution service within institutions of the State

According to Article 29 paras 3–5, the supreme prosecutor¹⁰ as leader and director of the Prosecution Service (who has the exclusive right to appoint prosecutors) is elected from prosecutors by the Parliament (by a proposal of the president) for a term of nine years with a majority of two-thirds of the votes. The supreme prosecutor has the duty to submit an annual report to the Parliament on his or her activities.

These rules establishing the position of the supreme prosecutor and of the Prosecution Service within the structure of public law organisations seem to have put an end to the previous long debates. The new constitutional order keeps the Prosecution Service under the control of an independent supreme prosecutor without his or her

subordination to the executive.

Consequently there is no reason to disregard the former opinion of the Constitutional Court considering the Prosecution Service as a judicial body (part of the judicial branch of power "in a wider sense"). Within this model the supreme prosecutor is responsible to the Parliament in public law sense, but this responsibility does not mean any kind of subordination. His or her responsibility is limited to the duties strictly prescribed by law: his or her obligation is to appear in the Parliament or in its committees and to answer the questions. However, the content of answer has to be considered by the supreme prosecutor, who also has the obligation to observe the law. As a consequence of his or her answers, the personal rights of others may not be hurt, Members of Parliament may not obtain illegitimate criminal information, and the answer may not endanger the interests of on-going criminal procedures.¹¹

The decision of the constitutive power wasn't unexpected since the "provisional" Constitution was amended along these lines during autumn 2010 and the new supreme prosecutor was elected in this wise. The amendment brought an important new feature, also present in the new Basic Law – the right of the Parliament to decide (to vote) over the answer of the supreme prosecutor was abolished. In earlier years this opportunity was often misused to express political distrust, which is unreasonable in connection with an independent judicial body.

These changes are in concord with the recently published suggestions of the Venice Commission.¹² The Venice Commission noted that "there is a widespread tendency to allow for a more independent prosecutor's office", although usually "subordination to the executive authority is more a question of principle than reality in the sense that the executive is in fact particularly careful not to intervene in individual cases". Nevertheless the Venice Commission suggested that "professional, non-political expertise should be involved in the selection process" of the head of prosecution service; "use of a qualified majority for the election of a Supreme Prosecutor could be seen as a mechanism to achieve consensus on such appointments"; he or she "should be appointed permanently or for a

relatively long period without the possibility of renewal at the end of that period”, and moreover “The period of office should not coincide with Parliament’s term in office”; “accountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out”; “specific instruments of accountability seem necessary, especially in cases where the prosecutor’s office is independent ... public reports ... could be one such instrument”.¹³

The independence of the prosecution system is strengthened by the prescription of Basic Law regarding the detailed rules of the organisation and functioning of the office, as well as the prescription that the legal status of public prosecutors shall be laid down in a cardinal statute (adopted by the qualified majority of two-thirds of votes of the Members of the Parliament, according to para 7).

The rule that keeps the prohibition of political pertinence or activity of prosecutors (para 6) is less convincing. This rule – as an answer to and keeping distance from the Bolshevik legacy – was first adopted in the provisional Constitution in 1989. I think that after more than twenty years, and considering the case law of the ECHR,¹⁴ the prohibition could have been removed.

2.2. Powers and competencies of prosecutors

In spite of the long debates, the constitutional position of prosecution is not one of the most important questions. The primordial competence of the prosecution is unquestionably concerning criminal procedures.¹⁵ The Hungarian system of criminal procedures is based on principles of officiality (with some exceptions, like defamation or minor personal assaults, police and Prosecution Services should not wait for denunciation, they have to investigate and prosecute any crimes they become aware of) and legality (law-enforcement bodies and the Prosecution Service may not select from crimes, they have to investigate and prosecute any offences if the evidence is available). Hence questions of subordination are mostly of no interest: positive instructions (to prosecute) are useless if there is a lack of evidence, while negative instructions

(not to prosecute) would effectuate a crime (of official abuse or complicity).¹⁶

What is more important, the Basic Law makes clear the rank of powers and competencies of prosecutors. While the enigmatic formulation of the provisional Constitution made it at least difficult to set priority among the different competencies of prosecutors, the Basic Law clarifies that the role concerning criminal procedures is of the highest importance, which underlines that prosecutors shall enforce the punitive authority of the State by prosecuting criminal offences, taking action against other illegal acts or omissions, and facilitating the prevention of illegal acts.

The Basic Law is not too expansive regarding the details of criminal-law tasks. It marks out only the main directions of the activities of prosecutors. They exercise powers in relation to criminal investigations, represent the public prosecution in ordinary court proceedings, and supervise the lawfulness of penal enforcement and exercise other powers defined by statute (para 2).

The term “defined by statute” appears twice in the text. Firstly, regarding the investigation, prosecution and supervision of penal enforcement. In this relationship the Parliament has more or less large discretion to regulate the detailed activity in a simple majority (i.e. not cardinal) statute. Hence, while the criminal procedure is usually meticulously regulated, the constitutional level may be abstract. However, some differences can be observed between the investigation and prosecution.

While investigation as the first stage of criminal procedures is mostly effectuated by actors other than prosecutors – e.g. the police or other law-enforcement agencies (like the National Authority for Taxes and Revenues or investigative officers of the National Defence Forces) – at this stage prosecutors intervene only in special cases, i.e. in cases of corruption, some organised or economic crimes, offences by or against justices or prosecutors, high-ranked officials, when the higher qualification or independence has been considered to have led to a condemning sentence in court.

The situation is different if a case arrives to be prosecuted. Representation of the punitive will of the State needs the

main contribution of prosecutors. In the Hungarian criminal-law system, prosecutors hold the general responsibility for prosecution, and no other public-law authority may detract from this role (monopoly of public prosecution).¹⁷ However, there are auxiliary instruments like civil action (used in the case of misdemeanours like defamation or minor personal assaults) carried out primarily by the private representative (private solicitor) of the victim (with the opportunity for the prosecutor to take over the case, or substitute civil action as an opportunity for the victim to carry on a case considered by a prosecutor as infeasible to bring to the court). Since the criminal procedure may have a single aim, conviction of perpetrators if their guiltiness is beyond any reasonable doubt, the crucial role of prosecutors is the court activity, and their involvement in the investigation process is only of secondary importance.

At the same time the Basic Law once again gives a mandate to the Parliament to create detailed rules determining that prosecutors should exercise other powers and competencies defined by statute. In this case there are no handholds of interpretation in the text. Only the historic interpretation could help, namely the actual role of prosecutors outside the criminal law field. This activity needs some special explanation.

Before beginning the exposition of this topic, it should be mentioned that supervision of penal enforcement is also a non-penal law competence; the only difference is that this one is specified in the text.

2.3. Non-penal role of prosecutors

European thinking about prosecution concerns mostly the question of how to prosecute. Even in 2000 the Council of Europe considered in its basic Recommendation prosecution services as bodies playing a crucial role in the administration of criminal justice, although its Explanatory Memorandum mentioned that "public prosecutors may also in some countries be assigned other important tasks in fields of commercial or civil law, for example".¹⁸

In the past few years we were witness to a growing interest regarding the non-penal role of prosecutors. This phenomenon was referred by one of the consultative

bodies to the Committee of Ministers of the Council of Europe, the Consultative Council of European Prosecutors (CCPE),¹⁹ which formulated a comprehensive opinion²⁰ on the role of prosecution services outside the criminal-law field.²¹ After long preliminary proceedings²² the Opinion observed that a

great variety of systems exist in Europe regarding the role of the prosecution services, including outside the criminal law field, resulting from different legal and historical traditions [and p]rosecution services in the majority of the Council of Europe Member States have at least some tasks and functions outside the criminal law field.[21] The areas of competence are varied and include, *inter alia*, civil, family, labour, administrative, electoral, law as well as the protection of the environmental, social rights and the rights of vulnerable groups such as minors, disabled persons and persons with very low income.

Non-penal roles are not criticised by the ECtHR, although some limitations are to be considered,²³ and the Venice Commission had formulated disagreement regarding these functions generally.

Under the former Constitution Hungarian prosecutors had certain tasks regarding administrative proceedings. If the legality of a decision of an administrative body was questioned as not being supervised by administrative courts, the prosecutors might examine it and take certain measures. The most powerful action of the prosecutor was objection – but without legally binding force – since it might affect the administrative decision in case (if the public body agreed with the objection or a court ruled to accept it). There was a less strong “alternative” of objection, the “observation”, which could be formulated if the prosecutor found systematic illegal practice within the jurisdiction of a public body. Observation itself did not have any effect on the particular decisions. The twin of observation was warning, applicable when the prosecutor intended to avoid a presumably illegal future act. Finally, prosecutors had the opportunity to submit a notice to public bodies if an act or

nonfeasance was illegal but the “level” of illegality was low.

Besides the formal measures of control prosecutors might initiate criminal, disciplinary or special administrative proceedings or civil lawsuits.

The new Basic Law of Hungary gives the opportunity to reconsider these competencies and to draft a new act more concordant with other European practices.

3. European standards in evolution

As mentioned above, the European thinking about prosecution mostly concerned the question of how to prosecute. The constitutional status of the institution remained hidden. In order to understand how and why prosecution services entered into the focus of interest, several important “stations” can be identified. Identification and description of these stations are quite easy if the main European political and legal changes are taken into consideration: legal co-operation within the European Union was cut short; the need for common standards for the position of prosecutors and for efficient control of public power was heightened; respect for human rights and personal freedoms and imperative obligation for redress if violated permeated all legal disciplines; new, alternative tools appeared within the control mechanisms of public bodies.

The archetype of international penal co-operation²⁴ is extradition based by connections between ministries of foreign affairs and diplomatic missions. Since it was a long and inefficient procedure, the European Union was going to simplify and accelerate it by special legislation. New agreements²⁵ appeared among the members of the European Community (EC), and – after the Maastricht Treaty²⁶ – the European Union (EU), based on the European Convention on Extradition of the CoE.²⁷ Agreements targeted the modernisation and simplification of sending and accepting requests, summary proceedings with the consent of the convicted person, legal assistance in procedural co-operation, transmission of execution of punishments, or recognition of foreign judgments.

Intensification of legal co-operation foreshadowed new

perspectives to direct relations among prosecution services, but the really new phenomena appeared when institutionalised forms had been set up. The European Council decided on 29 June 1998 to set up the European Judicial Network (EJN)²⁸ built on contact-points of Member States in order to facilitate exchange of information concerning texts and practice of legal provisions, organisations and bodies.

As an institutional consequence of the conventions and agreements mentioned above, prosecutors who used to represent the State's punitive interest before national courts got an important role in transnational co-operation. Within the EU these new ways of operation were formalised and institutionalised. The European Council – in order to create a genuine European area of justice – agreed in Tampere to create a new body “composed of national prosecutors, magistrates or police officers of equivalent competence” called Eurojust.²⁹ The reason for enlisting other authorities than prosecutors was the difference of competencies within the Member States. Responsibility for investigation, its supervision and other pre-trial procedures vary with national traditions.³⁰ However, the acting Eurojust – set up in 2002³¹ to facilitate and co-ordinate co-operation of national prosecuting services – is composed mostly of prosecutors.³² The realised forms of co-operation can be completed in the future by the drafted European Corpus Juris which targets better and more effective protection of EU interests³³ and its enforcement authority, the Office of the European Prosecutor.³⁴ The new basic regulations of the EU see prosecutors as important factors of legal co-operation.

On the broader European map the Committee of Ministers of the Council of Europe adopted the Recommendation to Member States – Rec. (2000)19 – on the Role of Public Prosecution in the Criminal Justice System on 6 October 2000. This Recommendation details the situation of the public prosecutors and public prosecution services in the criminal justice system and their basic principles of operation.

The Recommendation predetermines prosecution services as public authorities (which usually is unquestioned) and

highlights their designation as working on behalf of society and in the public interest; their role is to ensure the application of the law (with the limitation that this role is to be fulfilled if the breach of the law hits the level of criminality) and to take into account the rights of the individual and the necessary effectiveness of the criminal justice system at the same time. According to the Recommendation, the distinctive function of prosecutors (among other state officials) is to decide on prosecution and representation of the criminal law case before the courts (including decisions on legal remedies). All other functions like supervision of investigations or of court decisions are auxiliary (and incidentally, since these secondary functions differ from country to country, this latter characteristic applies even more to the non-penal tasks).

The text lays out the elementary guarantees: safeguards provided to public prosecutors for carrying out their functions (recruitment, training, promotion, mobility, remuneration, right to court actions against disciplinary measures); the general relationship between public prosecutors and the executive and legislative powers on the one hand, and the special relations regarding court justices and police on the other; international co-operation.

One of the most important requirements is the principle of proceeding of prosecutors "in a judicial context", which places them within the judiciary even if in certain countries some attributes of the prosecution services are not far from those of agencies of the executive power.

The Recommendation was the decisive step in the search for common European standards for prosecution, but it should be understood only as the beginning of a long common thinking and not the end of the search.

4. Re-regulation on the way

The Recommendation was followed by a number of important new achievements. The regular Conference of General Prosecutors (CPGE) mentioned earlier, and its transformation into the formal Consultative Council (CCPE), shows the growing interest. Yearly conclusions of the CPGE³⁵ and opinions of CCPE (no. 1 on "Ways of

improving international co-operation in the criminal justice field", no. 2 on "Alternatives to prosecution", no. 3 on "The role of Prosecution Services outside the criminal law field", no. 4 on "The relations between judges and prosecutors in a democratic society",³⁶ no. 5 on "Public prosecution and juvenile justice"³⁷) bring us closer to a more harmonised or at least mutual understandable regulation and practice. This aim was also facilitated by a comprehensive study.³⁸

The European Union added its contribution to the work through the more-or-less formal forms of co-operation like the forum of general prosecutors of the Member States, Eurojustice,³⁹ the Network of the Prosecutors General, and equivalent institutions of the Supreme Judicial Courts of the Member States of the European Union.⁴⁰

The latest international document is Part II of the Report of the Venice Commission on European standards as regards the independence of the judicial system concerning the constitutional law requirements of Prosecution Services.⁴¹ It is expected that the next important contribution to harmonisation will be a new recommendation of the Committee of Ministers of the Council of Europe on non-penal tasks of prosecution, which is under "composition".⁴²

Analysing the newest Hungarian legislation from the perspective of this process of harmonising European principles, it is easy to see that the Basic Law (and the cardinal statute on Prosecution Services to be drafted and accepted) tries to hit a moving target. Consequently it is no wonder that the Venice Commission was unusually cautious when formulating its opinion on the regulation of the Basic Law on Prosecution Services. The opinion of the Venice Commission states that the new Basic Law "focuses on the contribution of the Supreme Prosecutor and prosecution services to the administration of justice", and the only (but very important) comment is that "[t]his approach is in line with the findings of the Venice Commission in its Report on European Standards as regards the Independence of the Judicial System". The last finding of the opinion concerns the lack of indication "of any particular changes that would affect the legal status of the prosecutors" (paras 111–113).

Until the new cardinal statute on the Prosecution Service is adopted, more detailed evaluation of the Basic Law cannot be formulated. However, it seems that the constituent body was aware of the European model of harmonisation and had no objection to it.

Notes

- ¹ Szendrey, Géza, *A magyar ügyészség évszázadai* ("Centuries of Hungarian Prosecution"), Budapest, Rejtjel, 2005, p. 53.
- ² *Directory of Prosecution Services*, The Hague, International Association of Prosecutors, 1999, pp. 110, 172, 219.
- ³ See CCPE-Bu (2008)4rev, *Report on the Role of Public Prosecutors outside the Criminal Field*, (http://www.coe.int/t/dghl/cooperation/ccpe/conferences/2008/4rev_2008_CCPE-Bu_reportVargas_en.pdf).
- ⁴ Gross, Grudzinska (ed.), *Constitutionalism in East Central Europe*, Bratislava, Czecho-Slovak Committee of the European Cultural Foundation, 1994.
- ⁵ See Jakab, András, *The Republic of Hungary* in Wolfrum, Rüdiger, and Grote, Rainer (eds), *Constitutions of the Countries of the World*, issue 2, Oxford, OUP, 2008, p. 46.
- ⁶ The change of denomination of the former procurator general to supreme prosecutor is not reflected in Hungarian since both denominations are the same: "legfőbb ügyész".
- ⁷ This decisive consequence of the amendment on the constitutional position of the supreme prosecutor was highlighted by the Constitutional Court: see Decision 4/2003 CC.
- ⁸ See Decision 1/1994 CC on private law tasks of prosecutors, Decision 2/2000 CC on intervention of prosecutors into administrative law procedures, Decision 14/2002 CC on the formal relations between judges and prosecutors, Decision 3/2004 CC on independence of prosecution, and Decision 42/2005 CC on substitute civil action.
- ⁹ E.g. the Basic Law for the Federal Republic of Germany, the Constitution of Austria, the Instrument of Government of Sweden.
- ¹⁰ In the official Hungarian text the title of the head of the Prosecution Service was not revised ("legfőbb ügyész").
- ¹¹ See Decision 4/2003 CC on independence of prosecution.
- ¹² See *Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service*, Adopted by the Venice Commission at its 85th plenary session (Venice, 17–18 December 2010) ([http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)040-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)040-e.pdf)).
- ¹³ *Ibid.* items 26, 34–36, 42, 44.
- ¹⁴ Case R. versus Hungary no. 25390/94, case Z. versus Latvia no 58278/00.
- ¹⁵ "The Crucial Role in Administration of Criminal Justice", I. Recommendation Rec(2000)19 of the Committee of Ministers to the Member States on the Role of Public Prosecution in the Criminal Justice System, CoE, Strasbourg, 2000, Preamble and Article 5. See also Tak, J.P. Peter (ed.), *Tasks and Powers of the Prosecution Services in the EU Member States*, Nijmegen, Wolf Legal Publishers, 2004.
- ¹⁶ See Tóth, Mhály, *Einführung in das ungarische Strafrecht*, Passau,

¹⁷ See Decision 42/2005 CC on substitute civil action.

¹⁸ Recommendation Rec(2000)19 (footnote 20), *Explanatory Memorandum, Commentaries on Individual Recommendations, Functions of Public Prosecutors, Preamble*, paras 1 and 5 item D.

¹⁹ CCPE was set up by the CoMon its 935th meeting on 13 July 2005, see *Specific Terms of Reference of the Consultative Council of European Prosecutors*, [CMDel/Dec\(2005\)935/10.2/appendix13E /18 July 2005, CoE, Strasbourg](#).

²⁰ "Opinion" is the official form of communication of CCPE. See *Specific terms* (footnote 19), and *Terms of Reference of the CCPE for 2007–2008*, adopted on the 981st meeting of CoM, CCPE (2006) 04 rev final, CoE, Strasbourg, 2006.

²¹ *Opinion No. (2008) 3 of the Consultative Council of European Prosecutors on "Role of Public Prosecutors outside the Criminal Law Field"*, adopted by the CCPE at its 3rd plenary meeting, CCPE(2008)3, CoE, Strasbourg, 2008, paras I.4 and II.16. ("[21]" is the footnote of the citation enlisting the Member States concerned.)

²² The 4th Session of Conference of the Prosecutors General of Europe (hereinafter: CPGE) in Bratislava, the 5th CPGE in Celle ([www.coe.int/t/dg1/legalcooperation/ccpe/conferences/CPGE/2004/Conclusions_en.pdf](#)), the 8th meeting of the Co-ordinating Bureau of CPGE, the Reflection document (First Report) presented and discussed during the 6th Session of CPGE in Budapest (CPGE(2005)02) ([http://www.coe.int/t/dg1/cooperation/ccpe/conferences/cpge/2005/CPGE_2005_02docReflexionVarga_en.pdf](#)). The Report was presented at the Conference of European Prosecutors in Saint Petersburg ([http://www.coe.int/t/dg1/legalcooperation/ccpe/conferences/2008/4rev_2008_CCPE-Bu_reportVargas_en.pdf](#)).

²³ *Case PK v. Czech Republic no. 25326/03, Case K v. FYR Macedonia no. 443535/02, Case G v. FYR Macedonia no. 21510/03, Case M v. FYR Macedonia no. 22928/03, Case R v. Moldova no. 6267/02, Case A v. Moldova no. 40663/98, Case J v. Moldova no. 37431/02, Case B v. Moldova no. 74154/01, Case N GMBH v. Moldova no. 30303/03, Case M v. Moldova no. 37511/02, Case LM v. Portugal no. 15764/89, Case GA v. Portugal no. 48956/99, Case JP v. Portugal no. 13247/87, Case P v. Slovak Republic no. 10699/05.*

²⁴ See the comprehensive collection of texts by Vermeulen, Gert, *Essential Texts on International and European Criminal Law*, Antwerpen-Apeldoorn, Maklu, 2000.

²⁵ Agreement of 26 May 1989 between Member States of the European Communities on the simplification and modernization of methods of transmitting extradition requests; Convention of 10 March 1995 on simplified extradition procedure between Member States of the European Union, Council Act of 10 March, 1995, Official Journal C 78 of 30.03.1995; European Convention of 20 April 1959 on mutual assistance in criminal matters, European Convention of 15 May 1972 on the transfer of proceedings in criminal matters, Convention of 29 May on mutual assistance in criminal matters between the member States of the European Union, Council Act of 29 May 2005, OJ C 197 of 12.07.2005; Convention of 21 March 1983 on the transfer of sentenced persons, Agreement of 25 May 1987 on the application among the Member States of the European Communities of the Council of Europe Convention on the transfer of sentenced persons, Convention of 13 November 1991 between the Member States of the European Communities on the enforcement of foreign criminal sentences; European Convention of 28

May 1970 on the international validity of criminal judgments.

²⁶ *Treaty on European Union*, Official Journal C 191, 29 July 1992.

²⁷ European Convention of 13 December 1957 on extradition.

²⁸ Joint Action of 29 June 1998 on the Creation of a European Judicial Network, Official Journal L 191/1 of 07.07.1998.

²⁹ *Presidency conclusions*, Tampere European Council of 15–16 October 1999, paragraph IX, 46. See Vermeulen, *op. cit.*, p. 292.

³⁰ Delmas-Marty, Mireille.: *Combating Fraud – Necessity, Legitimacy and Feasibility of the Corpus Juris* (2000) 37, *Common Market Law Review*, p. 251.

³¹ Council Decision 2002/187/JHA of 28 February 2002, Official Journal L 63/1 of 06.03.2002, amended by Council Decision 2003/659/JHA of 18 June 2003, Official Journal L 245/44 of 29.09.2003 and Council Decision 2009/426/JHA of 16 December 2008, Official Journal L 138/14 of 04.06.2009.

³² Eurojust Annual Report 2008, pp. 57–68.

³³ Delmas-Marty, *op. cit.*

³⁴ *Green Paper on Criminal-Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor by the Commission of the European Communities*, COM (2001) 715 final, Brussels, 11.12.2001. *The Treaty of Lisbon gives a new perspective to the creation of this office (Article 2 para 67, amending the Treaty establishing the European Community with the new Article 69 E, which allows the Council to establish a European Public Prosecutor's Office from Eurojust).*

³⁵ See <http://www.coe.int/t/dg1/legalcooperation/ccpe/conferences/CPGE/>.

³⁶ Importance of opinion no. 4 was underlined by the fact that it is also opinion no. 12 of the Consultative Council of European Judges (CCJE). The joint opinion was based on the “Bordeaux declaration” (adopted on 19 November 2009) of the two judicial bodies (see <https://wcd.coe.int/>).

³⁷ See <https://wcd.coe.int/>.

³⁸ *European Judicial Systems*, Strasbourg: CEPEJ, CoE, 2008.

³⁹ See <http://www.euro-justice.com>.

⁴⁰ See <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1799637>.

⁴¹ See [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)040-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)040-e.pdf).

⁴² Terms of reference of the CJ-S-PR (Group of Specialists on the Role of Public Prosecutors Outside the Criminal Field) for 2011, see: www.coe.int/t/dghl/.

Chapter XII

The Commissioner for Fundamental Rights

András Zs. Varga

1. Ombudsmen in Hungary

The history of the ombudsman-like institutions in Hungary is rather short. The institution of ombudsmen in Hungary is based on the political consensus of the National Roundtable (1989).¹ The institution has been incorporated into the Constitution² since 1989 and an Act was adopted on the rules concerning the activities of the parliamentary commissioners in 1993. The first commissioners were elected in 1995.

Tracing the role of ombudsmen and the efficiency of their actions in the context of the provisions of the Constitution and political reality should be based on the overview of legal rules, the decisions of the Constitutional Court, and the analysis of the abstract characteristics of the institution.

The basic legal background for the Hungarian parliamentary commissioners is the 5th chapter of the Constitution (Article 32/B), which mentions two commissioners: the Parliamentary Commissioner for

Citizens' Rights and the Parliamentary Commissioner for the National and Ethnic Minorities' Rights. The two commissioners should be elected by the majority of at least two-thirds of the votes of the Members of the Parliament, and the Parliament may also elect special ombudsmen for the protection of individual constitutional rights.

Two other ombudsmen were elected in 1995. Their position is legitimated not directly by the Constitution but by special acts: the data protection and freedom of information commissioner was elected as prescribed in Act LXIII of 1992 for the protection of personal data and disclosure of data of public interest; the general deputy ombudsman was elected in conformity with Act LIX of 1993 by the parliamentary commissioner of human rights. By an amendment of this Act the position of the general deputy was abolished in 2007 and a new ombudsman with special competence – protection of the rights of the next generation – was elected.³

In the context of the Constitution the role of the parliamentary commissioners is to investigate or to have investigated infringements of constitutional rights (in general or in conformity with their special competence) if they have knowledge about them, and to initiate special or general measures for their remedy. The role of the informal procedure of the parliamentary commissioners to protect human rights is different from the role of the Constitutional Court in controlling legal acts, thus the primary character of the procedure of the parliamentary commissioners is not the formal protection of the Constitution. Since the duty of protecting the fundamental rights prescribed in the

Constitution is primary for every institution of the state, the role of the parliamentary commissioners is to complete and control the activity – including protection of rights – of other institutions.

However, there was a hidden form of “reception” of the institution, which is not unknown in the legal-literature of the countries of Central-Eastern Europe: the Russian Federation had explained the existence of the non-penal role of Russian prosecutors with this hidden reception.⁴ Its prosecution system – the “sovereign’s eye” – can be traced back to Peter I. And it is a generally known fact that Peter I performed a reform of the state institutions after his study-tour in other European countries. Among these countries we find Sweden and its institution of *lustitiekansler*– a “predecessor” of *lustitieombudsman* – set up in 1713.⁵ It is conceivable that the Soviet regime received the prosecution service of Peter I, and this model was “exported” after World War II to the countries in the sphere of interest of the USSR.

2. Role of ombudsmen

2.1. Role of ombudsmen within the instruments of control over public administration

Dissolution of boundaries between the fields of public and civil law (public services replacing the traditional tasks of public administration) rolls back the role of classical tools of legal redress since these tools do not apply in corporate

and private sphere. On the other hand the traditional civil lawsuit is long and expensive, thus it is not a perfect instrument for the quick elimination of the faults and mal-administrative acts of the executive power. Thus legal protection by ombudsman-like institutions is gaining more and more importance, and its focus is moving from the formal administrative decision-making to the less controlled activity of private companies working in the sphere of public services.⁶

Ombudsmen, due to the flexible nature of their proceedings, may concentrate on the relationship between an individual and a public or private body being effectively in a powerful position, leaving out of interest the origin of this power. Ombudsmen are helped by the stabilisation of the substantial content of rights by international documents.

The indeterminate scope of courts, whether their duty is to protect individual rights against the power of the State, or to rectify particular encroachments of rights,⁷ highlights the clear role of ombudsmen. In all those situations when an individual – standing in public-law relation directly with a body of the executive branch, or indirectly with a private body ensuring public services and getting its power from the executive – has his or her rights infringed upon, and legal redress could be excluded or accessible only with unreasonable cost or effort, the individual has a sole support: the ombudsman. Consequently, although the institution of ombudsmen is not considered to be an unavoidable function of the constitutional state (by theoretical thinking),⁸ it is necessary in the complex public-law relations of the twenty-first century.

2.2. Efficiency of ombudsmen-actions

This first question regarding efficiency is of methodological nature. The Hungarian ombudsmen have year after year been publishing splendid statistics presenting the number and nature of claims registered by their office, the methods of investigation and measures of remedy applied. These statistics, also concerning the acceptance of the recommendations by the addressed institutions, are commented on in their annual reports submitted to the Parliament. From the comments of the annual reports – discussed in the Parliament and its committees – conclusions can emerge on the effectiveness of certain ombudsman actions.

In order to decide whether the activity of the ombudsmen has achieved the aim of the institution (to provide effective contribution to the protection of human rights when state powers are exercised by different institutions and officers) or fallen short of it, the main characteristics of the ombudsman-like institutions should be taken into account.

2.3. Common features of European ombudsman-like institutions

European legal literature defines ombudsman-like institutions by their basic characteristics (irrespective of the special forms of their legal regulations in the different countries). The first group of characteristics consists of independence and mandate from the Parliament. The second group regards the criteria of proceeding: the control of public bodies and those providing public service,

as the aim of the institution is to protect the personal rights of individuals. In fulfilling their duties the ombudsmen must consider the legality, reasonableness and due process of the controlled activity and they are empowered with a large scale of inquiry-instruments and rights. Finally the special measures give the third group of characteristics: ombudsmen cannot emit legally binding decisions, but offer criticism and recommendations (in special cases ombudsmen also may initiate criminal, disciplinary, administrative and law-making proceedings of the competent authorities).

In 1985 the Committee of Ministers of the Council of Europe welcomed the development of the institution of ombudsmen, because one of the main aims of the Council is the maintenance and further realisation of human rights and fundamental freedoms and considering that, having regard to the complexities of modern administration, it is desirable to supplement the usual procedures of judicial control. The Council recommended the governments of Member States:

- a. consider the possibility of appointing an Ombudsman at national, regional or local levels or for specific areas of public administration;
- b. consider empowering the Ombudsman, where this is not already the case, to give particular consideration, within his general competence, to the human rights matters under his scrutiny and, if not incompatible with national legislation, to initiate investigations and to give opinions when questions of human rights are involved;

- c. consider extending and strengthening the powers of the Ombudsman in other ways so as to encourage the effective observance of human rights and fundamental freedoms in the functioning of the administration.⁹

The consequences of Recommendation 13 are as follows:

- ombudsmen should be appointed at national, regional or local levels, or for specific areas of public administration;
- one of the basic functions of the ombudsmen should be the protection of human rights and fundamental freedoms;
- the recommended instrument of the ombudsmen should be the investigation;
- the ombudsmen should investigate the functioning of the public administration.

3. Efficiency

3.1. Correlation of the efficiency of ombudsmen's actions with the nature of the institution

If the addressee of the recommendation of the ombudsman does not agree and rejects the proposal, this specific proceeding is evidently non-efficient. In the opposite case, it comes from the nature of recommendation (non-remedy) that it is the addressed body and not the ombudsman who performs the certain act redressing the violation of the

rights or interests of the claimant. Consequently, if the addressed body accepts the recommendation, the redress is facilitated by the ombudsman, but it is directly “given” by the addressed body, which in many cases is exactly the same body that had previously committed the violation of right or interest. If the contribution of the ombudsman to redress is only a kind of mediation, its role remains even more obscure.

Since the constitutional goal of the institution of ombudsmen is “to have redressed” the violation of rights and the prevention of subsequent violations, the certain effect of their proceeding is of major relevance and not the person or body to whom this effect is attributed. Although, if the efficiency of ombudsmen is challenged, the last question of attribution is not without importance.

It also comes from the nature of ombudsmen’s proceedings (non-remedy) that they are more efficient in situations or cases where all the instruments of legal remedy were inefficient or cannot be applied for.

3.2. Possible fields of activity, where growth of efficiency may be expected

One touchstone of the new tendencies in administration known as new public management is that in more and more situations tasks of public authorities are not managed directly by themselves, only the methods of solution are regulated and the immediate performance is “left” to private agencies, companies or other institutions.¹⁰ As a

consequence in certain but very frequent situations (like parking restrictions and charging in cities and other great localities) the different rules of (supremative) public law and those of (non-supremative) private law are to be used jointly.

The blending (amalgamation) of public and private law rules leads to an inconvenient outcome. The private persons concerned lose the (public-law) protection they would have in administrative procedures (principle of confidence – presumption of proceeding lawful, *onus probandi* on authorities, obligation of authorities to have a clear statement of facts, minute rules of procedure, etc.). At the same time the relationship between the private persons concerned and the private agencies fulfilling the (formerly public) task is only apparently equal. The agency performing the task is usually not only in a monopolistic position, but all the features of the legal relationship between the two parties are regulated by law. In such a situation even the possible evidence is determined.

Private persons who lost public-law protection and who at the same time cannot exercise their rights freely. This situation often occurs when public services and utilities are availed of and it is decisive in the complexity of legal relations in connection with traffic administration, taxation or consumer protection.

These are fields of public activity where the efficiency of ombudsmen is expected to grow since the classical (formal) instruments of legal remedy are not applicable in the cases concerned, while civil litigation being too long and expensive is also inappropriate to solve the violations,

which, in fact, are usually minor but very disappointing ones.

4. The new approach of the Basic Law

At first glance the new Basic Law of Hungary does not seem to have affected the functions, powers, and rights of the ombudsmen while the organisation (number of ombudsmen), the level of legal regulation and guarantees of independence were reconsidered. The commissioner henceforward has the duty to examine or to have examined abuses of fundamental rights of which he or she becomes aware and to propose general or special measures for their remedy.

4.1. Ombudsmen – ombudsman

The most noticeable change is the reducing of the ombudsmen: the former position of the specialised autonomous commissioners is transformed as deputies of the single ombudsman, the commissioner for fundamental rights with general competence; while the position of commissioner for data protection will be abolished and a new, independent administrative body will be entrusted with the majority of its functions.

Neither the text of the Basic Law nor the ministerial explanatory memorandum of its former draft gives the reason for the changes. It indicates that within the new approach of the Basic Law there are no specialised ombudsmen and only one commissioner is elected, who fulfils his or her goals in co-operation with his or her

deputies also elected by the Parliament. In the explanatory memorandum regarding data protection control of the enforcement of the right to protection of personal data and of freedom of information is the duty of an independent authority instead of the former data commissioner.

Fortunately, Act CXI on the commissioner of fundamental rights adopted by the Parliament on 15 July 2011– in conformity with the Basic Law prescribing that detailed regulations shall be given by a special act – refines the position of the deputies. Article 3 of this Act clarifies that the deputies of the commissioner are not simply his or her vicars, but have their own competencies. The commissioner has to pay special attention to the interests of the next generation, the rights of minorities living in Hungary, the rights of vulnerable social groups and those of children. The first two designed competencies are performed in co-operation with the two deputies, who can sign official documents and who have to inform the commissioner about their findings, and can also initiate *ex officio* proceedings or present a motion to the Constitutional Court for the commissioner. In the last two situations the commissioner has to carry out the suggestions of the deputies or to explain to the Parliament in his or her annual report the reasons for not doing so. Efficiency of the deputies is guaranteed by their own staff granted within the new Act.

Although the deputies as civil servants will wear the rank of state secretary instead of the former rank of minister, their position is mostly changeless. Election from specialists for a six-year term, and rules of incompatibility with other

official functions or labour relations (with the exception of teaching, performing arts, scientific or literary activity), gives them a certain degree of independence limited but not insignificant even in their relationship with the commissioner. A transitional rule of the 2011 Act assures the position of the acting special commissioners: they are keeping their mandate as deputies.

The situation is less simple in the case of the former data commissioner. Although the institution of data commissioner was established as a special ombudsman in the Act LXIII of 1992 on the Protection of Personal Data and Disclosure of Data of Public Interest, more and more powers were given by several amendments during the years. The original powers were to control the fulfilment of law regarding data protection and freedom of information, examination of complaints and keeping the registry of data protection. The data commissioner was empowered to block, erase or destroy any illegal management of data since 1 January 2004. Since 1999 he or she had a similar right to initiate annulment of special data-qualifications in the case of state secrets or official secrets. Disposition of the data commissioner could be challenged in court proceedings (like any supervision of administrative acts). The last amendment of the Act came into effect on 1 January 2011, which ruled that the data commissioner has to apply prescriptions of the Administrative Procedure Act when he or she decides on illegal data management.

Amendments to the Act on the Protection of Personal Data and Disclosure of Data of Public Interest had transformed step by step the initial ombudsman-like institution to a

specialised administrative body (or state authority). The new Basic Law completed this process when it abolished the institution of data commissioner and entrusted a new administrative body with the tasks of data protection.

Act CXII of 2011 on the right to information-autonomy and freedom of information was also adopted by the Parliament on 15 July 2011 to meet the requirement of the Basic Law prescribing that a cardinal statute should regulate the right to data protection and freedom of information. The National Authority for Data Protection and Freedom of Information (NADI), led by the president, is independent, subjected only to the law, may not be instructed by any other public body and may be given new tasks or functions only by an act of the Parliament. The President of NADI, who as a civil servant wears the rank of minister, should be appointed by the president of the republic on the proposal of the prime minister for a nine-year term. Rules of appointment and those of incompatibility are similar to the former data commissioner, and NADI practically inherits all of his or her tasks and procedural guarantees.

On the other hand, NADI is a public body that is part of the executive. Consequently its activity is not exempt from the jurisdiction of the commissioner for fundamental rights. Thus the level of protection could be higher than in previous years.

4.2. Parliamentary or not? Further new dimensions of the regulation

The list of new aspects of the Basic Law can begin with the

first clause of the text regarding the commissioner for fundamental rights who “shall perform activities protecting the fundamental rights; anyone may initiate the Commissioner’s procedure”. The translation – used by the Venice Commission and in this volume – does not perfectly reflect the official (Hungarian) rule. A more precise translation could be “fulfils activity of protection of rights”. This latest translation does not seem to be correct in English, however, the Hungarian clause is similarly strange and not only in grammatical approach.

One novelty of the Basic Law is the use of general introductory clauses in connection with several institutions¹¹ (in the Constitution such general clauses were applied more rarely¹²). Certain ambiguities are raised due to this new “style” of coding. There is no doubt that in the case of public-law institutions the rules of behaviour are those fixing the certain competences or jurisdiction, determining the organisation and legal position of the head of office (election or appointment, etc.) and regulating the special relations with other public-law bodies (supervision, co-operation etc.). Based on these effective legal rules theoretical conclusions may be drawn, some of which may lead to the scientific identity of an institution (e.g. the public-law body, which is independent and empowered to make final decisions in legal quarrels, or regarding the responsibility of a person charged with committing a crime, a situation identified in theoretical legal thinking as belonging to the judicial branch of state power). It is important to underline that theoretical conclusions are based on legal rules and not that the conclusion-type identity clauses are the sources of legal regulations. If the

genuine legal rules are mixed with theoretical dogma, difficulties may occur during the interpretation of the text. This ambiguity can be recognised regarding the commissioner for fundamental rights. The official wording of Basic Law identifies him or her as fulfilling the “activity of protection of rights” followed by a genuine rule of competence (power): “examine or cause to examine abuses of fundamental rights”; and a genuine rule of action: “propose general or special measures for their remedy”. The emerging question is the extra-regulation given by the introductory clause (“protection of rights”) to the rule of competence (“examination of abuses of rights and proposals for remedy”). One is not far from the truth if convinced that hardly any extra-regulation is given by the introductory clause. However it is incorporated in the text, consequently in the future situations could arise where unexpected extra-regulations could be rendered from the general clause.

At the same time an important element of denomination is abandoned in the text of the Basic Law. The former ombudsmen – with the exception of the data commissioner – were officially called parliamentary commissioners. The new commissioner for fundamental rights is not entitled anymore to the “parliamentary” epithet. Since the commissioner and his or her deputies are henceforward elected with a qualified majority of the Parliament and have to submit an annual report, the change is more formal than substantial.

Within the new structure of state institutions, importance of the commissioner is expected to increase due to the

changes of the procedural rules of the Constitutional Court. The main form of proceeding of the Court from 2012 will be the constitutional complaint submitted by persons affected by laws supposed to be unconstitutional (“on the case proceeding”). Contrary to the situation under the Constitution where the *actio popularis* was the most frequent *causa* of proceeding, in the framework of the new Basic Law the “abstract” motion is reserved for very few: the government, one-fourth (perhaps about fifty) Members of the Parliament and the commissioner, who will be the only dignitaries of the State entrusted personally with this right. Under the Constitution any natural or legal person had the same opportunity.

5. Doubts and their solutions

The Venice Commission formulated several comments regarding the rules on the commissioner. One of them concerned the transformation of the position of the former data commissioner into a new public authority. The Venice Commission could not appreciate the new rules, hence the new cardinal statute was not drafted at that time.¹³ Consequently, the Venice Commission had to restrain its opinion to general topics. It was underlined that

states enjoy a wide margin of appreciation with regard to such institutional arrangements, which depend to a large extent on the domestic specific situation. Moreover, one single ombudsperson or multiple ombudspersons may be more appropriate at different stages of the democratic evolution of

It is understood that in the majority of European states the ombudsman “family” consists of more than one single person. At the same time the exact number of ombudsman-like institutions, and moreover the reasons for creating new ones, is very different. In addition, the practice of electing the same person to different ombudsman positions is not unheard of, as happened with the last British parliamentary commissioner, who acted as health commissioner at the same time.¹⁵

Hence there is no substantial argument behind the comment of the Commission, the admonition is more important: the existing level of protection of rights should be maintained irrespective of the number of ombudsmen. This also applies to rights of minorities, of the next generation and to data protection and freedom of information.¹⁶

While awaiting the first year’s activity of the commissioner after the new Basic Law enters in force to be completed, some practical and theoretical considerations may be reassuring. The practical ones are the strong similarities between the specialised parliamentary commissioners of the interim Constitution and the deputy commissioners of the Basic Law, and those between the data commissioner and (the president of) NADI.

The theoretical argument is based on the generally accepted principle that fundamental rights and freedoms are more than separate elements of a broader or tighter enlistment, they form a coherent system, and the specific rights and freedoms have to be interpreted and enforced by

their mutual consideration.¹⁷ If we apply this principle to the ombudsmen, we should conclude that the superficial view that more ombudsmen (protecting the specific rights) lead to a stronger protection of rights is not necessarily true.

The specific rights are not *a priori* factors of the legal system, they have a common characteristic: they belong to the same person. If the role of these rights is to protect the equal autonomy of persons, they have to be protected at the same time. On the other hand, the rights and freedoms are manifested in legal rules, consequently they can be interpreted and protected only in interpersonal situations, within legal relations.

The task of the specialised ombudsmen is, of course, protection of the specific rights within his or her perspective. However, this separation of protection makes inevitable the lack of holistic, interdependent interpretation of the different rights and freedoms. The incoherent interpretation may easily lead to rivalry between ombudsmen. Expansion of the ombudsman “family” does not necessarily result in a more effective protection of rights. Their proceedings are guided by very few rules – their investigations are not formal but “personal” ones. Presumably it is not an accidental phenomenon that within the structure of courts composed by judges with independent jurisdiction the Supreme Courts have the right to pronounce the final decision in a case including the compulsory uniform interpretation of law to the lower courts. Division of tasks between the commissioner for fundamental rights and his or her deputies seems to have the same aim.

The Hungarian ombudsmen of the Constitution were elected for six years, and might observe all the public and public-service bodies. The instruments of investigation – based on a claim or initiated *ex officio* – were extremely wide, any file might be inspected and any officer might be questioned. These characteristics similarly belong to the commissioner for fundamental rights and his or her deputies under the rule of the new Basic Law.

Notes

- ¹ Grudzinska, Gross (ed.), *Constitutionalism in East Central Europe*, Bratislava, Czecho-Slovak Committee of the European Cultural Foundation, 1994.
- ² See Jakab, András, *The Republic of Hungary* in Rüdiger Wolfrum, and Rainer Grote (eds), *Constitutions of the Countries of the World* (issue 2), Oxford, OUP, 2008, p. 46.
- ³ Dezsű, Márta et al., *Constitutional Law in Hungary*, The Netherlands, Kluwer Law International, 2010, pp. 210–213.
- ⁴ See CCPE-Bu (2008) 4rev, *Report on the Role of Public Prosecutors outside the Criminal Field*, (http://www.coe.int/t/dghl/cooperation/ccpe/conferences/2008/4rev_2008_CCPE-Bu_reportVargas_en.pdf).
- ⁵ See Al-Wahab, Ibrahim, *The Swedish Institution of Ombudsman*, Stockholm, Liber Förlag, 1979, p. 20; and Weslander, Bengt, *The Parliamentary Ombudsman in Sweden*, The Bank of Sweden Tercentenary Foundation and Gidlunds Bokförlag, 1994, pp. 14–16.
- ⁶ Zielinski, Tadeusz, *The Ombudsman — Possibilities and Delimitations for Action*, Warsaw, Biuro Rzecznika Praw Obywatelskich, 1994.
- ⁷ Miles, Joana, *Standing in a Multi-Layered Constitution* in Bamforth, Nicholas, and Leyland, Peter (eds), *Public Law in a Multi-Layered Constitution*, Oxford and Portland (OR, US), Hart Publishing, 2003, pp. 407–412.
- ⁸ See *Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons: A Handbook* (hereafter: *Handbook*), Strasbourg, Council of Europe, Directorate of Legal Affairs, 1996, p. 34.

⁹ Recommendation No. R (85) 13 of the institution of the Ombudsman (Adopted by the Committee of Ministers on 23 September 1985 at the 388th meeting of the Ministers' Deputies).

¹⁰ See Pollitt, Christopher; van Thiel, Sandra; and Homburg, Vincent (eds), *New Public Management in Europe: Adaptation and Alternatives*, New York, Palgrave Macmillan, 2007; and Craig, Paul, and Tomkins, Adam (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective*, Oxford, Oxford University Press, 2006; Loughlin, Martin, *Constitutional Law: the Third Order of the Political* in Bamforth, *op. cit.*, pp. 27–52.

¹¹ Article 1: "Hungary's supreme body for popular representation shall be the Parliament." Article 15: "The Government shall be the supreme organ of the executive branch..." Article 24: "The Constitutional Court shall be the supreme organ for the protection of the Basic Law." Article 25: "The judiciary shall perform jurisdiction." Article 41: "The National Bank of Hungary shall be the central bank of Hungary..."

¹² E.g. in the case of the president.

¹³ Opinion on the New Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17–18 June 2011), para 114.

¹⁴ *Ibid.*, item 115. The Venice Commission based this comment to its former opinion regarding the ombudsman of Kazakhstan. See CDL-AD(2007)020, Opinion on the possible reform of the Ombudsman Institution in Kazakhstan, Venice, 1–2 June 2007, item 25.

¹⁵ See Kucsko-Stadlmayer, Gabriele, *Europäische Ombudsmann-Institutionen*, Wien, Springer Verlag KG, 2008; Caiden, Gerald (ed.), *International Handbook of the Ombudsman: Evolution and Present Function and Country Surveys*, Westport (CN, US), Greenwood Press, 1983; Roy Gregory, *The Ombudsman Observed* in C. Reif, Linda (ed.): *The International Ombudsman*, vol. 1, Kluwer Law International, 1997; Matscher, Franz (ed.): *Ombudsman in Europe*, Kehl-Strasbourg-Arlington, N.P. Engel, 1994.

¹⁶ *Op. cit.* footnote 14, see CDL-AD(2007)020, items 82 and 115.

¹⁷ Dworkin, Ronald, *The Center Holds!*, *New York Review of Books*, 1992; and Dworkin, Ronald, *Freedom's Law: The Moral Reading of the American Constitution*, Cambridge (MA, US), Harvard University Press, 1996.

Chapter XIII

Local Government

András Patyi

1. The constitutional status of local governments in the Constitution

Regulations of the Basic Law concerning local government can be understood and interpreted only in comparison with the regulations of the Constitution.¹

Local governments are of great significance in the Constitution. An entire chapter, Chapter IX, provides detailed regulations for them, giving more detail than for the other significant area of public administration (state administration – or governmental agencies). According to the provisions, local governments are decentralised government entities, named in the Constitution, established by a separate Act of Parliament (a two-thirds majority, under the Basic Law: cardinal statute). As compared to the central bodies, they possess autonomy defined in the Constitution and protected by the law. The constituents address the local public affairs based on their collective

right to local self-governance. Local affairs relate to the supply of local residents to the public services, the exercise of self-governance-type public power as well as to the creation of the organisational, personal and financial conditions related to all this.²

The essential element of the local-government system is the actual enforcement of local-government rights defined by the Constitution: to elect a board of members capable of practicing these rights effectively and its operation as based on these acts. According to the Constitutional Court:

the Act shall provide for all types of local governments the practice of the basic rights laid down in Article 44/A para 1 in the Constitution, namely: eligible voters exercise the right to local government through the representative body that they elect and by way of local referendum.³

According to the conception of the Constitutional Court the mentioned collective constitutional right is a right of fundamental importance communities of voters are entitled to, meaning as well the constitutional source of the local-government rights.⁴

While the subjects of the collective constitutional right of local self-governance are the communities of voters (the local "population" in question), the subjects of the local-government rights are the elected local boards (i.e. local councils). According to Article 43 para 1 of the Constitution

these local-government rights shall be equal, but their duties may differ. The rights and duties of local governments shall be determined by statute. It is important to stress that it is the Constitution itself that ensures judicial guarantees for the board of representatives:

The lawful exercise of the powers of local government is afforded the legal protection of the courts and any local government may appeal to the Constitutional Court for the protection of its rights.⁵

The Constitutional Court agreed: the operating principle of the local government is the protection by the judiciary.⁶ Judicial proceedings mean constitutional guarantee; Article 43 para 2 of the Constitution and the right to access to courts in Article 57 para 1 are interrelated. Article 43 para 2 deals with the judicial protection regarding the exercise of the responsibilities and powers of local governments, as a particular issue under Article 57. Hence, in case a public-administration activity becomes a local-government task that is based on statute, throughout the organisation of the completion of the task the decisions made by local governments (boards of representatives and their bodies), the possible disclaimers, the signed contracts, and other legal instruments used count as practice of the scope of duties of local governments related to the required function. Provision of Article 43 para 2 covers this.⁷

The local-government rights (not identical with the collective constitutional right to local self-governance) are listed in the

Constitution as independent powers of the local board of representatives⁸ and are referred to in two sections as fundamental rights of local self-governments.⁹ The Constitutional Court states that the rights regulated in Article 44/A of the Constitution ensure such powers and responsibilities of the local board of representatives which constitute the basis of the constitutional guarantee to ensure autonomy within the local governments' activities. The fundamental rights provide constitutional guarantee for the local governments primarily against the governmental and central administration interference. The fundamental rights regulated in the Constitution restrict the legislator; it cannot establish restrictions to such an extent that would infringe the basic content of a certain local-governmental fundamental right, or to result in its actual withdrawal. These groups of scopes of duties are intended to guarantee the autonomy of a public body of the type amongst the state organs exercising public power. This way, the Constitution does not regard the local-government rights enjoying fundamental-rights protection – compared with fundamental rights regulated in Chapter XII – that ensures the constitutional guarantee of the autonomy of the individuals. Therefore, it is not a constitutional requirement towards the restrictions on the local-government rights to be introduced necessarily and proportionally in order to enforce a constitutional right or achieve a constitutional target.¹⁰ In other words, the constitutional test of “necessity and proportionality” does not refer to these local-government rights, even if they are expressly addressed as

“fundamental”

According to the regulations of the Constitution in Article 44/A the central government or agencies of the central administration cannot intervene either with normative or individual decisions in the exercise of autonomy regarding the self-governance management or regulatory issues to which local governments are entitled.¹¹

Additionally, the Constitution regulates itself in most of the questions mentioned in the European Charter of Local Self-Government. Whereas the Charter provides for an option between the Constitution and a statute (e.g. in Article 4: “The basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute”), the Hungarian law “chose” the constitutional level of regulation.¹²

2. General approach – the Basic Law as the framework of the local self-government system

Literally, the new regulation of the local governments in the Basic Law is not entirely new. Many of the rules are the same or almost the same as before. However, the leading philosophy or conception behind them is fundamentally different, thus the new Basic Law establishes the basis and the frame of another sort of local self-government system.

These become visible especially in those rulings that are

absent when compared to the Constitution. The Constitution built the regulation of the local self-government system on the collective constitutional right to self-governance, in which not only the subject and the content of the right was fixed, but the levels of the self-government (municipality, city, county, capital and its districts) as well. As mentioned before, the board of representatives had local-government rights (also called “fundamental”) to implement this collective right. And – although the protection of these (fundamental) local governmental rights by the Constitutional Court was often not strong enough – only two-thirds majority statutes could restrict these rights. The legitimate exercise of the self-governmental powers prescribed by law was protected by the court and the limitation of this was proved to be unconstitutional (see Decision 42/2008 CC).

These rules have not been incorporated into the new regulations. The Basic Law focuses on the management of local public affairs and on the exercise of local public powers, instead of the regulation of the legal protection against the Government and the central public administration (moreover in some cases against the Parliament), while the separation of the local self-governmental and the state administration still predominates. For example, although the Government is the supreme body of the whole public administration (it also includes the local self-governments), it can “only” establish public administrative bodies according to statutes.¹³ The

elected mayor and the president of the county board of representatives – beyond their self-governmental duties – may exceptionally discharge public administrative duties and powers, but for fulfilling this there must be a statute or a Government decree based on statute. Therefore, the Government in its substantive competence is not allowed (alone) to assign public powers (and duties) to the elected leaders of the local government. By this sort of assignment of administrative powers the Basic Law shows the strong and prevailing separation of the local self-governments from the Government. With this solution the Basic Law made obvious, that – based on the separation of the local self-governments from the Government – a mandate of the Basic Law is essential to assign public administrative power to the mayor, whose autonomy from the Government and from the public administration is protected by the Basic Law itself.¹⁴

The Basic Law explicitly states that local governments and the state organs will mutually co-operate in the interest of achieving community objectives.¹⁵ All of these do not mean that the powers of local self-governments are depleted by any means of law, but – in my opinion – it strengthens the operation-oriented nature of the new constitutional regulation. Although they are not codified as rights (even less as fundamental ones), the essential fields of self-governmental autonomy can be found in Article 36 para 1 items d) – l). In strong connection with these, the third sentence of Article 34 para 1 states: “To perform its tasks

and competences, the local government shall be entitled to financial support from the budget or from other sources commensurate to the scope of such tasks.” Since the main components of autonomy are determined by Basic Law, those cannot be revoked even by a statute, although the autonomy has not got any separate legal protection, at least determined by the Basic Law itself.¹⁶

It is a fact that the new Basic Law does not determine the territorial levels on which self-governments should operate. The territorial subdivision of the state is stated in Article F among the general provisions instead of self-governmental regulations (unlike in the Constitution). Article F paras 1–2 declare that the capital of the country is Budapest and that the territory of Hungary shall be divided into counties, cities and municipalities, and districts may be formed in cities.¹⁷ Consequently forming districts in the capital is not a constitutional obligation anymore, neither is the establishment of the local governments of capital districts.

It also refers to the change in the principles of the system’s operation: the Basic Law mentions “legal supervision” instead of “legal control” in connection with the local governments. Supervision means a more regular and stronger intervention from the Government than control,¹⁸ while the Parliament invariably bears the power of dissolution. According to Article 1 para2 item g the Parliament may dissolve representative bodies functioning in breach of the Basic Law, which is repeated in part in Article 35 para5. Based on this – according to the

Constitution¹⁹ – the Parliament dissolves representative bodies functioning in breach of the Basic Law proposed by the Government, but the Government may submit its proposal only after requesting the opinion of the Constitutional Court. Based on the same regulation, the practice of the Constitutional Court regarding dissolution of representative bodies is still normative.²⁰

To adjudge generally the situation of local governments in the Basic Law (their status in public law) one has to consider the rules written in Article T as well. Based on this, the decree of local government is a legal act (a “law”) in which a generally binding rule of conduct may be determined. The local governments are organisations that have law-making (regulative) competence based on the Basic Law,²¹ although a cardinal statute may determine the rule of promulgation of local government decrees²² differently, namely that these decrees do not have to be published in the (national) Official Journal.

Since the local governments have exercised public power in their independent administrative competence²³ while managing public affairs,²⁴ one has to definitely consider them as public “authorities”. Therefore, they have to administer public affairs within their jurisdiction impartially, fairly and within a reasonable time during their operation, and according to the legal regulations they must justify their decisions. Additionally, the local governments are liable for any unlawful damages suffered by any person caused by them (as authorities) performing their public duties.²⁵

Exercising local public power the essential function is any person's fundamental right to present – individually or jointly with others – written petitions, complaints or suggestions to them, similar to any public authority.²⁶

3. The legal status and autonomy of local governments (powers, responsibilities, authority)

The Basic Law does not define the different types of local governments; it only names one particular type, the county. (Article 33 para2 explicitly names the county representative body, mentioning no other types of local-government authorities.) As the above-mentioned Article F (on the territorial subdivisions) is not directly linked with the rules laid down in Article 31 (definition of local governments), the cardinal statute on the fundamental rules pertaining to local governments (Act on Local Self-Governments) – see Article 31 para3 – will have to determine the different levels and even the different fields of operation of local governments. In other words, according to the Basic Law, it is not obligatory to maintain a local government with full scope of powers in every single municipality, but it is not prohibited to do so either. Correspondingly, it is not mandatory under the Basic Law to establish capital districts with full scope of local-governmental powers (unlike under the Constitution). Considering that the establishment and functioning of local governments is not based on the fundamental collective

right of self-governance granted to a community of voters living in a particular geographical area, this right is not violated when there is no operating representative body in a given municipality. The lack of an operating representative body – caused by any reason – does not violate this right, but may violate the rules of the Basic Law defining public powers.

According to the Basic Law, the essence of local self-governments is to manage public affairs and to exercise public authority (they have to function in order to fulfil this), since this is the reason why local governments shall exist.²⁷ The local referendum is not the (seldom-used) alternative method of exercising the collective right to local self-governance anymore, but a method of deciding each case within the competence of the local government, as it is possible to hold a local referendum on such cases – as set forth in law.²⁸ The Basic Law does not even remotely define the exact meaning of managing local public affairs. Practically, local public affairs mean the mandatory duties and powers (authorities) of local governments.²⁹ The Basic Law does not regulate these public powers – or public affairs – in an entirely systematic method, in other words, the closely interconnected regulations do not appear in the same parts of the Basic Law.

Regarding local public affairs, it is most important to emphasise the role of statutes. Local governments shall manage local public affairs within the frameworks defined in statutes.³⁰ At first glance, this might look limiting, but this

exact rule removes the local governments from the public administration controlled by the Government, as not “legal norms” in general but only the statutes may limit or determine the management of local public affairs. This “statute level” protection is defined by the following rules: local governments may issue local-government decrees to regulate issues of local society not regulated by statute (original legislation), and on the basis of a mandate stipulated by statute³¹ (delegated legislation); only a statute may set forth mandatory duties (powers) and authority for the local government.³²

These rules and limits on local public affairs set forth in statutes will only be considered constitutional as long as they do not cause the full revocation of autonomy on a given topic. The maintenance of the local governments’ substantive autonomy is a fundamental condition for the existence of autonomous organisations.

According to the Basic Law, there are two means of administering local public affairs. The local governments issue decrees (generally binding decisions) and make resolutions (particular decisions).³³ The local body performs “independent administration”, whichever method the local government should choose,³⁴ to be considered the general essence of local governance. The meaning of the autonomy is that the local government makes its decisions (decrees or resolutions) independently, without previous or posterior assent of any other organisation, and that it cannot be instructed while reaching this decision. As the

Basic Law itself regulates this autonomy, it can only be limited – at any level – by the Basic Law. The rule setting forth that the statute may require the approval of the Government for a local government to take out a loan – the size of which is defined by law – or to undertake any other obligation could be considered as an example of limiting the autonomous administration.³⁵ Another example of limiting the autonomous (or independent) administration is the above-mentioned obligation for co-operation (the local government and the state organs will mutually co-operate in the interest of achieving community or public objectives)³⁶ and the rule setting forth that a statute may order that mandatory local-government duties be performed in a partnership³⁷ – thus limiting the right to free association.

The Basic Law defines numerous groups of matters as well, as subjects of “managing the local public matters”, i.e. defining the most important public matters themselves. Accordingly, during the fulfilment of its tasks, the local government either issues decrees or makes resolutions (may be both), but in either case does so independently. These subjects fill the independence of local government with content.

The fundamental element of the autonomy of the local governments is the right to regulate its functioning and organisational structure (autonomy of organisation).³⁸ At first glance the Basic Law allows more independence in this than the Constitution, because it provides less local government bodies (representative body, mayor, county

chair, committee, office – not to mention the deputy chair and the notary). However, this autonomy will be limited further on not only through the cardinal statute, but could be restricted by other (normal) statutes as well. The right to regulate the organs and its inner structure would be exercised within these frames and in harmony with the decisions taken so far by the Constitutional Court.³⁹

It is deemed as a fundamental condition of the self-governance (*conditio sine qua non*) to determinate the types and rates of local taxes, more precisely, the autonomous right of taxation.⁴⁰ This regulation essentially divides the right of taxation between the Parliament and the local government,⁴¹ giving authorisation to ensure the necessary resources to cover expenses related to their duties and to their scope of authority. It is important to emphasise that it is only the determination of the framework that falls in the competency of the Parliament, as the “decision is made within a legal framework” about this as well. The right of taxation, the specification of the regulations of obligatory tax payments, the introduction of each tax, the determination of scale of exemptions within the frame, remains within the scope of autonomy of the representative body.⁴²

The power (and therefore the right) of taxation could not lead to full economic autonomy, even if the local government had the right to act independently with the property and the financial resources. The Basic Law considers this autonomous economic management as a

local public matter and ensures it by multiple connecting regulations. It states that the local government (or by Article 33 para1, the representative body) with respect to local government assets exercise proprietary rights,⁴³ i.e. while property of the local government is part of the public property and serves the performance of tasks,⁴⁴ the practice of the right of the owner does not depend on another body, it is not the Government or any of its offices that decides about it, but the elected representative body.

The property and its subjects (assets) mean only the conditions of management (the statics); the management itself forms the dynamics. The Basic Law ensures the autonomy of the management – within the framework – by ensuring the local government sets its own budget.⁴⁵ The peculiar local budget is only an apparent barrier above the management, as its enactment also falls into the autonomy. As the management-based budget does not necessarily mean the growth of property as well, the Basic Law determines separately that the local government (the representative body) might carry on entrepreneurial activities, on the condition that it may not endanger the completion of its mandatory obligations and only those properties and incomes might be used for this (enterprise) that are delegated to this.⁴⁶ The rule to take out a loan and to undertake an obligation is also a restriction of autonomy in management by the Basic Law.

The economic autonomy of the local government is not on its own behalf: the local government is not a corporation

and not a profit-oriented organisation. The economic autonomy should serve performance of duties of the local government. As only legislation may set duties or scope of authority for them, it is essential that their fulfilment should be granted by the legislator. This is based on the rule of the Basic Law similar to the provision of the Constitution, according to which the local government is entitled to budgetary or other asset support commensurate with their obligatory duties and scope of authority.⁴⁷

The Basic Law does not separately identify the local governments as the community of voters. One of the significant elements of the local governance is that the bodies of local governments are established through elections. The Basic Law states that the members of the local representative bodies and the mayors are elected by the citizens on the basis of universal and equal suffrage, with direct and secret ballot, at elections articulating the free will of the people in a manner defined by cardinal (qualified majority) statute and for five years.⁴⁸ The body that is elected to a determined area needs a symbol that expresses political and historical unity. The Basic Law, by keeping the existing rules, provides that the local government (representative body) may create symbols and emblems relating to the local government, and may establish local honours and titles.⁴⁹

Co-operation between bodies of public administration is regulated by legislation and usually they are not the ones who can decide about the forms of co-operation and the

bodies with whom to co-operate.

The elected local government bodies, however represent a political community. The strength of this community and the success of the local government may depend on how they are able to display their interest. The Basic Law creates an opportunity for this, stating that the local government may freely associate with other local representative bodies, may create local-government associations for the representation of their interests, may co-operate with the local governments of other countries and may be a member of international organisations of local governments.⁵⁰ As representative of the local community of voters, the local government may be the subject of a specific right to petition, while practising public power that the people may lodge complaint to. According to the Basic Law it may request information from authorities with jurisdiction, initiate a decision, or articulate an opinion.⁵¹

4. The delegated legislation and omission

Beyond the right of taxation, the second fundamental condition (*conditio sine qua non*) of autonomous self-governance is the creation of the generally binding local rules of conduct. Compared to the rule of the Constitution⁵² the Basic Law defines the right to issue local decrees more precisely: it states that the local government within its competence may create two types of decrees. The decree

might be issued based on an original mandate granted by statute in order to regulate relations of the local society (or community). Such decrees, which relate directly to local decrees concerning local public affairs, have their origins in the Basic Law. Decrees, however, may also be issued by authorisation of statute, by derivative nature.⁵³

The decrees of the local governments implicitly may not be in contradiction with other laws,⁵⁴ nevertheless clarifying their relation to Government decrees is more important. The practice of the Constitutional Court so far has been considered to be the normative one, by which the executive or public administrative powers of the Government shall not lead to intervention through decrees into the autonomy of local governments exercising its administrative power ensured by the Basic Law.⁵⁵ The Government within its competence may create a decree⁵⁶ in matters not regulated by statute, or by authorisation given by statute. This may not lead to the defining of duties and powers of local government,⁵⁷ because according to the Basic Law this is within the competence of the legislation.

Local government forms an integral part of the state organisation and an integral part of the public administration, yet do not belong to the government bodies and agencies that are controlled and directed by the Government. The Basic Law defines the Government as a general body of the executive, whose powers and authority covers all that are not delegated by the Basic Law or legislation into the duties and powers of another body. The

Government is the supreme organ⁵⁸ of public administration, which ensures the legal (administrative) supervision of the local governments through the government agencies of the capital and the counties.⁵⁹ This supervision implicitly extends to the creation of decrees; therefore its fundamental rules are incorporated in the Basic Law. The Constitution does not determine this, but new regulation (in the Basic Law) states that decrees of local governments have to be sent to the government agencies of the capital or the counties forthwith after publication. In case the capital and the county government agency find the decree or any of its provisions offending, it may initiate the supervision of the decree by a court.⁶⁰

The Basic Law does not exclusively introduce changes into the supervision of the legal provisions of local government decrees, but also provides for the omissions of the local governments as well. In their original legislative authority local governments issue decrees based on their own decisions by considering local needs and conditions. In relation to this, by definition omission is excluded. However, the vast majority of the local decrees are of executive nature, based on legal authorisation. In such cases the representative body has not only the right, but the obligation as well, to issue the decree in question. According to the precedent of the Constitutional Court the right to issue a decree becomes an obligation explicitly by legal requirement.⁶¹ Non-compliance of this might violate the interest of local citizens, but violates the public interest

as well. Determining the omission of the obligation of legislation can be initiated by the Government agency at the court. The court sets a deadline for supplementation in the verdict that states the omission. In case the local governments do not fulfil the obligation for legislation the government agency might initiate authorisation for the issue of the decree itself from the court. In case the court brings such a verdict, based on the resolution the decree of the local government will be issued on behalf of the local government by the head of the government agency.⁶²

5. Internal organisation and subjects

The new regulation determines the subject of self-governance only indirectly. Since it does not regulate voters' right to self-governance, it would have been appropriate to determine it at the provisions for the elected body of representatives. This lagged behind and the Basic Law states only that "Local government duties and powers will be exercised by the representative body."⁶³ Therefore the body is not entitled to the powers, it only "exercises" them. This does not change the current situation, namely that the elected body plays a key role in the system of the Hungarian self-governance system, which is headed by a directly elected mayor (except counties). The president of the county representative body is elected from among the members for the period of its mandate. The Basic Law mentions the county representative body and the local representative body separately among these regulations,

which may be disturbing, because the county representative body is also a “local” (not central) representative body.⁶⁴

The Basic Law ignores the declaration (and therefore creation) of other organs of self-governments; it states only that the representative body may, in accordance with the provisions of a cardinal statute, elect a committee and establish an office. It is obvious from the text that establishing an office and a committee is not an obligation for all local governments. The Basic Law does not determine the additional organs regulated in the Constitution,⁶⁵ such as vice-mayor, notary and the public servants of the office. On the one hand, this does not mean that these bodies cannot be established by cardinal statute, but on the other hand it means that their establishment would not be mandatory for the legislation. Therefore, the Basic Law gives the Parliament a broader scope of authority to create local public organs. An example of this may be the mandatory partnership (association), which is missing from the Constitution, being the main problem. Mandatory local government duties (responsibilities) may be performed in a partnership for providing mandatory tasks.⁶⁶

6. The elections and the political term of self-governments

One of the differences in the Basic Law to the Constitution

is that it does not define the date of the local government elections⁶⁷; the latter defines the electoral and political term of the elected local government as five years.⁶⁸ Due to this, the parliamentary elections and local elections will gradually shift through the years. Chairs of the county representative body receive their mandate in an indirect way: the members of the local representative bodies and the mayors are elected by the citizens on the basis of universal and equal suffrage, with secret ballot in elections, which ensures the articulation of the free will of the people in a procedure defined in the cardinal statute.⁶⁹

As the local governments practice public power, the determination of the beginning and the ending date of the mandate of the representative-body have constitutional relevance.

The mandate of the representative body lasts until the day of the general elections of the local government representatives and the mayor. In the case of cancelled elections due to the lack of nominees, the mandate of the representative body extends until the day of the by-elections. The mandate of the mayor lasts until the election of the new mayor.⁷⁰ The mandate may be terminated not only by time, but in extreme cases by the representative body too, as it may declare its dissolution, but the exact condition of this will be defined in the cardinal statute.⁷¹ As mentioned earlier, similarly to present regulations, the Parliament may exceptionally dissolve the body that has been deemed to function unconstitutionally, upon the

Government's initiation. Both cases of dissolution end the mandate of the mayor as well.⁷²

Notes

- ¹ A detailed description of the present local government system (including the statute-level regulations as well) can be found in Dezső, Márta *et al.*, *Constitutional Law in Hungary*, The Netherlands, Kluwer Law International, 2010, pp. 223–240.
- ² See Article 42 of the Constitution: “The community of voters of the municipalities, cities, the capital and its districts, as well as the counties shall have the right to local self-governance. Local self-governance shall be the independent, democratic management of local affairs affecting the community of voters and the exercise of local public authority in the interests of the population.”
- ³ Decision 56/1996 CC.
- ⁴ Decisions 18/1993 CC and 22/1993 CC.
- ⁵ Constitution, Article 43 para 2.
- ⁶ See Decision 3/2003 CC.
- ⁷ Decision 42/2008 CC in relation to the refund of the sewerage–support on the territory of local governments.
- ⁸ Constitution Article 44/A para 1.
- ⁹ Constitution Article 43 para 1, Article 44/C.
- ¹⁰ Decision 56/1996 CC.
- ¹¹ Decision 77/1995 CC.
- ¹² Further examples: Article 2, the legal foundation of self-governments; Article 8, administrative supervision.
- ¹³ Article 15 para 2.
- ¹⁴ Namely “The separation of the local self-governments from the public administration is reflected by the constitutional regulation of the mayor’s legal status.”
- ¹⁵ This sort of mutual co-operation is naturally not a new invention, because at the very beginning of the operation of the Constitutional Court it was emphasised that the constitutional bodies must co-operate with each other without specific regulation regarding this.

[16](#) Article 11 of the European Charter of Local Self-Government (about the legal protection of local self-government) guarantees that “local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation”. According to the Charter, the recourse to a judicial remedy and the details of judicial protection in the absence of constitutional provisions shall be enacted into the new cardinal statute on local self-governments.

[17](#) This is partly the same as in Article 41 of the Constitution. The fundamental difference is the ignoring of the capital district local self-governments.

[18](#) Article 8 of the Charter also provides for “administrative supervision” of local authorities’ activities, while the Constitution (mentioning “control”) prevented the Parliament from enacting a statute on “supervision” over local governments.

[19](#) Article 19 para3 item 1 of the Constitution.

[20](#) According to Decision 1220/H/1992 CC, it gives a principal opinion about the dissolution, if the situation written in the proposal can lead to an unconstitutional operation and it doesn’t review the statement of the Government about the facts.

[21](#) See: Article 32 para1 item 2 and para2.

[22](#) Article T para1 item P.

[23](#) Article 32 para1 items B and C.

[24](#) Article 31 para1.

[25](#) Namely: Article XXIV paras 1 and 2 are valid.

[26](#) Article XXV.

[27](#) Article 31 para1.

[28](#) Article 31 para2.

[29](#) See Article 32 para1 item I and the phrasing of Article 34 para1.

[30](#) Article 32 para1.

[31](#) Article 32 para2.

[32](#) Article 34 para1.

[33](#) Article 32 para1 items a and b.

[34](#) Article 32 para1 item c. The Constitution regulated the right of

“independent regulation and administration” first among the rights of local governments – Article 44/A para1 item A

[35](#) Article 34 para5.

[36](#) First sentence of Article 34 para1.

[37](#) Article 34 para2.

[38](#) Article 32 para1 item d; Constitution: Article 44/A para1 item e.

[39](#) Decisions 1285/D/1993 CC and 23/2001 CC.

[40](#) Article 32 para1 item h; Constitution: Article 44/A para1 item d.

[41](#) Decision 67/1991 CC.

[42](#) Decision 155/2008 CC.

[43](#) Article 32 para1 item e; Constitution: Article 44/A para1 item b

[44](#) Article 32 para6.

[45](#) Article 32 para1 item f.

[46](#) Article 32 para1 item g; Constitution: Article 44/A para1 item b.

[47](#) Article 34 para1 item h; Constitution: Article 44/A para1 item c.

[48](#) Article 35 paras 1 and 2. In accordance with the provisions of the Charter the right to self-government “shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute” (Article 3 para2).

[49](#) Article 32 para1 item i; Constitution: Article 44/A para1 item f.

[50](#) Article 32 para1 item k; Constitution: Article 44/A para1 item h.

[51](#) Article 32 para1 item i; Constitution: Article 44/A para1 item g.

[52](#) Article 32 para1 item i; Constitution: Article 44/A para1 item g.

[53](#) Constitution: Article 44/A para2.

[54](#) Article 32 para3.

[55](#) Decision 1/2001 CC.

[56](#) Article 15 para3.

[57](#) Decision 17/2006 CC.

[58](#) Article 15 paras 1 and 2.

[59](#) Article 34 para4.

[60](#) Article 25 para2 item c declares that local decrees interfering with other legal acts should not be reviewed by the Constitutional Court, but the ordinary courts. The Basic Law does not designate the court that exercises this scope of authority.

[61](#) E.g. Decision 37/2004 CC.

[62](#) Article 32 para5.

[63](#) Article 33 para1.

[64](#) Article 33 paras1 and 2.

[65](#) Article 44/B para1.

[66](#) Article 34 para2.

[67](#) According to Article 44 para2 of the Constitution local-government elections are to be held in October of the fourth year following the previous general elections.

[68](#) Article 35 para1.

[69](#) Article 35 para1.

[70](#) Article 35 para3; Constitution: Article 44 para3.

[71](#) Article 35 para4; Constitution: Article 44 para4.

[72](#) Article 35 para6; Constitution: Article 44 para6.

Chapter XIV

Law Enforcement

László Christián

1. History and basics

The Constitution of Hungary, drawn up according to the Soviet model, had not regulated the national armed forces for four decades, from 1949 until the Transition in 1989. The national armed forces were regulated by lower-level legislation like the National Security Act¹ – which ruled the operation of the Hungarian People's Army – or the statutory decree on the State and Public Security.²

First of all, the terminology of the topic needs to be clarified: namely, law enforcement and protection of public order. Sometimes even the academic literature uses these terms as synonyms, even though they do not mean the same thing. The theoretical debate of this question is not closed, relationship of the definitions and the meanings of them are still not clear. According to the opinion of advocators of the definition of law enforcement, it is part of public administration, which is for detection and prevention of infringements using legitimate force. Notwithstanding

this, the school of protection of public order has started to use the expression protection of public order body in 1990, which emphasises its military character (termination of service, the uniform and the right to be armed, a strict hierarchy, etc.). It is understood that the second is better related to defence. The definition of protection of public order was used first in 1993 in the National Security Act.³ This legislation set out first the protection of public order bodies such as the police, the civil national security services, the prison service, customs and the finance guard, civil protection and the professional, national and municipal fire services. The legislator emphasised that these services work in some tasks of national security as well.⁴ The Police Act⁵ of 1994 uses the terminology “protection of public order body” but in contrast to the National Security Act it sets out the border guard as well. With the expression protection of public order body (meaning military character, centralisation and hierarchy) the “old regime” appears, even though the legislator emphasised the importance of demilitarisation of services. The issue was decided in the Termination of Service Act.⁶ It was declared that the failure of demilitarisation is based on the purpose of building military protection of public order. Thereafter more than 300 pieces of legislation applied the expressions protection of public order and protection of public order body without defining them. Even the bodies meant under the expression were not defined. As the title of this chapter shows I accept the terminology of law enforcement, regarding it as part of public

administration, and I use it consistently. Nevertheless I would like to declare that according to my opinion law enforcement is not only police administration; it means a more complex activity, the implementation of which is shared between police service and other services.

The Constitution of Hungary used the expression of law enforcement yet, although according to the functioning of national armed forces (army, police) was regulated separately from public administration, in hierarchical order, with centralised confirmation, in termination of service – following military principles.⁷ The Constitutional Amendment of 2004 (Act CIV of 2004) brought the expression protection of public order body into the Constitution (change of terminology), until then in Chapter VIII “Armed forces and the police force” was used. Armed forces were the army and the border guard. For better understanding, it must be mentioned that the border guard became a body with two legal bases – military and law enforcement – through the amendments of the Constitution in the 1990s. A few years after socialism, this reasonable distress ran foul of the constitutional principle that forbids armed bodies to fulfil order-protection tasks. The Constitutional Amendment of 2004 has abrogated this situation and brought the terminology protection of public order body in.

The citation from 2009 states:

According to the original constitutional purpose, the

regulation of armed bodies and the police force is already partly operative, then just some of the order protection bodies are regulated by them together with the Army.⁸

This appears in the Constitution of 2011 as well – Article 40/A-C rules the army and the police force, but does not regulate the other protection of public order bodies. The Constitution has never included the protection of public order bodies. Chapter VIII, which contained these rules, was amended the most times during the two decades since the Transition in 1989. Even the title of the chapter went through a kind of metamorphosis in this period. A smaller technical legal mistake was to write in the original text the word police without capital letter in the title of the chapter, when it was written with capitals in the Police Act. A unique solution was the amendment of the title, the word “police” was deleted, so the expression of usual protection of public order body was brought into use. In the text the word “police” has been modified “quietly”.

2. Constitutional framework

The principle of legality means that law-enforcement authorities have to exercise their powers in the way, form and coverage that legislations order. This incorporates the observance of procedural requirements in police measures. The aggrievements of procedural requirements are strictly adjudicated.⁹ On the other hand, other

legislations – regulations, decisions – have to conform with the principle of legality. Supreme Court Decision No. 1/1999 said that exercising law enforcement – declared in the Police Act – is administrative activity. Police forces – according to their public power – take measures by unilateral declarations and lay charges on customers that are validated by them.¹⁰ Legal clarification of an outside police measure is quite problematic and it can be understood as an immediately enforced oral decision. This is the reason why rules and effective legal remedies are so important.

The legislature kept the processing of legal remedy for police measure (complaint) within the organisation; passing judgment is the task of the measuring body's leader. Judging on appeal against decision of complaint is the task of the inspector.¹¹ There are two more alternatives for citizens: the Law Enforcement College of Complaint and the judicial way in special cases.¹² It is a usual practice abroad – for example in Germany – that against police measures legal action can be taken immediately.

Literature has no standard opinion on the question of the principle of opportunity. According to certain views law-enforcement authorities have to perform their tasks – when somebody or something is in danger – with “deliberation in duty bound”, even though it is known that deliberation can be used just in accordance with its purpose. “Deliberation in duty bound” is a described definition in Prussian law: authorisation that gives right to the police force to decide

the method and degree of intervention. This interpretation can cause significant anomalies or even abuse.

Another view of the principle of opportunity appears in Prussian law. Law-enforcement authorities can dispense with interpretation or with a method of it when it would be unfeasible under the circumstances. The principle of deliberation appears in this doctrine too, although it cannot be used in criminal-law enforcement. The principle of legality has to prevail in criminal actions. To draw a conclusion, it is ascertainable that the problem of principles "legality – opportunity" reduces the question of how broad a right of deliberation the security forces (police) should have. Principle of legality has to succeed in the activity of security forces (police); it cannot be diluted by the principle of opportunity.

It is useful in this context to analyse the decisions of the Constitutional Court of Hungary regarding law-enforcement aspects. Protection of public order and public security (former maintenance of public security and protection of internal order) as the basic task of the police force are constitutional purposes as well. According to the interpretation of the Supreme Court this means the assurance of constitutional working of social bodies and undisturbed public life and additionally it means the protection of citizens' fundamental rights together with personal and property security.¹³

It is primarily important in a constitutional approach to law

enforcement that fundamental rights be enforced and the problem of abridgement is considered. As the Constitutional Court sets out, the

state can use abridgement only under the circumstance when protection or enforcement of other rights, or affecting other constitutional purpose, cannot be achieved in any other way, and it can be just as broad as definitely needed. Significant abridgement of fundamental rights can be used when it happens without force and if it is not in proportion with the importance of the wished purpose. Legislature has to apply the lightest implement to achieve its certain purpose. If the abridgement is inappropriate in achieving its purpose, the offence of fundamental rights can be ascertained.¹⁴

It is the concept of “necessity and proportionality” that is used consistently in the adjudication of the magistrate body. The usual test of necessity and proportionality is an abstract methodology rule, which is used in certain cases, for certain statutes, in relation to the subjects protected by the fundamental rights at issue in each case.¹⁵ The test has three parts. Firstly, the legitimate purpose of legislator, examining the logical connection of constitutional cause of abridgement, purpose and implement. Secondly, necessity, whether abridgement is inevitable, the analysis of forcing cause. And thirdly, proportionality, it has to be decided

whether abridgement and its purpose are in relation. These three aspects are equal; either of them can cause unconstitutionality.¹⁶

Alluding to the settled case-law, the Constitutional Court's Decision 22/1992 CC says that "abridgement of fundamental rights is constitutional under that circumstances when it does not affect the basic entity of it, when it is inevitable, so it has force causes, furthermore when the significance of abridgement is not out of proportion as compared to its purpose".¹⁷ It cannot be overlooked that, as the Constitutional Court pointed out, law-enforcement bodies work as militarised, hierarchical and centralised organisations, separated from administration.

One of the most problematic parts of law-enforcement functionality is the engagement of enforcing illegal command. The Constitutional Court has pointed out the following: "engagement of enforcing illegal command, which would be naturally unconstitutional in civil sphere (in connection with armed forces), cannot be considered unconstitutional in itself, without any quest".¹⁸

The Court of Justice of the European Union and the European Court of Human Rights of Strasbourg have examined mainly the Police Act and the Termination of Service Act,¹⁹ but because of the limited extent of this text they are not explained here.

3. Contrasting changes of the texts

First of all, I focus on the changes introduced by the new Basic Law. In the Constitution the last title of Chapter VIII was: “The Hungarian Army and Law Enforcement Bodies”. As it has been mentioned above, even this title and the whole Chapter VIII has been changed many times during the last two decades. “This chapter title is one of the nadirs of constitutional regulation (actually its shame)” wrote András Patyi in the Commentary on the Constitution.

- The first – maybe the most significant – change is the partition of regulation of the Hungarian Army and the police force. Article 45 of the new Basic Law regulates the army and Article 46 regulates the police force and the national security forces. In addition, I would like to note that it could be a really interesting grammatical essay to examine how the use of an initial capital letter on the word “police” affects constitution-making. Until the end of 2011 the Constitution used it with a capital letter but from 1 January 2012 we will use a small first letter in accordance with the new Basic Law.
- It can be considered as a leap forward that Article 46 does not use the terminology protection of public order body anymore. However, we notice later that this delight was baseless: Article 53 – about the former defensive situation – uses the expression, and so maintains the constitutional status of it, without any definition. Using this expression by the Basic Law without definition can cause

uncertainty. Maybe the limited extent of the text was the main cause of this situation, but under these circumstances it would not have been necessary to use this problematic expression.

- Article 46 sets more details concerning the tasks of police force than the Constitution. Next to the classical functions of preserving public order and public security, preventing and detecting crime has been drawn up, too. The extension can be seen as classical law-enforcement functions have been set out, because preventing crime can be identified with presence, guarding over and applying legal physical force; while detecting can be matched with the obtaining of information, as with criminal law enforcement. According to experts on the subject, the expression of state border protection does not harmonise with the demands of the EU and with the Schengen Agreement.²⁰ The main point is that according to the demands of the EU and the Schengen Agreement police force – as the successor of the former border guard – has responsibility for guarding the state border and maintaining its order and control of cross-border traffic, but the protection of the state border is not part of it. The workings of the police force are inferior to the government, as it used to be.
- The specification of basic tasks of national security forces are a new aspect of the Basic Law. According to the Basic Law the main duty of national security forces is the protection of Hungary's independence and order and

assertion of its national security interests. It works under the Government. Accepting that national security is a special form of obtaining information and its functioning raises many unpleasant questions; this text alteration can be evaluated as the legislature intended to raise the regulation of this field to the constitutional level.

- It is not a new rule in the Basic Law that professional members of the police force and national security forces are forbidden to be members of the party or to carry out political activity. The special meaning of this rule is regulated in the Termination of Service Act.²¹ In Chapter III of this Act about the abridgement of fundamental rights – among others, abridgements of freedom of speech and assembly – these are defined in connection with termination of service.
- As it is “usual”, organisation, functioning and other special rules of the police force and national security forces – like conditions of using secret service’s devices and methods or the rules of national security activity – are regulated in statute law.

In comparison with other EU Member States’ constitutions it can be ascertained that there are significant differences between law-enforcement regulations of these constitutions and the new Basic Law of Hungary. Some of these charts regulate the organisation and functioning of law enforcement in details, while others do not even mention them.²² On the basis of this fact, there are three groups of

Member States. In the first group constitutions regulate law enforcement in detail. This is the “positive constitutional regulation” of law enforcement. The Austrian Constitution, for example, is in this group.

In the second group, constitutions specify the legal framework of administration but do not go into detail on law-enforcement authorities; this is the indirect regulation of law-enforcement administration. This is typical of Finland’s constitution. The constitutional base of security is in the regulation of administration’s framework in the Constitution and the limits of police power. Constitutional rules are a firm base for the functioning of protection of public order, whereas the protection of public-order bodies is not even mentioned in the text.

The third group has a different logical order than the first two. These contain the list of fundamental rights in detail, so contain indirectly what forces can do. This is true even when the measure of force is in the interest of protecting public order and public security. This is the “negative constitutional regulation” of law enforcement. The constitution of Belgium contains specified regulations neither for law enforcement, the police force nor for administration, but it contains several rules for fundamental rights.

The new Basic Law of Hungary can be categorised in the first group, as it specifies the most important blocks of the police force, which is the essential element of law

enforcement.

Consequently, it can be ascertained that during the creation of the new Basic Law, law enforcement was not one of the most stressed topics where significant modifications have been accomplished. It is not surprising that compared to the former legislation the new act does not contain many significant new aspects.

Notes

¹ Act I of 1976 on national defence.

² Statutory Decree 17 of 1974 on state and public security.

³ Act CX of 1993 on the national defence.

⁴ Article 65 para 1 of Act CX of 1993 on national defence.

⁵ Act XXXIV of 1994 on the police force.

⁶ Act XLIII of 1996 on the termination of service of armed forces.

⁷ Finszter, Géza, *A rendészetelmélete* ("The Theory of Law Enforcement"), Budapest, KJK KRESZÖV, 2003, pp. 30–31.

⁸ Patyi, András, *A Magyar Honvédség és egyes rendvédelmi szervek* (VIII. fejezet) ("The Hungarian Army and the protection of Public Order Bodies [Chapter VIII]") in Jakab, András, *Az Alkotmánykommentárja I-II* ("Commentary on the Constitution I-II"), 2nd edn, Budapest, Századvég, 2009, p. 423.

⁹ Szamel, Lajos, *A rendészetés a rendőrség jogszabályozásának elméleti alapjai* ("The Teroretical Basis of Law Enforcement and Police Force"), Budapest, MTA programme office of the researches of political science, 1990, pp. 42–44.

¹⁰ Device Decision of Supreme Court No. 1/1999.

¹¹ Article 93/B para 3 Police Act (Act XXXIV of 1994).

¹² Article 93/A para 9 Police Act (Act XXXIV of 1994).

¹³ Decision 88/B/1999 CC.

¹⁴ Decision 7/1991 CC.

[15](#) Decision 6/1998 CC.

[16](#) Patyi, *op. cit.*, p. 421.

[17](#) Decision 22/1992 CC.

[18](#) Decision 8/2004 CC.

[19](#) Act XLIII of 1996 on the termination of service of the armed forces.

[20](#) Hautzinger, Zoltán, *Regulation of the armed forces in the Basic Law*, Script, 2011.

[21](#) Act XLIII of 1996 on the termination of service of the armed forces.

[22](#) Badó, Attila, and Trócsányi, László, *Nemzeti alkotmányok az Európai Unióban* (“*National Constitutions in the European Union*”), Budapest, KJK Kerszöv, 2005.

Chapter XV

Defence Administration

Miklós Molnár

1. Conceptual pillars

Defence as a legal and administrative term has at least two different meanings: on the one hand, it means resisting a foreign power's attack on the homeland with military force; on the other hand, the concept covers a broad-scale preparation for that, from military education to strategic planning. Obviously, the latter meaning is much broader, it includes not only administrative but all efforts of the society and multiple preparations to be able to efficiently protect the homeland and the nation.

It is important to emphasise that defence administration as a term is not to be confused with defence, simply because defence administration resembles a separate branch of public administration. Defence administration can be seen as a system of various governmental and administrative organs and can be approached also as the network of their legally established competences. Thus both approaches depict defence administration as a relatively autonomous

part of public administration. Defence administration as an administrative branch, besides direction of the army, includes the military organisation, both hierarchical and non-hierarchical defence-related direction or co-ordination of various organs, agencies and organisations. Among them there are, for instance, different policing agencies, including the police force, the national security services autonomous regulatory agencies, central administrative organs, organs providing public services, etc. relative to preparing for or executing defence tasks.

There is scientific consensus about the differentiation of two dimensions within defence administration itself: central and local-territorial defence administration. Central defence administration is done by central governmental and administrative organs; accordingly, local-territorial defence administration is provided by administrative agencies and municipalities operating at those levels. Central defence administration is also widely known as central direction of defence.¹

Direction of the army as a concept is part of defence administration: it refers to definite army-related competences and activities of central governmental organs and administrative agencies (such as allowing the army to conduct a military operation or establishing the military's budget or headcount, etc.). Commandment of the army is conceptually different, however it is used in the narrow-scale context of giving executive orders, that is to say commands.² Interestingly, this sort of distinction in Hungarian administrative sciences is based on the

separation of the director's and the manager's roles. The conceptual distinction itself was introduced by the Constitutional Court of Hungary in the early 90s.³ Essentially, the Court's main statement in this regard was that the two mentioned categories were not identical. The director practises overwhelming influence from outside of the organisation while not belonging to it, while the manager affects the organisation as part of it. Therefore, the two positions are substantively different, at least according to the Court's quoted opinion.

Another issue the Court has emphasised with respect to the topic is the content and the extent of the director's and the manager's output. In this area, the director determines the manager's decisions; consequently, management – however autonomous it may be – is the execution of the direction at the end. With other words, the director's decisions provide the grounds for the manager's operations, thus the director may override the manager. This kind of conceptual approach of course reflects a hierarchical, public-law dominated apprehension of organisational connections.

In my view, time has eroded the Constitutional Court's depicted conceptual distinction in many ways, even though it has never been revised. More and more think that there may be an overlap between the two positions. The possible overlap has been taken into consideration by newer laws in Hungary, for instance, the new cardinal act on defence and measures taken in special legal periods that regulate the defence minister as the member of the Government in

charge of directing and commanding (that is to say managing) the army at the same time.

It needs to be underlined that defence and defence administration are supposed to be distinguished from the laws applicable to them. Whereas defence and defence administration belong to central topics of constitutional and administrative law, a large quantity of constitutional and administrative legal norms deal with them. According to the general trends the relevant legal regulation is multi-layered: the constitutional rules mean the top-end, followed by the provisions of relevant acts with connecting executive laws, for instance government- and minister-made laws. The defence sphere of the regulatory system usually includes inner regulatory means of the military, like various sorts of technical-technological norms or normative measures.

The statement according to which defence and its administration are topics of constitutional and administrative law does not necessarily mean those two legal branches cover them fully. To a large extent they do cover, but in fact defence law contains significant criminal- and civil-law norms in great numbers as well (military crimes, military-related expropriation, compensation, etc.), not to mention the large and complex international law context.

Defence administration as a constitutional topic means the set of provisions established by the Constitution in general concerning defence administration. This set of constitutional provisions regarding the regulatory mode can

be laconic, framework-like or substantial. Our persuasion is that the new Basic Law has chosen the most reasonable path by regulating the most important points of defence administration sufficiently and thus providing a basic framework for connecting laws. The most important connecting law is the new cardinal act on defence, the Hungarian Army and measures taken in special legal periods.⁴

There are, of course, numerous other acts covering or touching the area of defence and defence administration, from the act on the legal status of professional and contractual soldiers of the Hungarian Army through the series of acts relative to various NATO-related international treaties and agreements, to the Criminal Code or the Act on National Security Services.

Defence administration as a system of constitutional rules can be edited and placed in several ways. One of those is to address a single extensive chapter to defence administration that would cover all the sub-topics necessary at the constitutional level. This editorial approach theoretically could generate a compact topic regulation, however it would break up the general logic of usual constitutional structures. (Usual constitutional structures go by regulating the State, the legislative, executive, judicative, etc. powers, their organisational and competence systems, connections, checks, balances, the basic freedoms, etc.)

Another way, as in the new Basic Law, is to divide the large-scale topic of defence administration among various

chapters of the Constitution and address separate chapters or subheadings strictly to the military (the army, its direction, special and extraordinary measures, etc.).

The Basic Law establishes provisions relative to defence and its administration at several places, in the chapters on freedom and responsibility, the Parliament, the president of the republic, the government, the Hungarian Army, decision-making on participation in military operations, and special legal orders. The new Basic Law therefore determines the system of central defence administration. Obviously, the constitutional provisions provide a basic framework for defence regulation of which a big part is the new cardinal act and its further connecting laws. Although the new Basic Law's normative content has grown some compared to the Constitution, the trend has remained the framework approach, which is very much the case internationally as well.

I am convinced that the division of tasks between the new Basic Law and the cardinal act is appropriate. The Basic Law refers to the cardinal act multiple times, leaving the regulation of details to it in terms of the Hungarian Army, its organisation, tasks, direction, management, functioning, the special legal periods and the extraordinary measures attached to them, and the military services. The same solution is applied by the Constitution and the connecting act in force; there has been no change in this regard.⁵ In the Basic Law, basic topics belonging to the constitutional level are generally well-regulated and the Basic Law is no more specific than it should be. Based upon the constitutional

provisions the cardinal statute establishes the specific details belonging to the level of the act and addresses entitlements to the Government and the minister to make the necessary executive laws. The question of what belongs to the constitutional and what to lower-level laws of course is quite complicated and goes from topic to topic. In general, it is a safe statement that the configuration is reasonable and the regulatory and conceptual interrelation is quite adequate.⁶

To complete our description it is important to note that the new Basic Law's regulatory structure has improved parallel to the former Constitution. There is, in fact, a separate chapter on the Hungarian Army, in contrast to the Constitution, which had an integrated chapter on the Hungarian Army and certain policing organs. Moreover, the new Basic Law has separate chapters on decision-making on participation in military operations and on special legal periods. The latter is an utterly extensive chapter with remarkably increased normative content on the topic compared to the Constitution's rules. The Constitution had no such separate chapters on these topics.

The rules pertaining to the mentioned topics were simply incorporated into the chapters on the Parliament, the President of the Republic and the Government.

It has to be admitted that the Constitution's rules on defence administration were amended several times. Those multiple amendments were mainly in conjunction with Hungary's joining NATO, the membership and thus the

slight modernisation of the directive system of defence administration; moreover, the subsequent termination of the conscript system and the mandatory military service and also the introduction of a newer special legal order, the preventive defence situation. The numerous overlapping amendments have unquestionably eroded the constitutional regulation; therefore, the new Basic Law can be regarded as a breakthrough development in terms of appropriate constitutional pillars for defence administration as well.

As to the conceptual dogmatic of the constitutional regulation regarding our topic: the new Basic Law uses a broad scale of legal and administrative terms adequately in accordance with their recent scientific meanings. It is a safe statement that the use of terms is scientifically well-established. Some explicitly military-related expressions used by the Basic Law are interpreted and explained not in the Basic Law itself but by explanatory provisions of the cardinal act. That solution generates a set of right conceptual cross-references between the Basic Law and the relevant cardinal act, of course.

2. The direction of the army and central defence administration

The new Basic Law establishes the legal status of the Hungarian Army in Article 45. According to it, the Hungarian Army is Hungary's armed force. It is essential to emphasise that the new Basic Law identifies the army as a defensive force to protect Hungary's independence,

territorial integrity and borders. It is also supposed to fulfil common defensive and peace-keeping tasks based upon international treaties and conduct humanitarian operations.⁷ The army should also participate in preventing catastrophes and eliminating their consequences.⁸

This constitutional approach is very much in accordance with relevant standards expressed by most constitutions of the western world and Hungary's allies. Naturally, it strongly refers to Hungary's NATO membership and the duties derived from that, without mentioning the treaty organisation's name. This solution follows the former Constitution's path chosen by the amendment, which allowed Hungary to join NATO at the time.

The new Basic Law underlines that professional members of the Army may not be members of parties or conduct partisan politics.⁹ Obviously, the purpose of the cited provision is to separate professional military service from political parties, to exclude the Army's turning into the instrument of political parties in one way or another. This constitutional provision leads to the topic of members of the army. Remarkably, the army has members of various legal status: professional and contractual soldiers fulfilling actual military service, government officers, public employees, and employees covered by the Labour Act. Government officers and public employees have separate legal regimes of their own.

Hungary has abolished enforced conscription and created a fully volunteer military – it normally does not require

mandatory military service from its citizens. In the case of two special legal orders, extraordinary situations, including times of war and preventive defence situations, the obligatory military service system will be revived. This applies to a preventive defence situation only if the Parliament orders it so. During the period of peace actual military service people join the army on a volunteer basis; that is to say, they are not drafted involuntarily. Staff of the military is completed with a tangled system of reserves. The reserve system is based upon the Basic Law itself: Hungary supports a volunteer reserve system.¹⁰ Without going into details unnecessarily, it is enough to state that the reserve system consists of volunteer operative reserves, volunteer defensive reserves, trained reserves and individuals potentially subject to military service. Volunteer operative reserves and volunteer defensive reserves by making a choice on their own stand by on terms defined by an act, and after being drafted participate in the execution of defence tasks by fulfilling actual military service.

Trained reserves used to fulfil service as professional, contractual soldiers, or volunteer reserves. The defence minister is in charge of making a decision on drafting volunteer reserves on the proposal of the chief of staff.

Within the framework of the Basic Law and the cardinal act, the army is directed by the Parliament, the President of the Republic, the Defence Council, the Government including the defence minister.¹¹ This constitutional provision expresses two things at the same time. Firstly, the listed

organs are entitled exclusively to direct the army, therefore no one else has competences in this field. Secondly, the competences of the mentioned organs are supposed to cover all army-related matters without any gap or overlap.

Overlaps are prohibited by Article 45 para2 implicitly, whereas army-related competences and entitlements are addressed and given to the above-listed organs by the Basic Law one by one. However, there is a general subsidiary rule applicable here, saying that whatsoever not given in a specific way to other organs or agencies by the Basic Law or other laws, belongs to the Government's competence.¹² The Basic Law does have an army-specific provision as well, according to which the Government directs the functioning of the army.¹³

The division of defence-related tasks and competences among central organs of the State as a constitutional model reflects the separation of powers¹⁴ and its mission is to prevent the danger of uncontrollable power concentration inside the sphere of defence administration. The former Constitution has applied more or less the same solution; nevertheless it had never directly expressed the separation of powers. Although the separation of powers is a much broader theme than defence administration, I have to refer to the fact that the new Basic Law contains a provision on the separation of powers in contrast to the Constitution. The ways through which the Constitutional Court could establish the separation of powers based on the former Constitution were mainly deriving from the rule-of-law formula.¹⁵ Although this solution worked, not surprisingly, it left much

to be desired.¹⁶

The division of competences is true in a broader context too, relative to defence administration. This means central defence administration as a branch of governmental and administrative functioning is divided among those organs and agencies involved in the direction of the army.

Central defence administration means a group of organs and agencies, or a set of competences, a competence structure, but in any case as it exists in the time of peace. When special legal orders come in, like in the case of an attack by a foreign power or an actual danger of such or industrial disaster occurs, the picture of central defence administration changes a lot. Special competences and extraordinary procedures appear that are unknown during peace-time. First we examine the structure of central defence administration as it can be seen in the time of peace. However, we may add that in special legal orders all the below-mentioned organs have special roles and competences. As far as the Basic Law deals separately with special legal orders, a separate chapter details the special measures in extraordinary periods.

The Parliament has a central role in the context of defence administration. Among others, it

- makes a decision on declaring war or making peace, and
- makes decisions regarding special legal orders and concerning military operations.

As to military operations the Parliament's competences cover the application of the army inside or outside the borders, the stationing of the army abroad, application of a foreign army in Hungary or from Hungary, as well as stationing in Hungary.¹⁷

The decisions listed above regarding military operations are made by a two-thirds majority of all representatives present.

The Parliament establishes:

- the basic principles of Hungary's security and defence politics and the execution of tasks derived from those, and
- the detailed headcount and the main military instruments of the army, for which the Parliament provides the necessary financial sources.¹⁸

One of the Parliament's committees, the Defence Committee, has a special role within the central direction of the army: it continuously monitors the functioning of the army, including the proper use of resources; the Committee also hears the nominee for chief of staff and expresses its opinion on his or her suitability. The defence minister is supposed to expose the drafts of laws concerning the military to members of the Committee. Thus the Defence Committee can be regarded as a vital instrument of Parliament providing civil control over the army and the military in general.

The President of the Republic is another complex centre of

competences when it comes to the military. The new Basic Law has adopted the ominous rule from the Constitution according to which the President of the Republic is the commander in chief.¹⁹ A decision has been made by the Constitutional Court related to this provision accepted by the majority of constitutional justices in the early 90s. The decision was supposed to establish the real meaning of this rule, most evidently the legal means of the commander in chief.²⁰ By examining the matter, the Constitutional Court has concluded that being the commander in chief means a sheer constitutional function, not an actual competence rule. Therefore, the President of the Republic directs and does not command the army. This sort of interpretation of the former Constitution's identical rule lead to an unquestionably paradoxical result: the commander in chief may not command the army.

If the President of the Republic – the Court went on – indeed were a commander, he would be subject to directive orders given by the Parliament and the Government and that would be absolutely incompatible with his legal status. Hungary is a parliamentary democracy, thus the directive army-related powers are divided among the Parliament, the President of the Republic, etc., and not accumulated by a chief executive or someone like that known rather in presidential systems.

The President of the Republic

- makes decisions concerning special legal orders,²¹

- appoints and promotes the generals,²²
- approves the plan of Hungary's armed defence,
- appoints and dismisses the chief of staff, and
- awards battalion flags to units and their commanders (Article 20 para1).²³

Notably, the President of the Republic exercises these powers in different ways. Some decisions are made on proposals coming from the defence minister. This applies to decisions, for instance, regarding the generals, the plan of armed defence, the chief of staff and the awarding of battalion flags. On the other hand, some decisions need countersignature from the defence minister. This is true, for example, in the case of appointment or promotion decisions relative to the generals. Consequently, there are certain decisions that do not assume any countersignature from the executive power; by making those the President of the Republic acts like a sovereign ruler.

The President of the Republic may request information from the Government concerning any matter related to the army.²⁴

As it was pointed out earlier, the very centre of defence administration is the Government. The Government has a wide range of directive powers, including competences connected with defence administration and entitlements directly aimed at the army.

Most notably, in terms of defence administration, the

Government

- establishes the tasks of the defence minister,
- submits the proposal on basic principles of Hungary's security and defence politics,
- co-ordinates governmental tasks with respect to military operations,
- establishes requirements related to defence economy, the country's defence reserves and infrastructures,
- co-ordinates the tasks and obligations of ministers and administrative agencies – except autonomous ones – that are supposed to participate in defence efforts,
- provides info-communicational support for the agencies operating in the field of defence administration, and proper processing of classified information,
- ensures the realisation of defence-education programmes within the system of public- and higher education, and
- makes decisions on special legal orders.

Among the main competences with respect to directing the army, the Government

- establishes the rules concerning the directing and commanding of the army,
- establishes the parameters and requirements regarding the geographic locations, infrastructure and training of

the army,

- decides about tasks in conjunction with preparing the country's territory for military operations,
- orders a higher alert level of the army,
- decides cross-border military operations,
- decides military operations based upon NATO or EU decisions.

In the annual budget plan the Government assumes the costs and expenses of supporting and developing the army.²⁵ The Government is supposed to plan the annual costs of defence preparation, including preparing the economy, providing special conditions for the Government's and the Defence Council's functioning during the course of special legal periods.²⁶

The defence minister is considered the member of the Government in charge of the country's defence- and crisis-management-related military tasks and is also responsible primarily for directing and managing the army.

He directly bears responsibility for preparing governmental decisions on defence and defence-related central administrative tasks and for the functional, professional and legal operation of the army. In conjunction with all this, he is supposed to exercise those powers not addressed to anyone else by the Basic Law or cardinal statutes.

The defence minister is in possession of extensive powers to direct defence as a broad-scale concept and he is to co-

ordinate the activities of agencies and organs participating in defence with special emphasis on their preparation.²⁷

Other ministers are to direct and co-ordinate the defence-related activities of administrative branches and agencies belonging to their competences.

3. Military duties and obligations

Rules on military duties and obligations are placed in the chapter on freedom and responsibility of the Basic Law. The examination of this chapter goes well beyond our scope here, nevertheless, it is hard to ignore that even the title is significant. This statement is supposed to mean that the title “freedom and responsibility” suggests a new constitutional approach to fundamental freedoms by putting an emphasis on the counter-element: responsibility. In this regard, responsibility as a collective term can be interpreted in two ways. On the one hand, it means that freedoms may be exercised responsibly by taking into account others and the community. This approach is often cited as the social content of basic rights. On the other hand, it reflects the fact that setting up provisions at a constitutional level only on fundamental freedoms is very unilateral. There are serious collective and individual duties accompanying fundamental freedoms and the Constitution is to establish those. This is the context from where the rules of the new Basic Law on military obligations have emerged.

According to the leading provision in this area, every

Hungarian citizen is obliged to defend the homeland.²⁸ The previously cited Act on Defence and the Hungarian Army makes a very clear statement in conjunction with military obligations: defence is a national matter.²⁹ As to the execution of defence tasks, those are based upon the services provided by individuals dwelling in Hungary regardless of their citizenship, by legal entities and personal service fulfilled by citizens.³⁰

Military duties have a collective term: general defence obligation. General defence obligations consist of military-service obligations in the form of armed or unarmed military service, civil-protection obligations, military-labour obligations, and material-service obligations.

In the case of an extraordinary situation or preventive defence situation, if so ordered by the Parliament, men over the age of 18 with Hungarian citizenship and with a residence in Hungary are obliged to fulfil military service. Conscientious objectors are to fulfil unarmed military service. The detailed rules on military service and the forms of its fulfilment are established by a cardinal statute.³¹

Notably, military-service obligation is associated with some complementary obligations: the data-providing, registering obligation and the duty of personal appearance. Military service is to be fulfilled in the army. The objective of armed military service is the execution of national- and alliance-based military tasks, the training of soldiers and the strengthening of the army's defence abilities. The purpose of unarmed military service is to participate in the unarmed

tasks of the army and the training necessary for that.³² Unarmed military service is to be fulfilled in positions at military organisations that do not require armed activities. Unarmed military service is to be formally allowed by the decision of the authorities concerned; rejection may be overruled by the court.

By abolishing mandatory military service Hungary has ceased the need for conscientious objection as a main rule. This issue may emerge only in times of extraordinary or preventive defence situations. The provisions according to which conscientious objectors are soldiers but do not participate in armed combat and do not fill armed positions challenge neither automatically nor potentially the freedom of thought, conscience and religion.³³ Much is dependent on the implementation of the cited rules, but in my view, the rules themselves do not interfere *per se* with the freedom of conscience.

Hungarian citizens over the age of 18 with a residence in Hungary, regardless of their gender, are supposed to fulfil their civil-protection obligation in order to participate in defence and disaster-protection tasks, according to the rules of a cardinal statute.³⁴ The tasks referred to are humanitarian activities; therefore, civil protection and the organisations in conjunction with that are not to eliminate armed or seriously violent acts.

In the case of an extraordinary situation, Hungarian citizens over the age of 18 with a residence in Hungary, regardless of their gender, are supposed to provide military labour

service according to the rules of a cardinal statute.³⁵

In order to support or restore the functioning of the country, obliged individuals are supposed to do physical or intellectual work in accordance with their abilities and health status at designated work places. There are a lot of exceptions from this rule, for instance a woman expecting a child is free of military-labour service obligations.³⁶ As military-labour service as an obligation can be ordered only under the conditions of an extraordinary situation it is far from being a general rule. Needless to say, it would be hard to ignore the fact that the same obligation has been established based upon the provisions of the former Constitution and its connecting cardinal statute. Once again, the praxis of application should be considered thoroughly.³⁷

Military-labour service as a legally established obligation does not cover members of the army fulfilling actual service, government officers, public employees of the army, professional members of policing organs, their government officers, public servants and public employees.

In order to aidedefence and disaster-protection tasks anyone can be obliged to provide economic and material service.³⁸

These kind of obligations may cover providing certain economic and material services or tolerating the use or the confiscation of services, abstaining from certain activities, preparing for the use or the confiscation, providing the necessary data for planning the use or the confiscation.³⁹

At a very abstract level this obligation may involve the use or confiscation of movable or immovable properties by the army or authorities of the State in accordance with the law in order to carry out defence tasks.

As a general rule, compensation is due to the obliged individual or legal entity for providing material service to which the rules of civil law are applicable. The compensation itself is established in the course of an administrative procedure; the decision may be revised by the court.

Unquestionably, this obligation, just like expropriation, functions in connection with the social content of fundamental freedoms reflecting the community's needs. Leaving aside the issue that the former legal regulation has chosen the same solution, it needs to be underlined that excluding these services implicitly or explicitly would have been an interference with defence efforts in certain cases. I tend to agree with the idea that this legal construction is to be judged by the practical implementation of the applicable rules.⁴⁰

Notes

¹ As a global approach to defence administration: Lakatos, László, *Honvédelmiigazgatás* ("Management of the Armed Forces"), Budapest, Budapesti Corvinus Egyetem, 2006.

² Kádár, Pál, A Magyar Honvédségirányításának és vezetésének időszereji jogi és igazgatási problémái ("Current Legal and Administrative Problems of the Control and Management of the Hungarian Defence Forces"), manuscript, Budapest, Zrínyi Miklós Nemzetvédelmi Egyetem Hadtudományi Doktori Iskola

Kézirat, 2009, pp. 34–60.

[3](#) Decision 48/1991 CC.

[4](#) Act CXIII of 2011 on defence, the Hungarian Army and measures taken in special legal periods.

[5](#) Act CV of 2004 on defence and the Hungarian Army.

[6](#) Venice Commission Opinion on the New Constitution of Hungary, opinion no. 621/2011 items 23, 24.

[7](#) Basic Law Article 45 para1.

[8](#) Basic Law Article 45 para3.

[9](#) Basic Law Article 45 para4.

[10](#) Basic Law Article XXXI para2.

[11](#) Basic Law Article 45 para2.

[12](#) Basic Law Article 15 para1.

[13](#) Basic Law Article 45 para2.

[14](#) Basic Law Article C para1.

[15](#) Decision 38/1993 CC.

[16](#) Decision 2/2002 CC.

[17](#) Basic Law Article 47 para2.

[18](#) Act CXIII of 2011 Article 19.

[19](#) Basic Law Article 9 para2.

[20](#) Decision 48/1991 CC.

[21](#) Basic Law Article 9 para3 item F.

[22](#) Basic Law Article 9 para4 item E.

[23](#) Act CXIII of 2011 Article 20 para1.

[24](#) Act CXIII of 2011 Article 20 para3.

[25](#) See the budgetary issue generally in Bland, Douglas L. (ed.), *The Transforming of National Defence Administration School of Policy Studies Queen's University*, Kingston, Ontario, Canada, 2005, pp. 19–31.

[26](#) Act CXIII of 2011 Article 21.

[27](#) Act CXIII of 2011 Article 22.

[28](#) Basic Law Article XXXI para1.

[29](#) Act CXIII of 2011 Article 1 para1.

[30](#) Act CXIII of 2011 Article 1 para3.

[31](#) Basic Law Article XXXI para3.

- [32](#) Act CXIII of 2011 Article 3 para4 item I.
- [33](#) Venice Committee cited opinion, item 84.
- [34](#) Basic Law Article XXXI para5.
- [35](#) Basic Law Article XXXI para5.
- [36](#) Act CXIII of 2011 Article 12.
- [37](#) Venice Committee cited opinion, item 86.
- [38](#) Basic Law Article XXXI para6.
- [39](#) Act CXIII of 2011 Article 13.
- [40](#) Venice Committee cited opinion, items 87–88.

Chapter XVI

Special Legal Orders

Balázs Szabolcs Gerencsér

1. Historical overview

The State is to protect its inhabitants and their legal, constitutional and economic values. In each historic era a sudden threat arising either from foreign attack, rebellion or natural disaster called for immediate response of the supremacy. For these kinds of situations the generally accepted definition, given by the ECHR, is “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”¹ Hungary’s new Basic Law sets its regulations on two pillars: (a) Hungary’s own traditions and achievements, and (b) international principles and obligations.

Before the ordinary (state) forces were set up in 1715, various “private” forces made up Hungary’s defence. The king had such a small army that it was not enough to defend the whole kingdom, so he called on the nobility’s, pontificates’, counties’, and towns’ armies. The king and the nobility recruited their soldiers on their own and paid them separately.

In a state of emergency, e.g. by an unexpected attack, the king called upon the nobility, the towns and counties to defend the State. Indeed, the king had the right to suspend the force of the acts by a royal decree in the case of emergency.² As Ferenc Deák put it: in case of war each noble’s obligation was to engage in hostilities and to support his own military unit.³ The mobilisation of the forces was, therefore, not decided by the Parliament but it was a natural outcome of that time’s defence system, says Deák. The incapacity of the Parliament was due to the inability of sitting (e.g. because of the state of war). The right of the king to regulate by decrees was exceptional, and was always followed by a *post facto* approval by the legislative power. These “emergency decrees” were in force as long

as the state of emergency lasted.⁴

Later, the defence and military systems changed in Europe and a professional (state) army was declared to be needed. Act VIII of 1715 determined to set up a stronger, more stable and ordinary army that would be able to defend the State more efficiently.⁵ In the same Act the role of the constitutional institutions during emergency states was regulated as well, which is the historic basis of the present (and the former) constitutional regulation.

Act VIII of 1715 allowed the executive power to regulate by emergency decrees in the case of attack by an enemy. The Hungarian constitutional system permitted this exceptional power only in the interest of the State. These strict rules applied not only to the king but to the government as well, by the *post factum* impeachment of the Parliament.⁶ Article 3 and 4 of the above-mentioned Act stated that in the case of foreign attack, when the ordinary decision-making processes cannot work, the highest offices of the country should sit and formulate a council. These offices were the *comes palatii*,⁷ the primate and the archbishops and prelates, the barons, the High Court of the King, the counties and free royal towns (*libera regiae civitas*).⁸

After World War II the communist Constitution of 1949 mentioned only few regulations regarding the special legal orders, mainly on the special mandate of the Parliament. The 1989 democratic amendment to the 1949 Constitution introduced (again) the state of national crisis and state of emergency in Hungarian constitutionalism. The institutions and the detailed control mechanisms were a goal of the former Roundtable of the Opposition.⁹

It established five types of special legal orders: the state of national crisis, emergency, preventive defence, danger and unexpected attacks. In a state of national crisis a new body was introduced: the National Defence Council that was composed of the President of the Republic, speaker of the Parliament, the heads of parliamentary factions, the prime minister, ministers and the chief of the national defence staff. This latter had only consultative rights. The previous regulation allowed the Council, the president and in some cases the Government to adopt extraordinary decrees that were under parliamentary supervision. These constitutional regulations were set in different chapters of the Constitution, such as (I) the general provisions, (II) the rules of the Parliament, (VII) the government, (VIII) the

armed forces, and (XII) fundamental rights.

2. General remarks on the new regulation

One of the main functions of constitutions is the protection of citizens and democratic institutions. In acute situations that threaten the country, or the country's Constitution, it is necessary to provide an opportunity for the major constitutional bodies to effect quick and efficient protection and eliminate the threatening situation(s). A fast response requires a special legal regime, which leaves the traditional democratic framework, but is limited until only the cause remains in effect. The constitutional regulation regarding the special legal orders loosens the constitutional constraints on the one hand, and on the other hand it provides protection against loosening.¹⁰ A special law's ultimate goal is to guarantee the return to "normal" law and order.¹¹

The Hungarian Basic Law has a rather detailed regulation for this that is not unique in European constitutionalism. The Venice Commission in its opinion¹² referred to the Polish and the German constitutions in this respect.¹³

There is a separate chapter in the Basic Law on the special legal orders. In this chapter all the regulations that are in connection with this topic are merged. As mentioned above, the previous regulations were dispersed among the various chapters of the Constitution. The detailed regulations of the national crisis and the state of emergency were located in Chapter II, which dealt with the Parliament, though several articles were also to be found in Chapter VIII on the armed forces. Similarly, some of the articles related fundamental rights were in Chapter XII and some were in Chapter I among the general provisions. Technically, by this manner of codification the former fragmented rules were restructured and refined.

I am convinced that the institutions that were set up in 1989's Transition remain in today's Basic Law. The five types of special legal orders are regulated on the same grounds and try to give answers to the questions that arose similarly in the 1989 amendment. New elements of these institutions are in the details, such as the controls and limits or the term of validity of the decrees taken in special legal orders as detailed below.

Similarly, the referring article is renewed as well. The “provisional” Constitution of 1989 in Articles 19/D and 35 para 3 regulated that a majority of two-thirds of the votes of the MPs present shall be required to pass the statute establishing the regulations to be applied in national crisis and state of emergency and separately in state of danger and in a state of preventive defence emergency. The Constitution stated two separate legal rules: one is mainly on the essential powers of the Parliament and the President of the Republic, and another is mainly on the government’s powers. It should be noted that neither of the statutes were born. According to the subject, detailed regulation was adopted especially on the state of danger (disaster management), which was actually induced by the floods that Hungary faced each year. Unlike the Constitution, the Basic Law mentions only one cardinal statute in Article 54 para 4 that means only one statute setting the common detailed rules for every special-legal-order system.

The cardinal statute was adopted in the summer of 2011. The Statute CXIII of 2011 on defence, the Hungarian Army and measures taken in special legal periods is finally putting an end to the previous years’ unconstitutional omission. That regulates the competence and operation of the National Defence Council (Articles 30–34), and the special measures that may be taken in the case of preventive defence, national crisis, emergency and unexpected attacks (Articles 64–79).¹⁴ The statute aims to be in line with the Constitutional Court’s previous decisions¹⁵ such as by containing some procedural and legislative regulation for the extraordinary decree-making as well as some internal functioning rules of the National Defence Council.

Before going into further detailed inquiry, let us see how the Basic Law defines certain special legal orders.

The national crisis (Articles 48 and 49) will be declared in the event of a state of war or danger of war, that is, an imminent danger of armed attack by a foreign power. In this situation the Parliament establishes the National Defence Council, which exercises the rights of the President of the Republic and the Government and which is delegated to it by the Parliament. This is the highest level of emergency that refers especially to mobilisation for military defence.

The state of emergency (Articles 48 and 50) is declared by the Parliament as well in the event of armed acts at the overturning of the constitutional order or at the exclusive acquisition of power, and of serious mass acts of violence threatening life and property, committed with arms or in an armed manner. The most important powers are exercised by the President of the Republic.

The state of preventive defence (Article 51) was introduced in the Constitution in 2005. It is declared by the Parliament for a fixed term, setting out government initiatives and a series of administrative actions focused on the declaration of the qualified legal status and the achievement of higher levels of protection in the public administration, the Hungarian defence forces and law-enforcement agencies. These measures will ensure that the administration, the defence forces and the law-enforcement agencies are carrying out their duties required by threats or alliance obligations without delay.

In the state of danger (Article 53) the government will have the right to immediate action and to take extraordinary measures in the event of any natural disaster or industrial accident endangering life or property, or to mitigate the consequences. This state may be declared in case of danger level of less than state of emergency too. The natural or industrial danger may be a natural disaster, flood, inland waters, or industrial accidents, mass disease and pollution of drinking water, environment, radiation and air, in the case of major obstacles caused by snowfall, impassable railway lines or main roads within the region at the same time.¹⁶ The state of extreme danger can be located in a village, sub-region, county, parts of the country or throughout the country.¹⁷

Unexpected attacks (Article 52) means the event of any unexpected invasion of the territory of Hungary by external armed groups. In this case the Government shall be obliged to take action immediately with forces duly prepared and proportionate to the attack to repel the same, and to safeguard the territory of Hungary. The Government has to protect law and order, life and property, public order and public safety, and to these ends may take special measures and regulate by decrees. These decrees may suspend the application of particular statutes and deviate from any statutory provision. The aim of this status is to make the government able to respond to the aggression

threatening the State as soon as possible.

3. Role of the constitutional institutions in special legal orders

3.1. The President of the Republic

The competence of the president differs significantly in national crisis from a state of emergency, and from the other special situations. In the first two special legal orders the president is the substitute of the Parliament if the latter is incapable. However, he or she has no complete competence, but according to Article 48 para 3 he or she may only declare the state of war, national crisis, and state of emergency, and establish the National Defence Council. The substitution makes it possible for the decision-making and executive bodies entitled to defence action to operate as quickly as possible. The president of the republic, however, in national crisis is not a direct decision-making institution, since this power is equally divided among public offices as the incapacity of Parliament and the justifiability of the declaration of the state of war, state of national crisis or state of emergency shall be unanimously determined by the speaker of the Parliament, the president of the Constitutional Court and the prime minister (Article 48 para 5). His or her duties are under a *post facto* control of the Parliament (Article 48 para 6).

In a state of emergency, however, the President of the Republic has direct decision-making competences, since (also in substituent position) he or she will decide on the involvement of the Hungarian Defence Forces (Article 50 para 2), and a legislative right is generated, which leads to taking extreme measures (Article 50 para 3). The control of these measures is the Parliament itself or, in the event of its incapacity, the National Defence Standing Committee, which may suspend the emergency measures introduced by the president (Article 50 para 4).

According to Article 9 para 2 the President of the Republic is the commander in chief of the Hungarian Defence Forces. This competence is interpreted by the Constitutional Court as in exceptional circumstances (replacement only) to include temporarily supplemented additional management powers as well.¹⁸ The president, when substituting for the Parliament, has typically an

indirect power.¹⁹ The provision of armed forces, which is a direct power, is a legal right of the president only in a state of emergency (Article 50 para 2).

3.2. The Parliament

The Parliament has a constant role in the extraordinary legal systems. In situations when it is not the most important decision-making body, then its role is permanent monitoring.

The Parliament, being the most important representative body, has a duty to operate continuously and unhindered if the country is threatened in any way. A constitutional rule (Article 48 para 7) gives a special guarantee that in the case of national crisis (in a state of emergency) the Parliament may not undergo voluntary or mandatory dissolution. During these times no general elections may be called or held. In such cases, a new parliament shall be elected within ninety days of termination of the special legal orders. If the general elections of MPs have already been held, but the new Government has not been formed yet, the President of the Republic shall convene the inaugural session within thirty days of termination of these statuses. This latter case is considered hindrance, so the president is entitled to declare the state of war or emergency and to establish the National Defence Council.

In general the Parliament has the right to declare the special order and to establish the National Defence Council. Should the Parliament be hindered the President substitutes, but the Parliament will control and review the justifiability of all status-decisions, i.e. declaration of state of war, national crisis and emergency, at its first session once it is able to convene again, and shall decide on the legitimacy of the measures adopted. According to the declaration the Basic Law uses affirmative sentence which, according to traditional law-editing, means that if the conditions are met the special legal order must be declared.

The declaration of the national crisis or state of emergency is a state monopoly that is a task of the representative decision-making body (parliament) in representative democracies.²⁰ In these special legal orders the Parliament is working (a) among members of the Defence Council to see the speaker of the Parliament and the heads of the political groups,²¹ and (b) in plenary and committee

sessions, when it says that in a state of emergency the Parliament or, in the event of its incapacity, its National Defence Committee, shall remain in session.²²

In case of preventive defence or unexpected attacks the Parliament is primarily responsible for the control over the executive, i.e. the government. The control means that in these states the Parliament must always be informed about the measures taken by the government. The information (particularly as Article 51 para 3 refers to it) is immediate, continuous and constant, which means it is not enough to summarise the action taken after the status ceased. After providing the information, decision-making competence is not generated.

The issue of incapability of the Parliament remains a major question in regulatory issues, since the right to declare a state of national crisis or emergency conditions depends on it (Article 48 para 3). At incapability the president is entitled to declare the state of war, a state of national crisis, establish the National Defence Council, and to declare the state of emergency.

The institution of incapability is aimed at promoting quick action. That is, if the Parliament is not capable of making an immediate decision on the declaration of the special status, the President of the Republic substitutes for the Parliament. Incapability has two conditions: on the one hand, the Parliament shall be considered prevented from making such decisions if it is not in session for whatever reason,²³ or on the other, if the convocation faces an obstacle of either (a) the event that generates the special legal order, which is an objective element, or (b) shortage of time (Article 48 para 4).

The fact of incapability and the justifiability of the declaration of a state of war, national crisis or emergency are unanimously determined by the speaker of the Parliament, the president of the Constitutional Court and the prime minister (Article 48 para 5). The selection of these three institutions has been introduced by the 1989 constitutional amendment. According to Jakab, this selection is reasoned by

- (a) the Parliament is the body whose powers are substituted,
- (b) the Constitutional Court is the main guardian of the constitutional operation and these special legal orders are always threats to this

operation, (c) the Prime Minister controls the Government and so the regular operational actions (which in this case would not be sufficient, hence there is a need for a special status to be declared) and those competences are delegated to the president by announcement.²⁴

In my opinion, the Hungarian Constitution does not allow total concentration of power even in a state of war, so it is necessary that the traditionally separated branches of power shall work together in this way.

Article 48 paras 5 and 6 also imply that the decision must be justified. The justification is reviewed by the Parliament in its first session once it is able again to convene and shall decide on the legitimacy of the measures adopted. This decision is an exclusive right of the Parliament against which no revision is possible, even by the Constitutional Court.²⁵ The decision may be approval or declaring illegality, i.e. withdrawal of the state of special legal order.

3.3. The Government

The Government's power is so complex and comprehensive that it extends to all the duties that the Constitution does not specifically refer to another body.²⁶ Thus, it is especially important in extreme situations that its (at this time partly limited and restructured) powers shall be properly managed. In special legal orders the army and the administration gain a special emphasis because of the immediate protection of life and property, therefore, I wish to highlight these two great powers of the Government: (a) the Basic Law sets out in Article 15 para 2 that the Government is the supreme body of the public administration; and (b) it directs the Hungarian Defence Forces' operation (Article 45 para 2).

In a national crisis the whole Government is involved in the National Defence Council, because both the prime minister and the ministers are members of the extraordinary body (Article 49 para 1). In this situation, the Government is not only an enforcement body but also a co-operative decision-maker. However, in a state of emergency, it shall ensure the implementation of the regulations of the president.

Stronger powers are delegated to the Government at "lower" levels of preparedness: in a state of preventive defence, at unexpected attacks, and in particular in a state

of danger.

The state of preventive defence is declared by the Parliament when the following conditions are met: (a) the risk of an external armed attack, or (b) an obligation arising from a military alliance; and (c) it can be declared only for a fixed termination. The Basic Law does not allow waiting for the Parliament's decision; the government is mandated to adopt special measures on subordinate bodies by decree.

It is important that these regulations have fixed personal scope: the administration, the military forces and law-enforcement agencies. Such cautious regulation ensures that in a state of preventive defence all the necessary institutional conditions for immediate order of compulsory military service would be ready. The measures had two limitations: (a) the Government shall inform the President of the Republic and the competent committees of the Parliament continuously, which means the Government is under a constant control; (b) a time limit is set by the Basic Law to the decrees, which is up to sixty days.

The status for unexpected attacks is specially a temporary institution, because it only may last until the declaration of crisis or emergency occurs. The aim is that the Government should not be prevented from allowing immediate military security tasks. The powers of the Government in this situation have three important characteristics: (a) it must take action, (b) the attack must be proportionate, and (c) the prepared forces must be made ready to act immediately. Of course, at unexpected attack there are multiple controls over the government actions, as detailed below.

The state of danger is declared by the Government by decree, which can result in temporary nullification measures as well. As indicated above, this special legal order had the most detailed regulation background until 2011, because the rules of Act XXXVII of 1996 on the protection of civilians should also be considered.²⁷ The Government is entitled to declare danger, which is regulated by decree, and also to declare disaster areas either of the whole territory or a certain part of the country. The measures introduced by decree shall remain effective for fifteen days unless prolonged by the authorisation of the Parliament.²⁸

3.4. The National Defence Council

The National Defence Council is established in a state of war or danger of war (Article 48 para 1). Primarily, it is set up by the Parliament, but at parliamentary recess the president of the republic substitutes it. Since the Constitution uses an obligatory formula, the National Defence Council must be established, if the conditions in Article 48 para 1 are met. Its president is the President of the Republic and its regular members are the speaker of the Parliament, the heads of the parliamentary factions, the prime minister, and the ministers. The chief of the national defence staff is a special member with a consultative right (Article 49 para 1).

It can be seen that it is primarily a co-operative operation of the legislative power and executive power, enabling the most efficient decision-making and also the implementation of decisions. The number of the members of the National Defence Council depends on the actual number of the designated functions. The current status may vary according to the Parliament's political groups and the number of ministers in line.

According to the Basic Law the National Defence Council shall exercise the rights delegated to it by the Parliament, and the rights of the President of the Republic and the Government (Article 49 para 2). Its authority, therefore, concerns only the state of national crisis: (a) according to Article 45 para 2 the National Defence Council has the exclusive right to direct the Hungarian Defence Forces; (b) it gains right to legislate and take measures. By its delegated competence this board's normative and individual measures are taken as corporate decisions. This latter regulation authorises the board to decide only on those questions that are set in Article 49 para 3 items A–C.

In 1992 the Constitutional Court already set out²⁹ in the provisional Constitution that the Defence Council's decision-making mechanism and the rules for its operation are not fixed either in the Constitution or in other statutes. The Constitutional Court then urgently called to the legislature's attention that these issues should be regulated according to the provisional Constitution's Article 19/D. These have been solved in the referred cardinal statute as it is presented above.

4. Limits of power in special legal orders

Regarding the nature of the special legal orders Jakob notes that the Constitution must find the balance between efficiency (the higher the risk, the greater are the extraordinary powers) on the one hand, and control on the other, the fear of misuse (the lower the risk, the lower are the extraordinary powers).³⁰ The Basic Law sets a limit on all legislation, regulations on restrictions of fundamental rights by which it aims to provide a possible protection against the abuse of the concentrating power.

4.1. The limits of the legislation

The Basic Law makes it possible for the designated body in every special legal order to regulate by decree. It aims to facilitate that, even if a statute should be adopted with certain questions, the conditions attached to decree-making make quick action possible, which is of high priority when under threat of war or when a disaster area is declared.

The common characteristics of the decrees adopted in the special legal system are (a) they may suspend the application of certain statutes, (b) they may deviate from any statutory provision, (c) they may contain other extraordinary measures, and (d) a cardinal statute will record all the relevant content issues.³¹

The following bodies have the right to decree-making in special legal orders:

- in state of war (national crisis): the National Defence Council (Article 49 para 4),
- in state of emergency: the President of the Republic (Article 50 para 3),
- in state of preventive defence: the Government (Article 51 para 3),
- during unexpected attacks: the Government (Article 52 para 3),
- in state of danger: the Government (Article 52 para 2).

The limit of the decree-making is, first off, the duration of the term of validity. All decrees introduced in extraordinary states are time-limited in validity. In general they are valid until the circumstances of the exceptional situation cease (that is, the eliminating of the extraordinary status). Special

rules, however, appear in each status except national crisis. The main reason for this is that in all other special legal orders the ordinary legislative power does not participate in decision-making. The decree introduced by the president lasts a maximum of thirty days; before the declaration of the state of preventive defence the government's regulation lasts until the announcement of the status, but up to sixty days; at unexpected attack the government regulation is in force until the attack is resolved; and in danger the emergency decree remains in force for fifteen days from the date of publication. The Constitution allows three cases where only the Parliament can extend the term of validity of the decrees: in a state of national crisis, emergency, and extreme danger.

Against the condensed power stands the inviolability of the Basic Law and the Constitutional Court's continuous operation. According to Article 54 para 2, in a special legal order the application of the Basic Law may not be suspended, and the operation of the Constitutional Court may not be restricted. In particular, this means that the legislature must operate constitutionally even in disaster or war-torn environments. Furthermore, I note, as it is detailed below, the prohibition of suspension of the Basic Law does not prevent the legislature to restrict certain fundamental rights. Other constitutional provisions are, however, not allowed to be suspended. The Constitutional Court is the real legal protection for these provisions. Another important task of the Constitutional Court is the contribution in declaring the incapacity of the Parliament and the justifiability of the declaration of the state of war and national crisis or emergency, where, according to Article 48 para 5 the Constitutional Court, just like the other participant institutions, has the right of veto.

Finally, a permanent barrier is continuous parliamentary control.³² The Basic Law sets the requirement of communication in any status where the Parliament is not directly a decision-making body, whether the obligor be the president or the government. The control does usually not mean, however, direct intervention of the Parliament, since the Basic Law clearly stipulates which body in certain extreme situations is authorised to take extraordinary measures. An exception is the state of emergency, when the parliament or, in the event of its incapacity, the National Defence Committee, may suspend the application of any extraordinary measure adopted by the president. By this

the constitution aims to forego the development of autocratic exercise of power. In addition, several standing committees' on-going work is set at state of emergency and preventive defence.

In connection with the announcement, until 2011 special regulations were adopted only for a state of danger. The Act LXXIV of 1999 on the management and organisation of the protection against disasters and the fight against major accidents in connection with dangerous materials³³ defines a special method for publication in Article 7 paras 3–4. It says that in cases of no delay the government's decrees can be announced through public media (national, regional and local) broadcasters (this is by definition extraordinary announcement), and can be entered into force even on a certain moment of the day. The decrees announced in such a way shall be published in the Official Journal's next edition. These extraordinary announced decrees shall be published in national and local newspapers on the day or the day after announcement as well.

4.2. The limitations of fundamental rights

The Article 54 para 1 of the Basic Law allows some fundamental rights within a special legal order to be (a) restricted, or (b) suspended.

The following fundamental rights are exceptions of the restriction or suspension:

- the right to life and human dignity (Article II),
- prohibition of torture, inhuman or degrading treatment or punishment, slavery, human trafficking, medical and scientific experiments on human subjects without their free and informed consent, eugenics, use of a human body for financial gain and human cloning (Article III),
- fair trial, presumption of innocence, and criminal-law-related basic rights (Article XXVIII paras 2–6).

I note that the Basic Law allows less exceptionality in restriction of fundamental rights than the 1989 Constitution did. For example, the previous text contained among the exceptions the right to freedom and personal safety; freedom of thought, religion and conscience; equality; the rights of children and minorities; rights relating to citizenship; and social rights.³⁴ Indeed, the Basic Law

redefined the relationship between the special legal orders and fundamental rights. This also means that compared to previous regulations, life-like provisions were set, because for example in a state of war (or even natural disaster) the social rights, minority rights, children's rights and also religious rights may be restricted within certain constitutional limits.

The level of restriction, according to Article 1 para 3 (necessity, proportionality, respect of the essential content), may be exceeded. There is no derogation allowed, however, from the suspension or limit of fundamental rights that may only be done by law. Furthermore, in my opinion, all this suspension or restriction, in line with the extraordinary status, still shall be necessary and proportionate. This is supported by the wording "beyond", i.e. under higher thresholds, the same constitutional requirements are to be met.

The Basic Law aims to follow the practice of the European Court of Human Rights (ECHR) on Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, consistency can be found according to the restrictions of the basic rights in this field, because the ECHR has consistently held to find that even in a state of emergency the following rights cannot be restricted: the right to life (Article 2),³⁵ the prohibition of torture (Article 3),³⁶ the criminal-law-related fundamental rights (Article 5),³⁷ or the right to a fair trial (Article 6).³⁸

Overall, I can conclude that in special legal orders the Basic Law's aims are to find the right path between efficiency and protection in a clarified and systematic way, which is in principle successfully done. However, to maintain this accurate regulation in line with international standards, the implementation must for the most part be constitutional. The rules of states of danger are therefore focused. The continuously operating institutions of control have a very important role, as well as each participant's personal engagement to constitutional regulations and values.

Notes

¹ *Lawless v. Ireland nr. 3*, [C] no. 332/57, §28, ECHR A3.

² See Act IX of 1485.

³ Deák, Ferenc, *Adalék a magyar közzoghoz* ("A Contribution to the Hungarian Public Law"), Pest, Pfeifer Ferdinánd, 1865, p. 134. Ferenc Deák (17.10.1803–28.01.1876) was a lawyer, a Hungarian statesman,

⁴ Ferdinandy, Geza, *Magyarország közigazgatási jogja (alkotmányjog)* ("Public Law of Hungary [Constitutional Law]") Politzer Zs. és fia, Budapest, 1902, §35 p. 91 and §212 p. 654.

⁵ Deák, *op. cit.*, p. 136.

⁶ Kmety, Károly, *Magyar közjog tankönyve* ("The Textbook of Hungarian Public Law"), Budapest, Politzer, 1907, pp. 28–29.

⁷ The highest office in Hungary after the king; the king's deputy and guardian. This office was established by King Saint Stephen (1001–1038); the last *comes palatii* (nádor) was in his office until the 1848–49 revolution. After the conciliation of 1867, in the Austro-Hungarian Monarchy his duties were transferred to the prime minister.

⁸ For more on special legal orders in the historical constitution, see Ereky, István, *Jogtörténeti és közigazgatási jogi tanulmányok* ("Essays on Legal History and Public Administration") Eperjes, Sziklai Henrik, 1917, pp. 544–551; Desider, Markus, *Ungarisches Verwaltungsrecht* Tübingen, J.C.B. Mohr, 1912, pp. 104–110; Szabó, István, *Adalékok Közép-Európa Polgári Alkotmánytörténetéhez* ("Contributions to Middle-European Constitutional History"), Budapest, Szent István Társulat, 2000, pp. 42–44.

⁹ Jakab, András, *Az Országgyűlés akadályoztatása különleges állapotokban* ("Incapacitation of the Parliament in Special Legal Orders") in Jakab, András (ed.), *Az alkotmány kommentárja* ("Commentary on the Hungarian Constitution"), 2nd edn, Budapest, Századvég, 2009, pp. 633–671, especially p. 634.

¹⁰ Jakab, *op. cit.*, p. 635 citing Koja, Friedrich, *Állami szükségállapot és szükségállapotra vonatkozó jog* ("State of Emergency, the Law of the State of Emergency"), trans. by Jakab, András in Takács, Péter (ed.), *Államtan. Írások a XX. századi általános Államtudomány köréből* ("Doctrine of State: Essays on the Twentieth Century's General Scope of Political Science"), Budapest, Szent István Társulat, 2003, pp. 797–817.

¹¹ Jakab, *op. cit.*, p. 636.

¹² Opinion on the Constitution of Hungary, (Grabenwarter, Christoph *et al.*), European Commission for Democracy Through Law (Venice Commission) CDL-AD(2011)016. item 134.

¹³ On German constitutional traditions, see McHugh, James T., *Comparative Constitutional Traditions*, New York, Washington and Baltimore, Peter Lang, 2002, pp. 159–174.

¹⁴ A further new cardinal statute will regulate the measures that may be taken in case of disasters. The Act adopted in the autumn of 2011 (Act CXXVIII of 2011) will enter into force on 01.01.2012.

¹⁵ See Decision 63/1992 CC.

¹⁶ The Act XXXVI on Civil Defence of 1996, Article 2 para 2. A similar definition will be adopted within Act CXXVIII of 2011, see below.

¹⁷ Hungarian NUTS (Nomenclature of Territorial Units for Statistics) structure in 2011: NUTS1 statistical great regions (3), NUTS2 statistical and planning regions (7), NUTS3 Counties and the Capital (20), LAU1 sub-region (168). According to the present governmental plans, this unit shall be reformed to the sub-regional district "járás" by 2013, LAU2 municipalities (3152).

http://epp.eurostat.ec.europa.eu/portal/page/portal/nuts_nomenclature/correspondence_tables/national_structures_eu (30.06.2011) On the reformation of sub-regional districts, see Gerencsér, Balázs Szabolcs, *Reform Attempts in the Hungarian Public Administration in the 1930s and in 2010*, Budapest, Szent István Társulat, 2011, pp. 495–505, especially pp. 498–499.

¹⁸ Decision 48/1991 CC.

¹⁹ According to the decision of the Constitutional Court, the right of the

Parliament to declare the special legal order may be considered only indirect guidance of the military defence. See *ibid*.

²⁰ *Brannigan and McBride v. The United Kingdom* [CP] no. 14553/89, §43, A258-B.

²¹ Article 49 para 1.

²² Article 50 para 4.

²³ According to the various forms of "sitting" see the chapter on the Parliament above.

²⁴ Jakab, *op.cit.*, p. 638.

²⁵ Jakab, *op. cit.*, p. 643.

²⁶ Decision 48/1991 CC. This practice of the Constitutional Court is implemented in the new Basic Law in Article 15 para 1.

²⁷ This Act will be replaced from 01.01.2012 by Act CXXVIII of 2011 on disaster protection. This Act reforms the governmental co-ordination of disaster protection (Chapter II) and civil protection (Chapter VI). In comparison to the previous regulation, this new Act focuses on reasonable co-ordination. In these types of special legal orders the new Act will move the administrative action from the decentralised (autonomous) bodies to centralised authorities, where professional staff should act more efficiently than they do today. The Act will set three types of civil protection: the voluntary, the professional special rescue services, and obligatory participation.

²⁸ About the announcement see below.

²⁹ See *ibid*.

³⁰ Jakab, *op. cit.*, p. 636.

³¹ The relevant regulations of Statute CXIII of 2011 contain rules on the National Defence Council's operation and competences: Articles 30–34; general regulations on measures in special legal orders: Article 64; special measures on defence administration: Article 65; special measures on public administration, public order and safety: Articles 66–73; special measures on jurisdiction: Articles 74–75; special measures on economical and obligation of material services: Articles 76–78; and special regulations on preventive defence: Article 79.

³² The parliamentary control is a standard of democratic constitutions. See Jackson, Vicky C., and Tushnet, Mark, *Comparative Constitutional Law: Documentary Supplement*, New York, Foundation Press, Thomson/West, 2006, pp. 21–26.

³³ The above-cited Act CXXVIII of 2011 on protection of disasters in Article 45 will regulate in a very similar way.

³⁴ Article 8 para 4 of the Constitution: During a state of national crisis, state of emergency or state of danger, the exercise of fundamental rights may be suspended or restricted, with the exception of the fundamental rights specified in Articles 54–56 paras 2–4, Article 57, Article 60, Articles 66–69 and Article 70/E.

³⁵ *Mahmut Kaya v. Turkey* [FS] no. 22535/93, §85, ECHR 2000–III.

³⁶ *Bazorkina v. Russia* [FS] no. 69481/01, §129.

³⁷ *Vamava and others v. Turkey* [GC] no. 16064/90, §208.

³⁸ *John Murray v. the United Kingdom* [GC] no. 18731/91, §66, ECHR 1996–I; *Lawless v. Ireland* [C] no. 332/57, §44, ECHR A3; *Aksoy v. Turkey* [C] no. 21987/93, §78, ECHR 1996–VI.

Chapter XVII

Public Finances

Zsolt Halász

1. Finances and financial law in the Constitution in general

What are the concepts and the subjects of financial law and financial regulation? There is no exact answer to this question. It has been defined neither by the literature nor by the legislation. There is more theory of the concept of financial law. In this essay I do not intend to examine all of these theories. However it is necessary to make some distinctions. From the widest point of view, theoretically one can differentiate five main fields forming the elements of financial law: budgetary law, law of the state debt management, law of the state property management, taxation law, and the banking and securities law. Certain elements of financial law are related to – or in certain law systems, form – constitutional law, administrative law, and private law as well.

The fundamental rules of budgetary law can be found in

almost every constitution in Europe.¹ Among these fundamental rules one can find the obligation for budget-making, the definition of the time of appropriation, the rules of the budgetary procedure, and the implementation of the budget. The rules on the institutions of budgetary control (Parliament, audit institutions) with their tasks and powers usually form a separate part of constitutional budgetary regulation² (except for in the Swiss Constitution). In the Constitution of the Swiss Confederation there are no rules on the supreme audit institution of Switzerland.

As a consequence of the financial crisis the law of state debt management has gained high importance. Some countries have incorporated the fundamental rules on state debt management in their constitutions, and/or on the limits of the state debt.³ The clearest constitutional regulation can be found in the Constitution of Poland (Article 216 para5):

It shall be neither permissible to contract loans nor provide guarantees and financial sureties which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product.

(It is just the same as one of the Maastricht criteria.)

As a consequence of the financial and budgetary crisis of some EU Member States, the economy and the investors pay attention to the independent fiscal institutions. The mandate of these institutions is the independent evaluation

of fiscal and other economic policies. This mandate is comparable to that of the central banks but on the fiscal side. They can fulfil their tasks if they can work independently, basically from the Government. There are not too many countries where one can find fiscal councils or other independent fiscal institutions. These institutions can be found in Austria (Government Debt Committee, 1997), Belgium (Public Sector Borrowing Requirement Section [1989] of the High Council of Finance [1936]), Canada (Parliamentary Budget Office, 2008), Denmark (Economic Council, 1962), Germany (Council of Economic Experts, 1963), Hungary (Fiscal Council, 2008), the Netherlands (Central Planning Bureau, 1945), Slovenia (Fiscal Council, 2007), Sweden (Fiscal Policy Council, 2007), the UK (Office for Budget Responsibility, 2010), and in the USA (Congressional Budget Office, 1975). However, independent fiscal institutions are often regarded as independent watchdogs of the fiscal policy and the fiscal sustainability; the fundamental institutional rules concerning them are not incorporated in the constitutions. Additionally, the state audit offices (courts of auditors) are independent institutions (independent at least from the governments) as they are the financial control institutions of the national Parliaments, but at the same time many of the so-called independent fiscal institutions are formally governmental institutions. In Austria the Government Debt Committee is composed of twelve plus three members, six of them – including the president of the Government Debt Committee – are delegated by the federal government. However,

membership in the Government Debt Committee is an honorary post.⁴ In Belgium, the chairman of the High Council of Finance is the minister of finance. In Denmark, the Economic Council's objective is to monitor the economy and analyse long-term economic development. Another objective of the Council is to improve co-ordination between the different economic interests in Danish society. Therefore, the Council plays an important role in the public debate on economic policy issues in Denmark. The Economic Council has seventeen members representing unions, employer's federations, the Central Bank and the government.⁵ In the Netherlands the Central Planning Bureau (which has never been engaged in economic planning) is part of the ministry of Economic Affairs, Agriculture and Innovation. Its director is appointed by the Minister, in consultation with other members of the government. However, the Central Planning Bureau is regarded as independent as far as the contents of its work are concerned.⁶ In Slovenia the government shall appoint the fiscal council as a consultative body for independent assessment of the fiscal policy and implementation of structural reforms. The members of the fiscal council shall be appointed by the government on the proposal of the minister responsible for finance.⁷ In Sweden, the Fiscal Policy Council is an agency under the government. The council has no formal relationship with the Parliament. The council has eight members: six active academics and two ex-politicians.⁸ In the UK the Office for Budget Responsibility consists of the chairman, appointed by the

chancellor of the exchequer with the consent of the treasury committee of the House of Commons, two other members appointed by the chancellor of the exchequer after consultation with the chairman and with the consent of the Treasury Committee, and not fewer than two members nominated by the office of and appointed by the Chancellor of the Exchequer.⁹ The Parliamentary Budget Office in Canada and the Congressional Budget Office in the USA are parliamentary institutions.

Theoretically the basic rules on state property management should be instrumental in the financial and economic rules of the modern constitutions. Nonetheless, if one observes the constitutions of the European states, it is not easy to find any constitutional provisions that affect the state property management.¹⁰ The “most detailed” rules on state property management can be found in the Instrument of Government of Sweden,¹¹ which stipulates that

The Riksdag [the Parliament] decides the principles for the administration and disposition of State assets. The Riksdag may also decide that measures of a particular nature may not be taken without its consent.

Concerning the taxation there are two questions having constitutional aspects. Firstly, who has the legislative power in the field of taxation, and secondly, whether the paying of taxes can be regarded as a fundamental obligation.

In modern constitutions one can mainly find the rules on legislative power. Without any exemption, the parliaments have the legislative power in the field of taxation. "No taxation without representation" was the slogan originating during the 1750s and 1760s that summarised a primary grievance of the British colonists in the Thirteen Colonies, which was one of the major causes of the American Revolution. Historically one of the first of these constitutional rules can be found in the U.S. Constitution (Section 8, first sentence):

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States ...

Besides the rules on legislative powers, taxation as a fundamental obligation has the same importance. In 1789 the French Declaration of the Rights of Man and the Citizen created the basis of this obligation:

13. A general tax is indispensable for the maintenance of the public force and for the expenses of administration; it ought to be equally apportioned among all citizens according to their means.

The Declaration has connected the obligation of taxation and the question of legislative power as well:

14. All the citizens have a right to ascertain, by themselves or by their representatives, the necessity of the public tax, to consent to it freely, to follow the employment of it, and to determine the quota, the assessment, the collection, and the duration of it.

In the modern European constitutions one can mostly find rules concerning the legislative power in the field of taxation.¹² In addition in the federal states, it is necessary to define the distribution of the legislative power between the federal state and the member states/provinces. Taxation as a fundamental obligation can be found in fewer constitutions. Constitutions deem the payment of taxes as public and/or fundamental duty.¹³ Nevertheless there are a significant number of states in Europe, where the Constitution does not deem the payment of taxes as fundamental duty.¹⁴ However the Constitution of the Czech Republic does not contain any rules on the obligation for taxation. It is incorporated in the Chart of Fundamental Rights and Freedoms.¹⁵ Neither does the Constitution of the Swiss Confederation contain any rules on the obligation for taxation, however it lays down the principles of taxation, and the subjects, objects, the maximum rates, and the basic provisions for the main taxes (direct taxes, value-added tax, consumption taxes, stamp duty, withholding tax, customs duties).¹⁶

In Hungary, both the Constitution and the Basic Law declare the legislative power of the Parliament,¹⁷ and set

taxation as a fundamental obligation.¹⁸

The Treaty on the Functioning of the European Union contains rules on the obligation for budget-making, the general principles governing the EU budget, the multi-annual financial perspective, the budgetary procedure, the implementation of the budget, budgetary control, the structure and powers of the Court of Auditors, and finally the financing of the budget (the own-resources system).¹⁹ There is no obligation for taxation in the Treaty (and the Treaty on the European Union), because the EU does not have the power to impose taxes in the Member States.

On banking and securities law the modern constitutions contain hardly any rules. The few constitutional rules²⁰ of banking and securities law are mainly concerning legislative and executive competences. However the Constitution of Italy contains not only formal rules, it states that the republic encourages and protects savings in all its forms, and regulates, co-ordinates and controls the provision of credits.²¹

There is one very important institution of the banking system of each country, mentioned in most of the constitutions: the central bank. Concerning the central bank the constitutions generally declare its independence, regulate the appointment of its leaders, determine its primary objective to achieve and maintain price stability, and empower it with the exclusive right to issue money and formulate the monetary policy.

There is no single formula for the form of regulation of public finances in modern constitutions. One can see constitutions with and also without separate chapters on public finances. The financial rules are gathered in a separate chapter, for example, in the Constitution of Austria, the Federal Republic of Germany, Poland, Slovenia, Slovakia, and Switzerland. The Treaty on the Functioning of the European Union has a separate chapter as well on the financial provisions.

2. Public finances in the Constitution²² of Hungary

2.1. The system of regulation of public finances in the Constitution

The Constitution contains very few direct provisions for public finances. These few provisions relate to the obligation to contribute to public revenues, the parliamentary approval of the state budget and its implementation, the State Audit Office and the Hungarian National Bank, as well as the Hungarian Financial Supervisory Authority. The Constitution does not contain an individual chapter on public finances. The Constitutional Court tried to recover this lack of the Constitution case by case, especially in the field of taxation and budgetary issues, however the Constitutional Court does not have the power to amend the Constitution. Its competence is limited

to the interpretation of the text of the Constitution, having regarded the petition initiating the constitutional review.

2.2. Taxation

Article 70/I sets the obligation for every natural and legal person and organisation without legal personality to contribute to public revenues in accordance with their income and wealth. This general clause can be found in many other modern constitutions. However, the deeper meaning and requirements deducted from it can be explored in the practice of the Constitutional Court. The practice and the main relevant decisions of the Constitutional Court concerning taxation can be summed up as follows.

The Constitution does not contain a separate financial chapter. However, the Constitutional Court has derived the fundamental constitutional requirements of the tax-law and the taxation from the general provisions of the Constitution.

The Constitutional Court had to decide if the government decree in the field of taxation was compatible with the Constitution. As the Constitution does not contain the "*nullum tributum sine lege*" principle explicitly, the Constitutional Court had to derive it from the general rules and principles of the Constitution. The Constitutional Court found that as the obligation to contribute to the public revenues in Article 70/I of the Constitution was located in Chapter XII on Fundamental Rights and Duties, it requires

the same constitutional safeguard as the fundamental rights. According to Article 8 para2: “in the Republic of Hungary rules pertaining to fundamental rights and duties shall be determined by an Act of the Parliament”. Having regarded the rules of Article 70/I and Article 8 para2, the legal provisions on taxation shall be determined by statute; provisions in government decree and other minor-level measures are formally unconstitutional.²³

The Constitutional Court had to answer the fundamental question of who was obliged to pay taxes having regarded the wording of Article 70/I of the Constitution. The text of Article 70/I was the following until 2002: “All Hungarian citizens shall have the obligation to contribute to public revenues in accordance with their income and wealth.” The Constitutional Court had to interpret the concept of “all Hungarian citizens”, because the petitioner initiated the examination of unconstitutionality of a company tax law, because – as he argued – under Article 70/I only Hungarian citizens were obliged to pay taxes. The Constitutional Court pointed out that “all Hungarian citizens” in Article 70/I does not mean exclusively. The State has the right to impose taxes and other obligations on persons other than Hungarian citizens.²⁴ Later the Parliament amended the text of Article 70/I in 2002. Since then, every natural and legal person and organisation without legal personality shall have the obligation to contribute to public revenues in accordance with their income and wealth.

Concerning the obligation to contribute to public revenues,

another fundamental question has emerged before the Constitutional Court. Neither the Constitution, nor any financial law, defines precisely the notion of tax. According to the argument of the petitioner, this deficiency violates the requirement of the legal certainty. The Constitutional Court pointed out that this failure was not unconstitutional as the VAT and the personal income tax laws did not contain the legal concept of tax. It is enough for the requirement of legal certainty if the notion of tax can be deducted clearly, unambiguously and standardised for the whole taxation from the Constitution and the tax laws.²⁵

Article 70/I sets a general requirement for taxation: the principle of proportionality. In the above-mentioned decision, the Constitutional Court has emphasised the right of the State – deduced from the Constitution – to impose different taxes to cover public expenditures. The state sovereignty determines the subject, the basis and the rate of the taxes. The state has a very broad but not unlimited power as it must not violate constitutional rights and principles (e.g. it must not have a discriminative nature). The Constitutional Court pointed out that the types of taxes may not only be income and property taxes, because the state and the legislature have the right to define the subject itself, the object and basis of the taxation.

The Constitutional Court has examined the constitutionality of the legislation of the tax on house cash register as a special tax on wealth. The Constitutional Court concluded that the examined special separate tax on wealth was not

directly related to the taxpayers' income and financial situation, and therefore does not meet the constitutional requirement of proportional taxation.²⁶

The Constitutional Court has worked out the conceptual elements of proportional taxation.²⁷ These conceptual elements are the following:

- the compliance of the tax with the taxpayers income or property,
- the direct link between the tax and the taxpayers taxable income or property,
- the taxation of the taxpayer's factually earned income or acquired property, and
- the tax proportional with the taxpayer's capacity to bear the tax burden.

In the case of income and wealth taxes, all these conceptual elements must be present to the examined regulation to meet the constitutional requirements. It can lead to the violation of the Constitution of the examined regulation to impose taxes on the factually acquired income.

A very hard case has been raised concerning the taxation of presumable income. The Constitutional Court pointed out that the legal presumption may only be an exceptional tool for simplifying the construction of legal measures and jurisdiction. The proof of the possibility of overturning the

presumption in Article 70/I cannot be ruled out. It is a constitutional requirement that the possibility of proof to the taxpayer should be provided. The Constitutional Court considered that the presumption of tax rules may only exceptionally applicable and should be subject to additional guarantees. It may not be a general tool of income taxation.

Concerning the tax rates, the Constitutional Court has emphasised that it cannot examine taxation on the whole. It can examine only the contested tax provisions. However, the tax rate can violate Article 70/I of the Constitution if the calculated tax amount compared with the value of the tax base is excessive. A provision cannot be regarded as a tax norm if its consequence is a high distraction leading to a subsequent impossibility.

With regard to the tax reliefs and exemptions the Constitutional Court can examine how these norms can be amended and if the State provides enough time for the taxpayers to prepare themselves for the application of the amendment. Generally taxation is an important part of the financial sovereignty; the State has the right to impose taxes and grant tax reliefs and exemptions. While the general and proportionate taxation is a constitutional obligation, nobody has a subjective right to tax relief and exemptions. The practice of the Constitutional Court²⁸ determines the main requirements concerning tax reliefs and exemptions:

- the legislature has the right to amend the provisions on

tax reliefs and exemptions, but only by constitutional methods,

- the amendment can be regarded as constitutional if the legislature has provided enough time for the taxpayers to prepare themselves for the new rules,
- from this it follows that the tax reliefs granted for a long time can be more easily amended than the reliefs granted for a short time, because the authorised taxpayers of the latter require increased protection. The short-term promises enjoy increased protection; the early termination offends acquired rights. In the case of the long-term promises, the amendment may have a constitutionally acceptable reason.

In the field of taxation the Constitutional Court has set the same requirements concerning the prohibition of discrimination as in the other fields of the legislation.²⁹

Concerning the sanctions in the tax law the Constitutional Court pointed out that the Constitution does not contain any provision on the administrative sanctions. The State has wide competition to determine the application conditions and dimensions of the administrative sanctions. The limits of these legislative freedoms are the constitutional rights (e.g. the requirement of non-discrimination, the right for human dignity, the right for personal freedom, the rule of law).³⁰

2.3. Budgetary issues

The regulation of the budgetary issues in the Constitution can be regarded as very reticent. The most important among these rules is the competence of the Parliament for establishing the balance of public finances, and approval of the state budget and its implementation (Article 19 para2 item D). However the Constitution does not prescribe these explicitly; the budget must be passed in the form of a statute.

As regards the State Budget Act, the Constitutional Court emphatically pointed out that constitutionality also includes the requirement that various bodies operate efficiently (including Parliament, *inter alia*), something that is inconceivable without a rational system of legal editing and drafting. An act amending several others, some of them profoundly, others in only one paragraph, makes responsible decision-making hard, because the specialties are very complex and in several cases there are no logical link between them. In 1995 the Constitutional Court considered these mixed acts generally as violation of legal certainty and pointed out that this method of legislation may only be special exemption, not a general law-making model.³¹ After a decade, the Constitutional Court held that the amending provisions of certain statutes related to the implementation of the budget in the State Budget Act of the Republic of Hungary for the Year 2005 was unconstitutional and, therefore, annulled these provisions. The Constitutional Court pointed out that under Article 19 para3 item d of the Constitution, the annual budget is to be

adopted in the form of a specific independent legal act (statute). The reference (with a particular emphasis) to this specific scope of the statute makes it mandatory (a condition of validity) for the Parliament to pass a decision on the budget independently from other subjects. In order to exercise, by passing an individual decision, its competence specifically mentioned in the Constitution, the Parliament is required to vote on the budget individually, following a separate debate. This is necessary because in the case of a joint (package) decision, the debate on some important and fundamental questions may be neglected or even missed, or it may be connected to the adoption of decisions not related to them. Of course, in constitutional democracies, such a connection goes hand-in-hand with political compromises, and in most cases no objections can be raised. However, an objection may rightfully be made if the Constitution requires a separate decision for the adoption of the subject concerned. This applies to the competences related to the budget – including the annual budget – as listed in Article 19 para3 item d of the Constitution.³²

There are several potential territories of budgetary regulation that cannot be found in the Constitution. Some examples include: the obligation for budget-making, the budgetary procedure, the tasks of the government, the fundamental rules for the implementation of the budget, the fundamental rules for budgetary accounts and financial statements, the detailed rules concerning the powers of the

Parliament over the budgetary control, the fundamental rules for the budgets other than the state budget (budgets of the local governments, and the social insurance funds).

Beyond the rules on the competence of the Parliament concerning the state budget the Constitution contains two special budget-related rules: the rules for the national referenda – especially the subjects of the national referenda – and the rules for the competence of the Constitutional Court.

Article 28/C para5 excludes from the subjects of the national referenda the statutes concerning state budget and its implementation, central taxes, stamp and customs duties, as well as on the content of statutes concerning central requirements on local taxes.

The Constitutional Court has the power to review the constitutionality of laws. Since the end of 2010 the competence of the Constitutional Court has been limited in the field of the constitutionality of statutes on the state budget and its implementation, on central taxes, stamp and customs duties, contributions, as well as on the content of the statutes concerning uniform requirements on local taxes. The Constitutional Court may review these laws and annul them if they are found unconstitutional only if the petition refers exclusively to the right to life and human dignity, the right to the protection of personal data, the right to freedom of thought, conscience and religion or to the right connected with Hungarian citizenship under Article 69

of the Constitution and if the content of these statutes violates these rights (Article 32/A). These new competence rules set an explicit limitation for the constitutional review of the budgetary and taxation laws by the Constitutional Court. Nevertheless no limitation can be set for the Constitutional Court for the interpretation of the right to human dignity and its requirements in the field of constitutional tax regulation.³³

2.4. The State Audit Office and the Budget Council

The State Audit Office was set up on 1 January 1990 after a general amendment to the Constitution by Act XXXVIII of 1989 on the State Audit Office (the SAO Act). The Constitution (Article 32/C) declared the State Audit Office as the organ of the Parliament responsible for financial and economic auditing. The constitutional task of the State Audit Office is to audit the management of public finances, and within this the well-founded nature of the bill on the state budget, the necessity and expediency of expenditures; it shall review the legality of state-budget expenditures in advance; it shall audit the final accounts of the implementation of the state budget; and it shall audit the management of state assets, the activities of state-owned ventures and enterprises concerning the maintenance in the value or increase of their assets.

The State Audit Office has to conduct its audits from the perspective of legality, expediency and efficiency. The State Audit Office has to inform the Parliament in a report

on the auditing activities it has carried out. Its reports – the yearly report on the budget and the special reports as well – are public.

The SAO Act granted full independence for the State Audit Office (and for its leaders).

The president and vice presidents of the State Audit Office are elected by the Members of the Parliament. A majority of two-thirds of the votes of the Members of Parliament was required to elect president and vice presidents. The Constitution has not determined the time of the mandate of the president and vice presidents. The SAO Act has determined it in renewable twelve years.

The Budget Council was set up in 2009 in Hungary by the Act on the state's economical management and budgetary responsibility.³⁴ The Constitution does not contain any rules on the Budget Council. Initially the Budget Council was a body composed of three members, and its task was to promote the legislative activity of the Parliament by macro-economical forecasts and budgetary evaluation of the bills. The Budget Council was set up as independent and it is not bound by any mandatory instructions. The members of the Budget Council were elected by the Parliament for a non-renewable nine years. The President of the Republic, the president of the State Audit Office and the governor of the National Bank of Hungary had the right to propose a member. The Act on the budgetary responsibility was amended at the end of 2010. This amendment has

concerned the provisions on the composition and tasks of the Budget Council. From the former wide tasks only one has remained: to give an opinion on the government's budget proposal. The new Budget Council is composed of the president of the State Audit Office, the governor of the National Bank of Hungary and one member appointed for six years by the President of the Republic. The latter is the chairperson of the council.

2.5. The National Bank of Hungary

The Constitution has declared The National Bank of Hungary as the central bank of the Republic of Hungary. The National Bank of Hungary is responsible for the monetary policy.

Although the independence of the central bank is an essential question in its regulation, the Constitution does not contain any rule on it. The rules concerning its independence can be found in the Act on the National Bank of Hungary, as well as the organisational and operational rules.³⁵ Under the Act on the National Bank, the governor of the National Bank is appointed by the President of the Republic on the proposal of the prime minister. The two deputy governors are appointed by the President of the Republic as well, but on the proposal of the president of the National Bank and the consent of the prime minister. The members of the monetary council are elected by the Parliament.

2.6. The Hungarian Financial Supervisory Authority

Since the beginning of 2011 the Constitution has laid down the fundamental provisions on the status and tasks of Hungarian Financial Supervisory Authority.^{[36](#)}

3. Public finances in the Basic Law

3.1. The system of the regulation of public finances in the Basic Law

It is a fundamental change for the system and form of the constitutional regulation of public finances that the Basic Law contains a separate chapter on public finances. In the chapter on public finances one can find the basic rules on the budget, the state debt, the management and protection of national assets, the National Bank, the State Audit Office, and the Budget Council. Outside the chapter on public finances there are the provisions on the obligation to contribute to the public revenues; the declaration of the Forint as the official currency of Hungary; the principle of balanced, transparent and sustainable budget management; the competence of the Parliament to adopt the State Budget Act and approve its implementation; and the basic rules on the finances of the local governments (their own budgets, their own assets, and the local taxes).

One of the most important regulative changes in the system

of public finances is that the Basic Law sets some basic financial principles, as follows:

- the principle of balanced, transparent and sustainable budget management,^{[37](#)}

the principle of annuity of the budget,^{[38](#)}

- the principle of specification and transparency of the budget,^{[39](#)}
- the principle of lawful, efficient and transparent budget management,^{[40](#)}
- the principle of public interest in national asset management,^{[41](#)}
- the principle of transparency in financial state supports,^{[42](#)} and
- the principle of transparency and clear public life in the management of national assets.^{[43](#)}

For the completion of the constitutional regulation with particular rules the Basic Law sets several fields of legislation to be the subjects of cardinal statute. Concerning the public finances the following topics shall be regulated in cardinal statutes:^{[44](#)}

- the requirements for the preservation, protection and responsible management of national assets,
- the scope of the State's exclusive properties and exclusive economic activities and the limitations and

conditions of alienation of national assets that are strategic in terms of the national economy,

- the fundamental rules of the contribution to the public revenues for the predictable contribution to the satisfaction of common needs,
- the fundamental rules of the pension system to ensure decent old-age living standards,
- the rules for the organisation and operation of the National Bank of Hungary, and for its responsibility for the monetary policy,
- the rules for the body supervising the system of financial intermediaries,
- the rules for the organisation and operation of the State Audit Office, and
- the rules for the operation of the Budget Council.

3.2. Taxation

Similarly to the Constitution, the Basic Law prescribes the fundamental obligation to contribute to public revenues and/or community needs. This contribution shall be proportional, but in a different manner. In the Constitution the basis of the proportionality was income and wealth. The Basic Law links the proportionality with the contribution capacity and participation in the economy. Additionally the Basic Law takes the costs of bringing up children into consideration in the taxation.⁴⁵ This is a very important

provision for the support of families, even if it could have been better formulated. For example, in the Constitution of the Slovak Republic there is a provision with an analogous character: "Parents caring for children are entitled to assistance from the State". However, the assistance of the State is not restricted to the contribution to the community's needs in the Slovak Constitution. The constitutional rule of consideration of the costs of bringing up children in the taxation has another special importance, because the detailed rules of this stipulation have to be defined in cardinal statutes that will guarantee the stability of the tax provisions supporting families in bringing up children.

As the Constitution sets the contribution to the public revenues as fundamental obligations, the form of the tax-legislation must be a statute. The Basic Law has not changed this situation, but it has changed the rule on the proportionality of the taxation. The new provisions are based fundamentally on the contribution capacity, which is in the one hand more permissive than the former, but on the other hand it expressly prohibits the taxes having a confiscatory nature.

3.3. The adoption, implementation and structure of the budget

Compared with the provisions of the Constitution, the Basic Law contains more detailed rules on budgetary issues. Under the Basic Law the approval of the annual budget and the report on its implementation have remained in the

Parliament's competence. In addition the Basic Law explicitly prescribes that these must be adopted in form of a statute and the principle of annuality of the budget. For easier decision-making the Basic Law sets the essential requirement of the same and detailed structure of the annual budget and the report on its implementation (including the general appropriation rule for the incidental case of *ex-/ex* situation).

The Basic Law defines the function of the budget: the appropriation of the government to collect the revenues and to disburse the expenditures.

For the implementation of the budget the Basic Law sets the general principles of legality, effectiveness, efficiency, and transparency. The Basic Law does not contain detailed rules on the budgetary procedure and on the implementation of the budget. One can see in modern constitutions that it is not unheard of but certainly not typical to determine detailed procedural rules in the constitutions. However, the rules of the budgetary procedure can be found, for example, in the Treaty on the Functioning of the European Union.^{[46](#)}

There is one more important new aspect concerning the adoption of the state budget in the Basic Law. The President of the Republic will have the right to dissolve the Parliament if it fails to adopt the state budget for the current year by 31 March. The impact of this rule cannot be assessed yet, however, the aim is clear: without

appropriation the Government may not collect revenues and disburse the expenditures. If it cannot reach the appropriation, for the favour of stability the Parliament shall be dissolved. Among the modern constitutions, in the Constitution of Poland there is an analogous provision on this competence of the President of the Republic.⁴⁷

3.4. The State debt

Besides the adoption and implementation of the annual budget, the Basic Law determines fine-grained and rigorous rules on the state debt and for its cutback. These rules are more precise than the similar rules in the modern constitutions. Similar detailed constitutional regulations can be found, for example, in the Basic Law of the Federal Republic of Germany.⁴⁸

The Basic Law sets the principle of balanced, transparent and sustainable budget management.⁴⁹ It prohibits the Parliament from adopting a Budget Act that allows exceeding half of the GDP. Until the state debt exceeds half of the GDP, the Parliament may adopt a budget that contains state debt reduction in proportion to the GDP. The same rules are valid for the implementation of the budget as well. Additionally, until the state debt exceeds half of the GDP, no debt or financial obligation may be assumed. The cutback of the state debt is safeguarded by the Budget Council.

3.5. The Budget Council

The Budget Council is a supporting body of the Parliament with the main task of examining the feasibility of the State Budget.

Contrary to the Constitution, the Basic Law contains the basic competence and organisational rules on the Budget Council. The provisions on the organisation of the Budget Council are the same as in the Act on budgetary responsibility after the amendment at the end of 2010. (The Budget Council is composed of the president of the State Audit Office and the governor of the National Bank of Hungary and one member appointed for six years by the President of the Republic. The latter is the chairperson of the Council.)

The Basic Law empowers the Budget Council with a very strong competence: the State Budget Act shall be subject of the consent of the Council. There is no single more independent fiscal institution having such strong competence. The independent fiscal institutions are generally consultative and supporting bodies without any consent-giving or decision-making competence. This competence sets barriers not only for the Government, but restrains the Parliament's decision-making powers as well.

3.6. The State Audit Office

The Basic Law does not make fundamental changes to the regulation of the State Audit Office. It continues to be a financial and economic control organ of the Parliament, led

by the president, who is elected by a two-thirds vote of the Members of the Parliament for twelve years. Under the Basic Law the State Audit Office does not audit the well-founded nature of the bill on the state budget and does not countersign contracts pertaining to the assumption of credits for the budget. The Budget Council is responsible for checking the well-founded nature of the bill on the state budget.

As the State Audit Office does not have any powers to impose financial sanctions, its only weapon is publicity. The Constitution has prescribed that the reports of the State Audit Office should be made public. The Basic Law does not require the publicity of the State Audit Office's reports.

After the adoption of the Basic Law the first cardinal statute passed by the Parliament was the Act on the State Audit Office.⁵⁰ This new Act on the State Audit Office declares the public nature of its reports.⁵¹

3.7. The National Bank and the official currency

Like the Constitution, the Basic Law declares the National Bank of Hungary as the central bank of the Republic of Hungary that is responsible for the monetary policy. The declaration of the central bank's independence has not found its place in the Basic Law. The Basic Law empowers the President of the Republic with the appointment of the governor and the deputy governors; however it does not

contain any rules on the appointment of the members of the main decision-making body, the Monetary Council. These questions, as well as the detailed rules of the organisation of the National Bank and the detailed rules of the determination and implementation of the monetary policy, shall be defined by a cardinal statute.⁵²

The Basic Law declares the Forint as the official currency of Hungary.⁵³ The Forint has been the official currency of Hungary since 1 August 1946. However, this declaration can be regarded as a new aspect of the Basic Law and the modern constitutions as well. It is a generally atypical rule; modern constitutions do not contain any similar rules on the official currency. In addition, when Hungary introduces the euro as an official currency, it will be necessary to repeal or amend this Article of the Basic Law.

3.8. The Hungarian Financial Supervisory Authority

The constitutional regulation of the Financial Supervisory Authority existed for only a year in Hungary. The Basic Law does not contain any rules on the Authority any more. If one compares the regulation with other modern constitutions, there are no examples for the constitutional regulation of the financial supervision.

Concerning the regulation of the financial supervision in the Basic Law there remained only that the rules for the body supervising the system of financial intermediaries shall be

defined by cardinal statute.

3.9. Constitutional checks and balances in the regulation of public finances

There are two changes in the constitutional regulation of the public finances that restrict the protection of constitutionality.

The first change was the amendment of Article 32/A of the Constitution in 2010 by Act CXIX of 2010, under which the Constitutional Court shall review the constitutionality of statutes on the state budget and its implementation, on central taxes, stamp and customs duties, and contributions, as well as on the content of the statutes concerning uniform requirements on local taxes only if the petition refers exclusively to the right to life and human dignity, the right to the protection of personal data, the right to freedom of thought, conscience and religion, or rights related to Hungarian citizenship. The Basic Law upholds this competence restriction for a time limit until the state debt exceeds half of the GDP.⁵⁴

The second change was the amendment of the procedural rules of the Constitutional Court by the Basic Law. Under the regime of the Constitution everyone may initiate the posterior law review for unconstitutionality of laws, as well as normative decisions and normative orders.⁵⁵ The Basic Law removes it from the competence of the Constitutional Court.⁵⁶

Contrary to these modifications, the public finances do not remain without constitutional protection, but this protection will be indisputably different than the former was and will be refined by practice.

The main elements of this new system can be summarised as follows:

Among the non-politician actors of the state, only the commissioner for fundamental rights has the right to initiate the review of any piece of legislation for its conformity with the Basic Law at the Constitutional Court. Everyone has right to initiate the proceedings of the commissioner for fundamental rights. The Constitutional Court has the unrestricted right to annul the laws for non-compliance with the Basic Law's procedural requirements for the legislation and publication of laws. Besides formal unconstitutionality, the Constitutional Court has right to review the laws in relation with the rights mentioned above, among them especially in relation to the right to human dignity.⁵⁷ (Only the Constitutional Court has the right to authentically interpret the deeper meaning of human dignity and the constitutional requirements deriving from it.)

Besides this restricted *actio popularis*, everyone will have the right to initiate a review of any piece of legislation applied in a particular case and any court decision for its conformity with the Basic Law (constitutional complaint). Contrary to the regime under the Constitution the new constitutional complaint opens the way for constitutional

review of court decisions. It must be pointed out that the basis of the constitutional review of the court decisions is not restricted for the few fundamental rights mentioned above. From this it follows that the Constitutional Court can ensure constitutional protection through the review of court decisions. Additionally, the ordinary courts will have to take the fundamental rights and all other constitutional provisions into consideration in the particular cases.⁵⁸

Notes

- ¹ Articles 51–51/C of the Constitution of Austria, Articles 109–112 of the Constitution of the Federal Republic of Germany, Article 39 and 47 of the Constitution of the Republic of France, Article 81 of the Constitution of Italy, Article 126, 167 and 183 of the Constitution of the Swiss Confederation, Articles 58 and 86 item G of the Constitution of the Republic of Slovakia, Article 42 of the Constitution of the Czech Republic, Article 146 items e–f and Articles 219–226 of the Constitution of Poland, Article 148 of the Constitution of the Republic of Slovenia, Articles 7–9 Chapter 13 of the Instrument of Government and Article 12–14 of the Riksdag Act (of the Kingdom of Sweden).
- ² Article 121–128/C of the Constitution of Austria, Article 114 of the Constitution of the Federal Republic of Germany, Article 47–2 of the Constitution of the Republic of France, Article 100 para2 and Article 103 para2 of the Constitution of Italy, Article 60 of the Constitution of the Republic of Slovakia, Article 62 and 97 of the Constitution of the Czech Republic, Articles 202–207 of the Constitution of Poland, Articles 150–151 of the Constitution of the Republic of Slovenia, Articles 3–12 Chapter 9 of the Instrument of Government of the Kingdom of Sweden.
- ³ Articles 115 and 143 item d of the Constitution of the Federal Republic of Germany, Article 89 item d and Article 216 para5 of the Constitution of Poland, Article 149 of Constitution of the Republic of Slovenia.
- ⁴ Federal Act on the Establishment of the Government Debt Committee.
- ⁵ <http://www.dors.dk/sw3018.asp>.

⁶ <http://www.cpb.nl/en/about-cpb>.

⁷ <http://www.fiskalnivet.si/fs/fs-eng.nsf/a-fiscal-council/a-fiscal-council>.

⁸ Calmfors, Lars, *The Swedish Fiscal Policy Council*, in *Schwerpunkt Staatsschuldenausschuss: The Swedish Fiscal Policy Council*, pp. 45, 49.

⁹ Act on Budget Responsibility and National Audit of 2011.

¹⁰ Article 52 para2 of the Constitution of the Republic of Austria, Article 20 para2 of the Constitution of the Republic of Slovakia.

¹¹ Article 9.

¹² Article 10 para1 item 4 of the Federal Constitution of Austria. (In Austria besides the Constitution there is a special constitutional law the Finanzverfassungsgesetz regulating legislative powers in taxation between the federal state and the Länder [provinces].) Article 59 of the Constitution of the Slovak Republic, Article 105 of the Basic Law of the Federal Republic of Germany, Articles 127–134 of the Constitution of the Swiss Confederation, Article 1 Chapter 9 of the Instrument of Government (Sweden), Article 34 of the Constitution of the Republic of France.

¹³ Article 84 of the Constitution of Poland, Article 53 of the Constitution of Italy.

¹⁴ Some examples include the Czech Republic, the Federal Republic of Germany, the Republic of Slovenia, the Swiss Confederation, the Kingdom of Sweden, the Republic of France.

¹⁵ Article 11 para5.

¹⁶ Articles 128–133.

¹⁷ Article 8 para2 and Article 70/I of the Constitution, Articles I and XXX of the Basic Law.

¹⁸ Article 70/I of the Constitution, Article XXX of the Basic Law.

¹⁹ Treaty on the Functioning of the European Union Articles 310–325.

²⁰ Article 10 para1 item 5 of the Constitution of Austria, Article 74 para1 item 11 of the Constitution of the Federal Republic of Germany, Article 98 of the Constitution of the Swiss Confederation.

²¹ Article 47 of the Constitution of Italy.

²² Act XX of 1949 as revised and restated by Act XXXI of 1989.

²³ Decision 62/1991 CC.

²⁴ Decision 62/1991 CC.

- [25](#) Decision 544/B/1997 CC.
- [26](#) Decision 61/2006 CC.
- [27](#) Decision 8/2007 CC.
- [28](#) Decisions 9/1994 CC and 16/1996 CC.
- [29](#) Decision 9/1990 CC.
- [30](#) Decision 498/D/2000 CC.
- [31](#) Decision 42/1995 CC.
- [32](#) Decision 4/2006 CC.
- [33](#) Decision 37/2011 CC.
- [34](#) Act LXXV of 2008 on the State's economical management and budgetary responsibility.
- [35](#) Act LVIII of 2001 on the National Bank of Hungary.
- [36](#) Article 40/D.
- [37](#) Article N.
- [38](#) Article 36 para1.
- [39](#) Article 36 para2.
- [40](#) Article 37 para 1.
- [41](#) Article 38 para 1.
- [42](#) Article 39 para 1.
- [43](#) Article 39 para 2.
- [44](#) Article 38 paras 1 and 2, Article 40, Article 41 paras1 and 5, Article 42, Article 43 para4, and Article 44 para5.
- [45](#) Article XXX.
- [46](#) Treaty on the Functioning of the European Union Article 314.
- [47](#) Article 225 of the Constitution of Poland.
- [48](#) Article 91c, 91d, 104b, 109, 109a, 115, 143d of Basic Law (Grundgesetz).
- [49](#) Article N.
- [50](#) Act LXVI of 2011 on the State Audit Office.
- [51](#) Article 32 of the State Audit Office Act.
- [52](#) Article 41.
- [53](#) Article K.
- [54](#) Article 37 para4.

[55](#) Article 1 item B and Article 21 para2 of the Act XXXI of 1989 on the Constitutional Court.

[56](#) Article 24.

[57](#) Article 24 para2 item E, Article 37 para4.

[58](#) Article 24 para2 items C–D, Article 37 para4.

Appendix

Remarks on the English Translation of the Basic Law

The first English translation of the Basic Law (named as “Fundamental Law”) was made soon after the original Hungarian text was adopted. As the constitutionalisation process and the content of the Basic Law were debated throughout Europe, the English translation was sent to several international organisations: among others, to the Venice Commission. That translation is also “official” in a sense that it can be found on the government’s website (<http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>).

However, during the creation of this present volume, it was found that the translation was misleading in certain regulations. Therefore, we decided to make a new one that was used in the work.

During the translation, wherever the Hungarian text of the Basic Law repeats the text of the Constitution (being in force until the end of 2011), we have maintained the sections of the English translation you may find at the website of the Constitutional Court (<http://www.mkab.hu/index.php?id=constitution>). Due to the linguistic coherence, the two texts can be compared to see what the differences are.

We are grateful to Viktória Graepel-Csink for proofreading the translation.

Lóránt CSINK, Johanna FRÖHLICH, Endre ORBÁN

BASIC LAW OF HUNGARY

(25 April 2011)

God bless the Hungarians!

National Avowal

WE, THE MEMBERS OF THE HUNGARIAN NATION, at the beginning of the new millennium, with a sense of responsibility for every Hungarian, hereby proclaim the following:

We are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country part of Christian Europe a thousand years ago.

We are proud of our ancestors, who fought for the survival, freedom and independence of our country.

We are proud of the outstanding intellectual achievements of the Hungarian people.

We are proud that our people defended Europe in trials and tribulations over the centuries and enriched Europe's common values with its talent and diligence.

We recognise the role of Christianity in preserving the

nation. We honour the various religious traditions of our country.

We promise to preserve the intellectual and spiritual unity of our nation torn apart in the storms of the last century. The nationalities living with us form part of the Hungarian political community and are constituent entities of the State.

We undertake to preserve and safeguard our heritage, our unique language, Hungarian culture, the languages and cultures of the nationalities living in Hungary, along with all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendents; therefore, we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources.

We believe that our national culture is a rich contribution to the diversity of European unity.

We respect the freedom and culture of other nations, and shall foster to co-operate with every nation of the world.

We believe that human existence is based on human dignity.

We believe that individual freedom can be complete only in co-operation with others.

We believe the family and the nation the most important

frameworks of our coexistence, and that our fundamental cohesive values are fidelity, faith and love.

We believe that the strength of the community and the honour of all people are based on labour, the achievement of the human mind.

We believe that we have a general duty to help the vulnerable and the poor.

We believe that the common goal of the citizens and the State is to achieve a good quality of life, safety, order, justice and liberty.

We believe that democracy is only possible where the State serves its citizens and manages their affairs in an equitable manner, without prejudice or abuse.

We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of the statehood of Hungary and the unity of the nation.

We do not recognise the suspension of our historical constitution due to foreign occupations. We deny that the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorships could lapse.

We do not recognise the communist constitution of 1949,

since it was the basis for the tyrannical regime; therefore, we proclaim it to be invalid.

We agree with the members of the first free Parliament, which proclaimed as its first decision that our current liberty was born in our Revolution of 1956.

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.

We believe that after the decades of the 20th century, which led to a state of moral decay, we have an abiding need for spiritual and intellectual renewal.

We trust in the future we shape together and in the commitment of the younger generations. We believe that our children and grandchildren will make Hungary great again with their talent, persistence and moral strength.

Our Basic Law shall be the basis of our legal order: it shall be a contract among Hungarians of the past, the present and the future; a living framework which expresses the nation's will and the boundaries within which we want to live.

We, the citizens of Hungary, are ready to found the order of

our country upon the co-operation of the nation.

Foundation

Article A

OUR HOMELAND shall be named Hungary.

Article B

- (1) Hungary shall be an independent, democratic state under the rule of law.
- (2) Hungary's form of state shall be a republic.
- (3) The source of public power shall be the people.
- (4) The people shall exercise its power through elected representatives, or, in exceptional cases, directly.

Article C

- (1) The operation of the Hungarian State shall be based on the principle of separation of powers.
- (2) No activity of anyone may be directed at the acquisition or exercise of public authority by force, nor at its exclusive possession. Everyone shall have the right and

obligation to resist such attempts in a lawful manner.

(3) The State shall have the exclusive right to use coercion in order to enforce the Basic Law and legislation.

Article D

With regard to the unity of the Hungarian nation, Hungary shall bear a sense of responsibility for the fate of Hungarians living outside its borders, and shall foster the survival and development of their communities; it shall support their efforts to preserve their Hungarian identity, the application of their individual and collective rights, the establishment of their local governments, and their pursuit of happiness in their native lands, and shall promote their co-operation with each other and with Hungary.

Article E

(1) The Republic of Hungary shall contribute to achieve European unity in order to realise the liberty, the well-being and the security of the European peoples.

(2) In order to participate in the European Union as a Member State, Hungary – to the extent that is necessary to exercise the rights and to perform the obligations arising from the Founding Treaties – may exercise certain competences arising from the Basic Law in conjunction with other member states through the institutions of the

European Union based upon international treaty.

(3) The law of the European Union may stipulate a generally binding rule of conduct subject to the conditions set out in paragraph (2).

(4) The establishment of consent to be bound by an international agreement referred to in paragraph (2) shall require a two-thirds majority of the votes of the Members of Parliament.

Article F

(1) The capital of Hungary shall be Budapest.

(2) The territory of Hungary shall be divided into counties, towns and villages. In towns districts may be formed.

Article G

(1) The child of a Hungarian citizen shall be a Hungarian citizen by birth. Other cases of the origin or acquisition of the Hungarian citizenship may be defined by cardinal statute.

(2) Hungary shall defend her citizens.

(3) No person may be deprived of Hungarian citizenship established by birth or acquired in a lawful manner.

(4) The detailed regulations concerning citizenship shall

be defined by cardinal statute.

Article H

- (1) In Hungary the official language shall be Hungarian.
- (2) Hungary shall protect the Hungarian language.
- (3) Hungary shall protect Hungarian Sign Language as part of the Hungarian culture.

Article I

- (1) The coat of arms of Hungary shall be a vertically divided shield with a pointed base. The left field shall contain eight horizontal bars of red and silver. The right field shall have a red background and shall depict a base of three green hills with a golden crown atop the central hill and a silver patriarchal cross issuing from the middle of the crown. The Holy Crown shall rest on top of the shield.



(2) The flag of Hungary shall feature three horizontal bands of equal width coloured red, white and green from top to bottom as the symbols of strength, fidelity and hope respectively.

(3) The anthem of Hungary shall be the poem Himnusz by Ferenc Kölcsey set to the music of Ferenc Erkel.

(4) The coat of arms and the flag may also be used in other historical forms. The detailed rules for the use of the coat of arms and the flag, as well as the state decorations, shall be defined by cardinal statute.

Article J

(1) The national holidays of Hungary shall be:

a) the 15th day of March, in memory of the Revolution and Freedom Fight 1848–49,

b) the 20th day of August, in memory of the foundation of the State and King Saint Stephen the State Founder, and

c) the 23rd day of October, in memory of the Revolution and Freedom Fight 1956.

(2) The official state holiday shall be the 20th day of

August.

Article K

The official currency of Hungary shall be the Hungarian Forint.

Article L

(1) Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the institution of family as the foundation of the subsistence of the nation.

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

(3) The protection of families shall be regulated by cardinal statute.

Article M

(1) The economy of Hungary shall be based on value-creating work and the freedom of enterprise.

(2) Hungary shall ensure the conditions of fair economic competition. Hungary shall act against any abuse of a dominant position, and shall defend the rights of consumers.

Article N

- (1) Hungary shall enforce the principle of a balanced, transparent and sustainable budget management.
- (2) The Parliament and the Government shall have primary responsibility for the enforcement of the principle set out in paragraph (1).
- (3) In the course of performing their duties, the Constitutional Court, courts, local governments and other state organs shall be obliged to respect the principle set out in paragraph (1).

Article O

Every person shall be responsible for himself or herself, and shall be obliged to contribute to the performance of the state and community tasks in proportion to his or her abilities and possibilities.

Article P

Natural resources, especially the agricultural land, the forests and the drinking water supplies, the biodiversity – in particular native plant and animal species – and the cultural assets shall form part of the nation's common heritage; the State and every person shall be obliged to protect, sustain

and preserve them for future generations.

Article Q

(1) In order to create and maintain peace and security, and to achieve the sustainable development of the mankind, Hungary shall foster co-operation with every nation and country of the world.

(2) Hungary shall ensure the conformity between international law and Hungarian law in order to fulfil its obligations under international law.

(3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation.

Article R

(1) The Basic Law shall be the foundation of the legal system of Hungary.

(2) The Basic Law and other laws shall be binding on every person.

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

Article S

(1) A proposal for the adoption of a new Basic Law or any amendment to the present Basic Law may be submitted by the President of the Republic, the Government, any Parliamentary Committee or any Member of Parliament.

(2) The adoption of a new Basic Law or any amendment to the present Basic Law shall require a two-thirds majority of the votes of the Members of Parliament.

(3) The Speaker shall sign the Basic Law or the amendment to the Basic Law and send it to the President of the Republic. The President of the Republic shall sign the Basic Law or the amendment to the Basic Law and shall order its promulgation in the Official Journal within five days from receipt.

(4) During promulgation the designation of the amendment of the Basic Law shall include the title, the serial number of the amendment and the date of promulgation.

Article T

(1) A generally binding rule of conduct may be laid down by a law made by a body with legislative competence as specified in the Basic Law and which is published in the Official Journal. A cardinal statute may define different rules for the publication of the decrees of local governments and

other laws adopted during any special legal order.

(2) Laws shall be statutes, Government decrees, decrees of the Prime Minister, ministerial decrees, decrees of the Governor of the National Bank of Hungary, decrees of the heads of autonomous regulatory bodies and the decrees of local governments. Furthermore, laws shall be the decrees issued by the National Defence Council and the President of the Republic during any state of national crisis or state of emergency.

(3) No law shall conflict with the Basic Law.

(4) Cardinal statutes shall be statutes of the Parliament, whose adoption and amendment require a two-thirds majority of the votes of the Members of Parliament present.

Freedom and Responsibility

Article I

(1) The inviolable and inalienable fundamental rights of MAN shall be respected. Their protection shall be the primary obligation of the State.

(2) Hungary shall recognise the fundamental human rights, exercised either individually or collectively.

(3) Rules related to fundamental rights and obligations shall be defined by statutes. A fundamental human right

may only be restricted in order to enforce another fundamental human right or to protect a constitutional value, to the extent that it is absolutely necessary, proportionate to the aim, and with respect to the essential content of the relevant fundamental right.

(4) Legal entities established by statute shall also be subjects of rights and obligations that are, by nature, applicable not only to human beings.

Article II

Human dignity shall be inviolable. Every person shall have the right to life and human dignity, the life of the foetus shall be protected from the moment of conception.

Article III

(1) No person shall be subjected to torture, inhumane or degrading treatment or punishment, or be held in servitude. Trafficking in persons shall be prohibited.

(2) It shall be prohibited to perform a medical or scientific experiment on human beings without their informed and voluntary consent.

(3) Practices aimed at eugenics, the use of human body or its parts for financial gain and human cloning shall be prohibited.

Article IV

(1) Every person shall have the right to freedom and personal security.

(2) No person shall be deprived of this freedom, except on the grounds of and in accordance with the procedure provided for by statute. Life imprisonment shall only be imposed for committing an intentional and violent criminal offence.

(3) Anyone suspected of having committed a criminal offense and held in detention shall either be released or shall be brought before a judge within the shortest possible period of time. The court shall be required to grant the detained individual a hearing and shall immediately prepare a written ruling with a justification for either releasing or arresting the detainee.

(4) Every person whose freedom has been restricted unlawfully, or without a well-founded reason shall be entitled to compensation.

Article V

Every person shall have the right to repel any unlawful attack or direct threat launched against his or her person or property.

Article VI

- (1) Every person shall have the right to have their private and family life, home, relations and good standing of reputation respected.
- (2) Every person shall have the right to the protection of his or her personal data, as well as to have access to and impart information of public interest.
- (3) An independent authority, defined by cardinal statute, shall supervise the protection of personal data and the fulfilment of the right to access information of public interest.

Article VII

- (1) Every person shall have the right to freedom of thought, conscience and religion. This right shall include the free choice or change of religion or other conviction, as well as the freedom – either by religious acts or ceremonies or in any other way, either alone or in community with others, in public or in private – to manifest his or her religion or other convictions, to refrain from their manifestation, to practice or to teach them.
- (2) The State and the churches shall operate separately. Churches shall be autonomous. The State shall co-operate with the churches in order to attain community aims.
- (3) The detailed regulations concerning churches shall be

defined by cardinal statute.

Article VIII

- (1) Every person shall have the right to peaceful assembly.
- (2) Every person shall have the right to establish and join organisations.
- (3) Political parties may be established and may operate freely on the basis of the right to association. Political parties shall participate in the formation and expression of the will of the people. Political parties may not exercise public power directly.
- (4) The detailed regulations concerning the operation and financial management of the political parties shall be defined by cardinal statute.
- (5) Trade unions and other representative bodies may be established and may operate freely on the basis of the right to association.

Article IX

- (1) Every person shall have the right to freely express his or her opinion.
- (2) Hungary shall recognise and protect the freedom and the diversity of the press and shall ensure the conditions of accessing the adequate information necessary for the

development of a democratic public opinion.

(3) The detailed regulations concerning the organ supervising the freedom of the press, the media services, the publications and the communications market shall be defined by cardinal statute.

Article X

(1) Hungary shall ensure the freedom of scientific research and artistic expression, as well as – in order to obtain the highest possible level of knowledge – the freedom of learning, and, in the framework defined by statute, the freedom of teaching.

(2) The State shall not be entitled to decide on questions of scientific truth, only scientists shall have the right to evaluate scientific researches.

(3) Hungary shall protect the scientific and artistic freedom of the Hungarian Academy of Sciences and the Hungarian Academy of Arts. Institutions of higher education shall be independent regarding the content and methods of research and teaching; rules on their organisation and financial management shall be defined by statute.

Article XI

(1) Every Hungarian citizen shall have the right to

education.

(2) Hungary shall ensure this right by providing general access to public culture, free and compulsory primary schooling, free and universally available secondary education, and higher education available for every person on the basis of his or her ability, and, furthermore, through the financial support for students in training, as defined by statute.

Article XII

(1) Every person shall have the right to freely choose his or her job and profession, as well as the right to enterprise. Every person shall have the obligation to contribute to the enrichment of the community through his or her work, in accordance with his or her abilities and possibilities.

(2) Hungary shall endeavour to create the conditions ensuring that everyone who is able and willing to work has the opportunity to do so.

Article XIII

(1) Every person shall have the right to property and the right to succession.

(2) Property may only be expropriated under exceptional circumstances, serving the interest of the public, in the

manner defined by statute, with full, unconditional and immediate compensation.

Article XIV

(1) Hungarian citizens shall not be expelled from the territory of Hungary, and they may return from abroad at any time. Foreigners legally staying in the territory of Hungary shall only be expelled on the basis of a lawful decision. Group expulsion shall be forbidden.

(2) No person shall be expelled or extradited to a state where he or she is threatened to be sentenced to death or to be subjected to torture or to inhuman treatment or punishment.

(3) Should neither the state of origin nor other states provide protection, Hungary grants asylum on request to those non-Hungarian citizens who are persecuted in their homeland or in the country of their habitual residence on the basis of their race, national origin, belonging to a particular social group, religious or political conviction, or whose fear of being persecuted is established.

Article XV

(1) Every person shall be equal before the law. Every person shall have legal capacity.

(2) Hungary shall ensure the fundamental rights for all persons without any kind of discrimination, such as on the basis of race, colour, gender, disability, language, religion, political or other opinion, national or social origin, financial situation, birth, or on any other ground whatsoever.

(3) Women and men shall have equal rights.

(4) Hungary shall promote the equality of rights through separate measures.

(5) Hungary shall protect children, women, the elderly and the persons with disabilities through separate measures.

Article XVI

(1) Every child shall have the right to receive protection and care necessary for their proper physical, mental and moral development.

(2) Parents shall have the right to choose the education given to their children.

(3) Parents shall have the obligation to take care of their children. This obligation shall involve the education of their children.

(4) Children above legal age shall be obliged to take care of their parents in need.

Article XVII

(1) The employers and the employees – regarding the support of workplaces, national economy and other community goals – shall co-operate with each other.

(2) The employers, the employees and their organisations shall have the right to negotiate with each other, to conclude collective agreements according to that, to pursue to defend their interests jointly, and to strike.

(3) Every employee shall have the right to have appropriate working conditions taking their health, personal security and dignity into consideration.

(4) Every employee shall have the right to take daily and weekly breaks, as well as to have paid annual leave.

Article XVIII

(1) The employment of children – excluding the cases defined by statutes when their physical, mental, and moral development is not threatened – shall be forbidden.

(2) Hungary shall promote the protection of youths and parents at the workplaces through separate measures.

Article XIX

(1) Hungary shall endeavour to provide social protection to every citizen. In case of motherhood, illness, disability, being orphaned and in the case of unemployment through

no fault of their own, every Hungarian citizen shall be entitled to have an allowance defined by statute.

(2) Hungary shall attain social security through the system regarding paragraph (1) and in case of other needs through the system of social institutions and measures.

(3) Statutes may determine the nature and extent of social measures on the basis of the activity of the recipient useful for the community.

(4) Hungary shall promote the assurance of the elderly subsistence on the basis of social solidarity based on the maintenance of the unified pension system and on the enabling of the functioning of the voluntarily established social institutions. Statutes may determine the conditions of the right to state pension with regard to the requirement of the increased protection of women.

Article XX

(1) Every person shall have the right to physical and mental health.

(2) Hungary shall promote the exercise of the right regarding paragraph (1) through an agriculture free from genetically modified organisms, through providing access to safe drinking water, through organising labour safety and health care, through supporting sports and regular physical training, as well as through providing the protection of the

environment.

Article XXI

- (1) Hungary shall recognise and implement the right to a healthy environment for everyone.
- (2) Anyone who causes damage in the environment shall be obliged to restore it or to meet the expenses of the restoration, as defined by statute.
- (3) With the aim of allocation, importing contaminant waste into the territory of Hungary shall be forbidden.

Article XXII

Hungary shall endeavour to provide the conditions of decent housing and access to public services for everyone.

Article XXIII

- (1) Every adult Hungarian citizen shall have the right to be elected and the right to vote in the parliamentary elections, as well as in local elections of representatives and mayors, furthermore, in the elections for the European Parliament.
- (2) Every adult citizen of other Member States of the European Union whose domicile is in the territory of Hungary shall have the right to be elected and the right to

vote in local elections of representatives and mayors, as well as in the elections for the European Parliament.

(3) Every adult person holding refugee, immigrant, or permanent resident status in Hungary shall have the right to vote in local elections of representatives and mayors.

(4) A cardinal statute may connect the right to vote or its completeness to Hungarian domicile and the right to be elected may be bound to further conditions.

(5) At the local elections of representatives and mayors the voters may vote at their domicile or at their registered residence. The voters shall exercise the right to vote at their domicile or at their registered residence.

(6) The right to vote shall not be granted to persons who have been deprived of their suffrage by court on the grounds of having committed a crime or due to their limited capacity. Citizens of other Member States of the European Union who have a domicile in the territory of Hungary shall not have the right to be elected in case they were deprived of such right by the laws of the country of their citizenship, or by a decision of court, or by other public authorities.

(7) Everyone who has the right to vote in the parliamentary elections shall have the right to participate in national referenda. Everyone who has the right to vote in the local elections of representatives and mayors shall have the right to participate in the local referenda.

(8) Every Hungarian citizen shall have the right to hold

public office in accordance with his or her suitability, education and professional ability. A statute shall define those public offices which shall not be fulfilled by members or officers of political parties.

Article XXIV

(1) Every person shall have the right to have their cases managed by the authorities impartially, fairly, and within a reasonable period of time. The authorities shall be obliged to justify their decisions, as defined by statute.

(2) Every person shall have the right to be compensated for the damages that the authorities unlawfully caused in the course of performing their duties, as defined by statute.

Article XXV

(1) Every person shall have the right to file a petition, complaint or a proposal, either individually or together with others, to any institution exercising public authority.

Article XXVI

In order to enhance its more efficient functioning, increase the quality of its public services, achieve greater transparency in public affairs, and to promote equal opportunities, the State shall endeavour the application of

new technological solutions and the achievements of science.

Article XXVII

(1) Every person legally staying in the territory of Hungary shall have the right to move freely and to choose a place for residence.

(2) Every Hungarian citizen shall have the right to the protection of Hungary while abroad.

Article XXVIII

(1) In the determination of any criminal charge against him or her or a litigation of his or her rights and duties, everyone shall be entitled to a fair and public trial, by an independent and impartial court established by statute, in a reasonable period of time.

(2) No one shall be considered guilty until the court establishes the criminal responsibility in the final judgement.

(3) Every person subjected to criminal proceedings shall have the right to be defended at all stages of the proceedings. The defence counsel shall not be held responsible for opinions expressed in the course of the defence.

(4) No person shall be declared guilty and subjected to punishment for an offence that at the time it was committed was not considered a criminal offence under Hungarian law or – in the scope of international agreement or the legislation of the European Union – under the law of another state.

(5) Paragraph (4) shall not exclude the possibility of involving a person in a criminal procedure and sentencing a person for an offence which, at the time it was committed, was considered a crime on the basis of the generally recognised rules of international law.

(6) No person, with the exceptions of the special cases of legal remedy defined by statutes, shall be involved in a criminal procedure and shall be sentenced for an offence for which in Hungary or – in the scope of international agreement, or the legislation of the European Union – in another state he or she was finally acquitted or sentenced in accordance with law.

(7) Every person shall be entitled to seek legal remedy against decisions of the courts, the public administration or other authorities which infringe their rights or justified interests.

Article XXIX

(1) Nationalities living in the territory of Hungary shall be constituent parts of the State. Every citizen belonging to a

nationality shall have the right to freely declare and preserve his or her identity. Nationalities living in Hungary shall have the right to freely use their mother tongue, to the use of individual and community names in their language, to foster their culture as well as to education in their mother tongue.

(2) Nationalities in Hungary shall have the right to form local and national self-governments.

(3) The detailed regulations concerning the nationalities living in Hungary, as well as the regulations concerning the election of their local and national self-governments, shall be defined by cardinal statute.

Article XXX

(1) Every person, in accordance with his or her capacity, and proportionately to his or her participation in the economy, shall contribute to fulfil the community needs.

(2) The measure of the contribution to the community needs shall be defined in the cases of those who raise children by considering the expenses of child rearing.

Article XXXI

(1) Every Hungarian citizen shall have the obligation to defend his or her country.

(2) Hungary shall maintain the voluntary military reservist system.

(3) During the state of national crisis or in case the Parliament decides so in the state of preventive defence, every adult man with Hungarian domicile and having Hungarian citizenship shall perform military service. Should armed service be incompatible with the conscience of the person obliged to perform military service, he shall perform unarmed service. The details and forms of the military service shall be defined by cardinal statute.

(4) During a state of national crisis, adult Hungarian citizens with Hungarian domicile may be ordered to do defence-related work, as defined by a cardinal statute.

(5) Every adult Hungarian citizen with Hungarian domicile may be ordered – as defined by cardinal statute – to participate in civil defence for the purpose of performing national defence or disaster-related tasks.

(6) Everyone, for the purpose of national defence and disaster-related tasks, may be obliged to provide economic and financial service, as defined by cardinal statute.

The State

The Parliament

Article 1

(1) HUNGARY's supreme body for popular representation shall be the Parliament.

(2) The Parliament shall

- a) adopt and amend the Basic Law of Hungary;
- b) adopt statutes;
- c) adopt the central budget and approve its implementation;
- d) give authorisation, pertaining to its scope of authority and competence, for the establishment of consent to be bound by an international treaty;
- e) elect the President of the Republic, the members and the president of the Constitutional Court, the president of the Curia, the Supreme Prosecutor, the Commissioner and Deputy Commissioners for fundamental rights and the president of the State Audit Office;
- f) elect the Prime Minister and decide on questions of confidence concerning the Government;
- g) dissolve local representative bodies whose activity is in violation of the Basic Law;
- h) decide on the declaration of state of war and on concluding peace;

- i) make decisions concerning special legal orders and the participation in military operations;
- j) grant general amnesty;
- k) perform further tasks and exercise further competences defined in the Basic Law or in statute.

Article 2

(1) Members of Parliament shall be elected by universal and equal suffrage and by direct and secret ballot ensuring the free expression of the voters' will, in a manner defined by cardinal statute.

(2) The participation in the Parliament's operation of the minorities living in Hungary shall be defined by cardinal statute.

(3) The general election of the Members of Parliament, except for the elections due to the dissolution of the Parliament, shall be held in April or May of the fourth year following the election of the previous Parliament.

Article 3

(1) The Parliament's mandate shall commence with its inaugural sitting and shall last until the inaugural sitting of the next Parliament. The inaugural sitting of the Parliament shall be convened by the President of the Republic at a

date within one month following the elections.

(2) The Parliament may declare its dissolution.

(3) The President of the Republic may dissolve the Parliament, simultaneously with the announcement of new elections in case:

a) the mandate of the Government terminates, a candidate for Prime Minister nominated by the President of the Republic is not elected by the Parliament within a period of forty days from the day on which the first candidate was nominated;

b) the Parliament fails to adopt the central budget for the current year until 31 March.

(4) Prior to dissolving the Parliament, the President of the Republic shall request the opinions of the Prime Minister, the Speaker of the Parliament and the leaders of the parliamentary fractions.

(5) The President of the Republic may exercise the right stipulated in paragraph (3) item a) as long as the Parliament does not elect the Prime Minister. The President of the Republic may exercise the right stipulated in paragraph (3) item b) as long as the Parliament does not adopt the central budget.

(6) A new Parliament shall be elected within a period of ninety days following the declaration of the Parliament's dissolution or the Parliament having been dissolved.

Article 4

(1) The rights and obligations of the Members of Parliament shall be equal; they shall perform their activities in the interest of the public, and they shall not be instructed in this respect.

(2) Members of Parliament shall be entitled to immunity and to remuneration adequate to ensure their independence. Offices that may not be fulfilled by Members of Parliament and other cases of incompatibility shall be defined by cardinal statute.

(3) The mandate of a Member of Parliament shall terminate:

- a) upon completion of the term of Parliament;
- b) upon the death of the Member of Parliament;
- c) upon the declaration of incompatibility;
- d) upon resignation;
- e) in case the conditions of his or her election are no longer fulfilled;
- f) in case he or she fails to participate in the Parliament's work for one year.

(4) The Parliament shall decide on the establishment of the cessation of the conditions for the election, on the declaration of incompatibility and on the establishment that the Member of Parliament has failed to participate in the Parliament's work for one year by the majority of two-thirds

of the votes of the Members of Parliament present.

(5) The detailed regulations for the legal status and remuneration of the Members of Parliament shall be defined by cardinal statute.

Article 5

(1) Sittings of the Parliament shall be open to the public. Upon request by the Government or any Member of Parliament and with the assent of two-thirds of its Members, the Parliament may decide to hold a sitting in camera.

(2) The Parliament shall elect the Speaker of the Parliament, Deputy Speakers and Clerks from among its members.

(3) The Parliament shall establish standing committees from among its members.

(4) Members of Parliament may, upon the conditions defined by the Standing Order, establish parliamentary fractions for co-ordinating their activity.

(5) The Parliament shall have a quorum if more than half of its members are present.

(6) Unless the Basic Law regulates otherwise, the Parliament shall pass its decisions with a majority of more than half of the votes of its members present. The Standing Orders may require qualified majority for certain decisions.

(7) The Parliament shall establish its rules of procedure and order of debate in its Standing Orders, being adopted with a majority of two-thirds of the votes of the Members of Parliament present.

(8) Regulations ensuring the regular sittings of the Parliament shall be defined by cardinal statute.

Article 6

(1) The adoption of a statute may be initiated by the President of the Republic, the Government, any Parliamentary Committee, or any Member of Parliament.

(2) Upon the motion of the initiator of the Bill, the Government or the Speaker of the Parliament submitted prior to the final vote, the Parliament may refer it to the Constitutional Court in order to review its conformity to the Basic Law. The Parliament shall decide on the motion after the final vote. Should the motion be approved, the Speaker of the Parliament shall immediately refer the adopted statute to the Constitutional Court in order to review its conformity to the Basic Law.

(3) The Speaker of the Parliament shall sign the adopted statute within five days and refer it to the President of the Republic. The President of the Republic shall sign the adopted statute and order its promulgation within five days. Should the Parliament refer the adopted statute to the Constitutional Court in order to review its conformity to the

Basic Law upon paragraph (2), the Speaker of the Parliament shall only sign it and refer it to the President of the Republic if the Constitutional Court has not stated the violation of the Basic Law.

(4) Should the President of the Republic consider the statute or any provision thereof to be contrary to the Basic Law, and no review has taken place under paragraph (2), the President of the Republic shall refer the statute to the Constitutional Court in order to review its conformity with the Basic Law.

(5) Should the President of the Republic disagree with the statute or any provision thereof, and has not exercised the right stipulated in paragraph (4), prior to signing it, the President of the Republic may return such statute once, along with comments, to the Parliament for reconsideration. The Parliament shall debate the statute again and hold another vote on its adoption. The President of the Republic may exercise such a right even if the Constitutional Court in its review, based on the decision of the Parliament, has not stated the violation of the Basic Law.

(6) The Constitutional Court shall decide on the petition in extraordinary proceedings but within thirty days at the latest. Should the Constitutional Court state the violation of the Basic Law, the Parliament shall debate the statute again in order to dissolve the violation of the Basic Law.

(7) Should the Constitutional Court not state the violation of the Basic Law in its review upon the petition of the

President of the Republic, the President of the Republic shall immediately sign the statute and order its promulgation.

(8) Statutes re-debated and re-adopted by the Parliament under paragraph (6) may repeatedly be referred to the Constitutional Court in order to review their conformity with the Basic Law under paragraphs (2) and (4). The Constitutional Court shall decide on the repeated petitions in extraordinary proceedings but within ten days at the latest.

(9) Should the Parliament modify the statute that was referred back due to the disagreement of the President of the Republic, the review of its conformity to the Basic Law under paragraphs (2) or (4) may only be requested concerning the modified provisions or if the petitioner indicates that the procedural criteria stipulated in the Basic Law concerning legislation were not fulfilled. Should the Parliament adopt the statute that was referred back due to the disagreement of the President of the Republic invariably, the President of the Republic may request the review of its conformity to the Basic Law if the procedural criteria stipulated in the Basic Law concerning legislation were not fulfilled.

Article 7

(1) Members of Parliament may direct a question to the

Commissioner for Fundamental Rights, to the President of the State Audit Office, or to the Supreme Prosecutor, as well as to the Governor of the National Bank of Hungary on any matter which falls within their respective competence.

(2) Members of Parliament may direct an interpellation or a question to the Government or any of the Members of the Government on any matter which falls within their respective competence.

(3) The enquiring activity of the parliamentary commissions and the obligation to appear before the commissions shall be defined by cardinal statute.

National referendum

Article 8

(1) The Parliament shall decide on holding a national referendum on the petition of at least 200,000 voters. On the initiative of the President of the Republic, the Government or 100,000 voters, the Parliament may decide to hold a national referendum. The decision made on a valid and successful national referendum is binding to the Parliament.

(2) Questions falling within the competence of the Parliament may be subjects of national referenda.

(3) No national referenda may be held:

a) on questions pertaining to the amendments to the Basic Law;

b) on the content of the statutes concerning the central budget and its implementation, central taxes, stamp and customs duties, as well as on the content of statutes concerning central requirements on local taxes;

c) on the content of the statutes concerning the elections of the Members of the Parliament, of the local representatives and mayors and of the Members of the European Parliament;

d) on the obligations arising from international treaties;

e) on personal issues, and on questions concerning the establishment of organisations that fall within the competence of the Parliament;

f) on the dissolution of the Parliament;

g) on the dissolution of local representative bodies;

h) on the declaration of state of war, state of national crisis and state of emergency and on the declaration and lengthening of state of preventive defence emergency;

i) on questions concerning the participation in military operations;

j) on granting general amnesty.

(4) The national referendum shall be valid if more than half of all voters voted validly, and it shall be successful if more than half of the voters who voted validly have given the same answer to the question put.

The President of the Republic

Article 9

(1) The Head of State of Hungary shall be the President of the Republic, who shall express the unity of the nation and guard the democratic operation of the State.

(2) The President of the Republic shall be the Commander in Chief of the Hungarian Defence Forces.

(3) The President of the Republic:

- a) shall represent Hungary;
- b) may participate and take floor at the sittings of the Parliament;
- c) may initiate statutes;
- d) may initiate national referenda;
- e) shall announce general parliamentary, local government and mayoral elections, as well as the dates of the European Parliament elections and

national referenda;

f) shall make decisions concerning special legal order;

g) shall convene the inaugural sitting of the Parliament;

h) may dissolve the Parliament;

i) may refer the adopted statute to the Constitutional Court in order to review its conformity to the Basic Law or may return it to the Parliament for reconsideration;

j) shall make nominations for the offices of the Prime Minister, President of Curia, Supreme Prosecutor, Commissioner for Fundamental Rights;

k) shall appoint judges and the President of the Budget Council;

l) shall confirm the President of the Hungarian Academy of Sciences;

m) shall establish the organisation of the President's Office.

(4) The President of the Republic shall:

a) recognise the establishment of consent to be bound by an international treaty, upon the authorisation of the Parliament;

b) accredit and receive ambassadors and envoys;

c) appoint ministers, the Governor and the Deputy Governor of the National Bank of Hungary, the leader of autonomous regulatory bodies and university professors;

d) appoint the rectors of the universities;

e) appoint and promote generals;

f) confer decorations, medals of merit, and titles specified by statute, and authorise the use thereof;

g) grant pardons;

h) decide on issues of territorial arrangements assigned to the President's authority and competence;

i) decide on issues concerning the acquisition and termination of citizenship;

j) decide on all issues assigned to the President's competence by statutes.

(5) The countersignature of the Member of the Government shall be required for all the measures and actions of the President of the Republic enumerated in paragraph (4). A statute may regulate so that the measure being assigned to the President's competence by statute requires no countersignature.

(6) The President of the Republic may refuse to perform competences stipulated in items b)-e) of paragraph (4) if the legal conditions are missing, or it would result in a serious disorder of the operation of the organisation of the

State.

(7) The President of the Republic may refuse to perform the competence stipulated in item f) of paragraph (4) if it infringes the values of the Basic Law.

Article 10

(1) The Parliament shall elect the President of the Republic for a term of five years.

(2) Any Hungarian citizen who has reached the age of thirty-five may be elected President of the Republic.

(3) The President of the Republic may be re-elected to this office no more than once.

Article 11

(1) The President of the Republic shall be elected within a period of thirty to sixty days prior to the expiration of the mandate of the previous President of the Republic. The Parliament shall elect the President of the Republic by secret ballot.

(2) The election of the President of the Republic shall be preceded by nomination. The written recommendation of no less than fifty Members of Parliament shall be required for a valid nomination. The nomination shall be submitted to the Speaker of Parliament prior to the announcement of the

vote. No Member of Parliament may nominate more than one candidate. Should a Member of Parliament nominate more than one candidate, all nominations made by this Member are invalid.

(3) The candidate who receives a two-thirds majority of the votes of the Members of Parliament at the first voting shall be elected President of the Republic.

(4) Should no candidate receive such a majority at the first voting, a second voting shall be held. At the second voting only those two candidates who received the largest numbers of votes may stand for election. Should the candidates receive equal votes at the first place at the first voting, candidates receiving the most votes may stand for election. Should the candidates receive equal votes at the second place at the first voting, candidates receiving the two largest numbers of votes may stand for election. The candidate receiving the most votes at the second voting, regardless of the number of votes cast, shall be elected President of the Republic. Should the second vote be invalid, new elections shall be held upon new nominations.

(5) The election procedure shall be completed within two consecutive days.

(6) The elected President of the Republic shall enter office upon expiration of the previous President's mandate, or, should the President's mandate terminate prematurely, on the eighth day following the announcement of the result of the elections; prior to entering office, the President of the

Republic shall take an oath before the Parliament.

Article 12

(1) The person of the President of the Republic shall be inviolable.

(2) The office of the President of the Republic shall be incompatible with all other state, social, economic and political offices or mandates. The President of the Republic shall not otherwise gainfully pursue an occupation and shall not accept remuneration for other activities, with the exception of activities falling under the protection of intellectual property law.

(3) The mandate of the President of the Republic shall terminate:

- a) upon completion of the term of office;
- b) upon the death of the President;
- c) in case the President is unable to perform his or her duties for over ninety days;
- d) in case the conditions of the election are no longer fulfilled;
- e) upon declaration of incompatibility;
- f) upon resignation;
- g) upon removal of the President of the Republic from office.

(4) The Parliament shall decide with a two-thirds majority of the votes of the Members of Parliament present on the declaration that the President has been unable to perform his or her duties for over ninety days, or that the conditions of the election are no longer fulfilled, or on incompatibility.

(5) The detailed regulations for the legal status and remuneration of the President of the Republic shall be defined by cardinal statute.

Article 13

(1) Criminal proceedings against the President of the Republic may only be initiated subsequent to the termination of office.

(2) Should the President of the Republic infringe the Basic Law or another statute regarding performing his or her duties, or commit a crime intentionally, one-fifth of the Members of Parliament may initiate the removal of the President of the Republic from office.

(3) A two-thirds majority of the votes of the Members of Parliament shall be required to initiate impeachment proceedings. Voting shall be held by secret ballot.

(4) From the passage of the parliamentary decision until the conclusion of the impeachment proceedings the President of the Republic may not perform presidential duties.

(5) The Constitutional Court shall have the competence to decide on the impeachment proceedings.

(6) Should the Constitutional Court, as a result of the procedure, determine the President's responsibility under public law, it may remove the President of the Republic from office.

Article 14

(1) Should the President of the Republic be temporarily prevented from attending to the presidential duties, or the President's mandate terminates, the Speaker of the Parliament exercises the authority and competences of the President of the Republic until the newly elected President enters office.

(2) The fact of the President's prevention shall be stated by the Parliament upon the request of the President of the Republic, the Government, or any Member of the Parliament.

(3) While acting as the President of the Republic, the Speaker of the Parliament may not act as a Member of Parliament, and the duties as Speaker of the Parliament shall be performed by the Deputy Speaker of the Parliament designated by the Parliament.

The Government

Article 15

(1) The Government shall be the supreme organ of the executive branch, whose activity and competence shall cover all those that are not delegated explicitly to another organ by the Basic Law or by law. The Government shall be responsible to the Parliament.

(2) The Government shall be the supreme organ of public administration and may create administrative organs as defined by statute.

(3) Within its competence or upon the authorisation granted by statute the Government may issue decrees.

(4) Decrees of the Government shall not conflict with statutes.

Article 16

(1) The Members of the Government shall be the Prime Minister and the ministers.

(2) The Prime Minister shall, in a decree, appoint one or more deputy Prime Ministers from the ministers.

(3) The Prime Minister shall be elected by the Parliament upon the nomination of the President of the Republic.

(4) The majority of the votes of the Members of Parliament

shall be required for the election of the Prime Minister. The Prime Minister shall enter office upon his or her election.

(5) The President of the Republic shall make the nomination defined in paragraph (3):

a) at the inaugural sitting of the newly elected Parliament if the mandate of the Prime Minister terminates upon the establishment of the newly elected Parliament;

b) within fifteen days from the termination of the office if the Prime Minister's mandate terminated upon resignation, death, declaration of incompatibility, due to the lack of the necessary conditions for the election, or due to the fact that the Parliament expressed its lack of confidence in the Government in a vote of confidence.

(6) Should the Parliament not elect the person nominated in accordance with paragraph (5), the President of the Republic makes a new nomination within fifteen days.

(7) Ministers shall be appointed by the President of the Republic upon the nomination of the Prime Minister. Ministers shall enter office on the date defined in their appointment, or, if no date was defined, upon their appointment.

(8) The Government shall be formed by the appointment of the ministers.

(9) Members of the Government shall take an oath before

the Parliament.

Article 17

(1) The ministries shall be listed in statute.

(2) Ministers without portfolio may be appointed to perform the tasks determined by the Government.

(3) The Government's administrative organ having general competence shall be the Metropolitan and County Government Office.

(4) Statutes may amend provisions of cardinal statutes designating the ministry, the minister or an administrative organ.

(5) The legal status of Government officers shall be defined by statute.

Article 18

(1) The Prime Minister shall define the general policy of the Government.

(2) Within the frameworks of the Government's general policy, ministers shall autonomously direct the branches of administration in their competence and the subordinated organs, and perform tasks stipulated by the Government or the Prime Minister.

(3) Upon the authorisation of statute or Government decree, the Members of the Government shall, individually or with the assent of another minister, issue decrees within their competence; such decrees shall not conflict with statutes, Government decrees and the decrees of the Governor of the National Bank of Hungary.

(4) Members of the Government shall be responsible to the Parliament; ministers shall be responsible to the Prime Minister. Members of the Government may participate and take the floor at the sittings of the Parliament. The Parliament may oblige the Members of the Government to appear before parliamentary commissions.

(5) The detailed regulations for the legal status, remuneration and the order of substitution of the Members of the Government shall be defined by statute.

Article 19

The Parliament may request information from the Government on its standpoint represented at the decision-making procedure of those institutions of the European Union that require governmental participation. The Government shall act on the basis of the Parliament's stand during the decision-making of the European Union.

Article 20

(1) With the termination of the mandate of the Prime Minister the mandate of the Government shall terminate.

(2) The mandate of the Prime Minister shall terminate:

a) by the establishment of the newly elected Parliament;

b) in case the Parliament expresses its lack of confidence in the Prime Minister and elects a new Prime Minister;

c) in case the Parliament expresses its lack of confidence in the Prime Minister in a vote of confidence initiated by the Prime Minister;

d) upon resignation;

e) upon death;

f) upon declaration of incompatibility;

g) in case the conditions of the election are no longer fulfilled.

(3) The mandate of a minister shall terminate:

a) by the termination of the mandate of the Prime Minister;

b) upon the minister's resignation;

c) upon dismissal;

d) upon death.

(4) The Parliament shall decide on the establishment of the conditions of the election no longer being fulfilled and on the declaration of incompatibility with a two-thirds

majority of the votes of the Members of Parliament present.

Article 21

(1) A written motion of no-confidence against the Prime Minister may be introduced by one-fifth of the Members of Parliament, nominating a candidate for the office of Prime Minister.

(2) Supporting the motion of no-confidence by the Parliament shall result in the expression of lack of confidence in the Prime Minister, and in the election of the nominated candidate in the motion of no-confidence to Prime Minister. For such a decision, more than half of the votes of the Members of Parliament shall be required.

(3) The Prime Minister may initiate a vote of confidence. The Parliament expresses its lack of confidence when more than half of the Members of Parliament do not support the Prime Minister in the vote of confidence initiated by the Prime Minister.

(4) The Prime Minister may initiate that the vote on a proposal submitted by the Government be considered as a vote of confidence. The Parliament expresses its lack of confidence when it does not support the Government's proposal.

(5) The Parliament shall decide on the question of confidence no earlier than three days and no later than

eight days following the submission of the motion of no confidence, or the Prime Minister's submission under paragraphs (3) and (4).

Article 22

(1) From the termination of the mandate of the Government until the establishment of the new Government, the Government shall perform its competences as interim government with the restriction that it may not establish consent to be bound by an international treaty and it may only issue a decree in the case of urgency, upon the authorisation of a statute.

(2) Should the mandate of the Prime Minister terminate upon resignation or upon the establishment of the newly elected Parliament, the Prime Minister shall perform competences as interim Prime Minister until the election of the new Prime Minister, with the restriction that he or she cannot initiate the dismissal and the appointment of ministers, and he or she may only issue a decree in the case of urgency, upon the authorisation of a statute.

(3) Should the mandate of the Prime Minister terminate upon death, declaration of incompatibility, due to the conditions of the election no longer being fulfilled, or due to the fact that the Parliament has expressed its lack of confidence in the Prime Minister in a vote of confidence, the Prime Minister's competences shall be exercised, with

the restrictions stipulated in paragraph (2), by the Deputy Prime Minister, or – in case more than one Deputy Prime Minister was nominated – by the Deputy Prime Minister nominated in the first place.

(4) From the termination of the mandate of the Prime Minister until the appointment of the new minister, or until another Member of the Government is assigned to perform ministerial duties, the minister shall perform competences as interim minister with the restriction that he or she may only issue decrees in case of urgency.

Autonomous Regulatory Bodies

Article 23

(1) In cardinal statutes, the Parliament may establish autonomous regulatory bodies to perform tasks and competences in the sphere of the executive branch.

(2) The head of an autonomous regulatory body shall be appointed by the Prime Minister or by the President of the Republic upon the nomination of the Prime Minister, for a term defined in cardinal statute. Heads of autonomous regulatory bodies shall appoint their deputies.

(3) The head of the autonomous regulatory body shall report to the Parliament annually on the activity of the autonomous regulatory body.

(4) Upon the authorisation granted by statute, in a sphere of competence defined by cardinal statute, the head of the autonomous regulatory body shall issue decrees that shall not conflict with statutes, Government decrees, decrees of the Prime Minister, ministerial decrees and decrees of the Governor of the National Bank of Hungary. In issuing decrees, the head of the autonomous regulatory body may be substituted by the deputy he or she assigned in a decree.

The Constitutional Court

Article 24

(1) The Constitutional Court shall be the supreme organ for the protection of the Basic Law.

(2) The Constitutional Court shall:

a) review the conformity of the adopted but not yet promulgated statutes with the Basic Law;

b) review the conformity of a law that is to be applied in a particular case to the Basic Law, upon the petition of a judge;

c) review the conformity of a law applied in a particular case to the Basic Law, upon constitutional complaint;

d) review the accordance of judicial decisions with the Basic Law, upon constitutional complaint;

e) review the conformity of laws to the Basic Law, upon the petition of the Government, one-fourth of the Members of Parliament or the Commissioner for Fundamental Rights;

f) examine the conflicts between laws and international treaties;

g) perform further tasks and competences defined in the Basic Law or in cardinal statute.

(3) The Constitutional Court:

a) in its competences stipulated in items b), c) and e) of paragraph (2) shall annul laws or provisions thereof that conflict with the Basic Law;

b) in its competence stipulated in item d) of paragraph (2), shall annul the judicial decision that conflicts with the Basic Law;

c) in its competence stipulated in item f) of paragraph (2), may annul laws or provisions thereof that conflict with international treaties.

(4) The Constitutional Court shall be a body of fifteen members, who are elected for a term of twelve years by the Parliament with a two-thirds majority of the votes of the Members of Parliament. The Parliament shall elect a president among the Members of the Constitutional Court with a two-thirds majority of the votes of the Members of

Parliament; the mandate of the president shall last until his or her judicial office terminates.

(5) The detailed regulations on the competences, organisation and operation of the Constitutional Court shall be defined by cardinal statute.

The Judiciary

Article 25

(1) The judiciary shall perform jurisdiction. The supreme judicial organ shall be the Curia.

(2) The judiciary shall decide:

a) in criminal cases, in disputes of private law and in other cases set by statute;

b) on the legality of administrative decisions;

c) on the establishment of conflicts between decrees of local government and other laws and on their annulment;

d) on the omission of legislative duties of the local government based on statute.

(3) Besides paragraph (2), the Curia shall ensure the uniformity in the application of the law by the courts; its uniformity resolutions shall be binding on the courts.

(4) The judicial shall have multilevel organisation. For a certain field of cases, especially for administrative and labour disputes, special courts may be established.

(5) Self-government organs of the judges shall participate in the administration of the judiciary.

(6) Statutes may also establish the procedure of other organs in certain disputes.

(7) The detailed regulations concerning the organisation, administration and legal status of the judges shall be defined by cardinal statute.

Article 26

(1) Judges shall be independent and responsible only to the law; they shall not be instructed in their activity of jurisdiction. Judges may only be removed from office on the grounds of and in accordance with the procedure specified by cardinal statute. Judges may not be members of political parties and may not engage in political activities.

(2) Professional judges shall be appointed by the President of the Republic in the manner specified by cardinal statute. Those who have reached the age of thirty may be appointed to judges. Except for the President of the Curia, the legal status of judges may last until the general retiring age.

(3) The Parliament shall elect the President of the Curia

from the judges for a term of nine years upon the nomination of the President of the Republic. For the election of the President of the Curia a two-thirds majority of the votes of the Members of Parliament shall be required.

Article 27

(1) Courts, unless provided otherwise by statute, shall adjudicate in panels.

(2) In cases and in the manner described by statute, lay judges shall also participate in the adjudication.

(3) Only professional judges may proceed alone or act as presidents of a panel. In matters described by statute, which fall within the competence of local courts, the officer of the court may also proceed, whose activity shall meet the conditions stipulated in Article 26 paragraph (1).

Article 28

In their judicial activity courts shall interpret laws primarily in accordance with their aims and the Basic Law. During the interpretation of the Basic Law and laws, it shall be presumed that they seek a moral and economic aim in accordance with common sense and public good.

The Prosecutor's Office

Article 29

(1) The Supreme Prosecutor and the Prosecutor's Office shall enforce the punitive authority of the State as contributors to the jurisdiction. The Prosecutor's Office shall prosecute crimes, act against other unlawful actions and omissions, and facilitate the prevention of such actions.

(2) In accordance with statutes, the Supreme Prosecutor and the Prosecutor's Office shall:

- a) exercise powers in relation to the investigation;
- b) represent the public prosecution in court proceedings;
- c) supervise the legality of the implementation of punishments;
- d) perform further tasks and competences stipulated by statute.

(3) The prosecution shall be headed and directed by the Supreme Prosecutor, who shall appoint prosecutors. Except for the Supreme Prosecutor, the legal status of the prosecutors may last until the general retiring age.

(4) The Parliament shall elect the Supreme Prosecutor from the prosecutors for a term of nine years upon the nomination of the President of the Republic. For the election of the Supreme Prosecutor a two-thirds majority of

the votes of the Members of Parliament shall be required.

(5) The Supreme Prosecutor shall report to the Parliament annually on his or her activity.

(6) Prosecutors shall not be members of political parties and shall not engage in political activities.

(7) The detailed regulations on the organisation and operation of the Prosecutor's Office, the legal status and remuneration of the Supreme Prosecutor and the prosecutors shall be defined by cardinal statute.

The Commissioner for Fundamental Rights

Article 30

(1) The Commissioner for Fundamental Rights shall perform activities protecting fundamental rights; anyone may initiate the Commissioner's procedure.

(2) The Commissioner for Fundamental Rights shall investigate the anomalies concerning fundamental rights which have come to the Commissioner's attention, or shall have these anomalies investigated; and shall initiate general or specific measures for redress.

(3) The Commissioner for Fundamental Rights and his or

her deputies shall be elected by the Parliament for a term of six years with a two-thirds majority of the votes of the Members of Parliament. The deputies shall ensure the protection of the interests of future generations and the rights of national minorities residing in Hungary. The Commissioner for Fundamental Rights and his or her deputies shall not be members of political parties and shall not engage in political activities.

(4) The Commissioner for Fundamental Rights shall report to the Parliament annually on his or her activity.

(5) The detailed regulations pertaining to the Commissioner for Fundamental Rights and his or her deputies shall be defined by statutes.

Local Governments

Article 31

(1) In Hungary local governments shall operate for local administration and for the exercise of local public power.

(2) Affairs pertaining to the task and competence of the local government may be subjects of local referenda.

(3) Regulations pertaining to the local government shall be defined by statute.

Article 32

(1) Within the frameworks of statute, in the administration of local affairs, the local government:

- a) shall issue decrees;
- b) shall make decisions;
- c) shall administrate independently;
- d) shall establish its own organisation and rules of procedure independently;
- e) shall exercise the rights of ownership regarding the property of the local government;
- f) shall establish its own budget and, based on that, shall manage local government revenues independently.
- g) may undertake entrepreneurial activities with the financial resources and income that can be used for this purpose, without endangering the performance of obligatory tasks;
- h) shall decide on the types and rates of local taxes;
- i) may create symbols and emblems of the local government, and establish local honours and titles;
- j) may request information from the authorised and competent organ, may initiate decision-making and may express its opinion;
- k) may freely associate with other local

representative bodies, may create local government associations for the representation of their interests, may co-operate with the local governments of other countries in its sphere of authority and competence, and may be a member of international organisations of local governments;

l) perform further tasks and competences defined by statute.

(2) While performing its tasks the local government shall issue decrees either in order to regulate local social affairs not regulated by statute, or upon the authorisation of a statute.

(3) Decrees of the local government shall not conflict with other laws.

(4) Subsequent to the promulgation of its decree, the local government shall immediately refer it to the Metropolitan and County Government Office. Should the Metropolitan and County Government Office find the local government's decree or a provision thereof unlawful, it may initiate the review of the local government's decree at the court.

(5) The Metropolitan and the County Government Office may request the court to establish that the local government has failed to fulfil its legislative obligation based on statute. Should the local government not fulfil its legislative obligation by the deadline outlined in the court's decision establishing the breach, the court, upon the initiation of the Metropolitan and the County Government Office,

establishes that the local government's decree necessary for the remedy of the breach of legislative obligation shall be issued by the leader of the Metropolitan and the County Government Office on behalf of the local government.

(6) The property of the local governments shall be public property that serves the performance of their tasks.

Article 33

(1) The tasks and competences of the local government shall be exercised by the representative body.

(2) The local representative body shall be led by the mayor. The members of the representative bodies of counties shall elect their presidents from their own members for the term of their office as a representative.

(3) The representative body may elect committees and establish an Office as defined by cardinal statute.

Article 34

(1) Local governments and state organs shall co-operate to achieve public aims. The compulsory tasks and competences of the local government shall be defined by statute. To perform its tasks and competences, the local government shall be entitled to financial support from the budget or from other sources commensurate to the scope

of such tasks.

(2) Statute may establish the performance of a compulsory task in the association of local governments.

(3) Upon the authorisation of statute or of Government decree based on statute, the mayor or the president of the county representative body may exceptionally perform tasks and competences of state administration.

(4) The Government, via the Metropolitan and County Government Office, shall ensure the supervision of legality of the local governments.

(5) For securing the financial balance, statute may establish conditions or require the Government's consent for the local government to take out loans or assume other obligations above a set limit.

Article 35

(1) Representatives and mayors of local governments shall be elected by universal and equal suffrage and by direct and secret ballot ensuring the free expression of the voter's will, in a manner defined by cardinal statute.

(2) Representatives and mayors of local governments shall be elected for a term of five years in a manner defined by cardinal statute.

(3) The mandate of the representative body shall last until the day of the general elections of the representatives and

mayors of local governments. Should the elections be postponed due to the lack of candidates, the mandate of the representative body is prolonged until the day of the mid-term election. The mandate of the mayor shall last until the election of the new mayor.

(4) The representative body may declare its dissolution as defined by cardinal statute.

(5) Upon the initiation of the Government, submitted subsequently to the request of the Constitutional Court's opinion, the Parliament shall dissolve the representative body whose activity is in violation with the Basic Law.

(6) In case the local government declares its dissolution or it is dissolved, the mandate of the mayor terminates.

Public Finances

Article 36

(1) The Parliament shall adopt an act on the central budget and on its implementation for one calendar year. The Government shall submit the bills on the central budget and on its implementation to the Parliament by the deadline defined by statute.

(2) The bills on the central budget and on its implementation shall contain the state expenditures and

revenues in the same structure, in a transparent manner and in reasonable detail.

(3) With the adoption of the Act on the central budget and on its implementation the Parliament authorises the Government to collect the revenues and to perform the expenditures in it.

(4) The Parliament shall not adopt such an Act on the central budget which would result in a public debt exceeding half of the gross domestic product.

(5) As long as the public debt exceeds half of the gross domestic product, the Parliament shall only adopt the Act on the central budget which includes the reduction of the state debt in proportion to the gross domestic product.

(6) Derogation from the provisions in paragraphs (4)–(5) may only be permitted in the case of a special legal order, to the extent necessary to mitigate the consequences of the circumstances triggering the special legal order, or in case of a significant and enduring recession of the national economy, and only to the extent necessary to restore the balance of the national economy.

(7) Should the Parliament not adopt the Act on the central budget until the beginning of the calendar year, the Government has the right to collect the revenues determined in the laws, and within the framework of the appropriations determined in the state budget act to make the pro-rata expenditures for the previous year.

Article 37

(1) The Government shall implement the Act on the central budget lawfully and expediently, with efficient management of public funds and ensuring transparency.

(2) In the course of the implementation of the Act on the central budget – with the exception determined in Article 36 paragraph (6) – no debt or financial obligation may be undertaken which would result in the level of the state debt exceeding fifty percent of the gross domestic product.

(3) As long as the state debt exceeds half of the gross domestic product – with the exception determined in Article 36 paragraph (6) – in course of the implementation of the Act on the central budget, no debt or financial obligation may be undertaken which would result in raising the level of the state debt compared to the the previous year.

(4) As long as the state debt exceeds half of the gross domestic product, the Constitutional Court – in its authority defined in Article 24 paragraph (2) items b)–e) – shall review the constitutional conformity of the Act on the central budget, its implementation, the statutes on central taxes, stamp and customs duties, contributions, as well as statutes concerning uniform requirement for local taxes only in connection with the right to life and human dignity, the right to protection of personal data, the right to freedom of thought, conscience and religion, or the rights concerning Hungarian citizenship, and shall only annul them in the

cases above. The Constitutional Court shall annul the statutes in these domains without any restrictions if the rules of procedure in the Basic Law concerning the adoption and promulgation of the statutes were not realised.

(5) The rules regarding the calculation of the state debt and the gross domestic product, as well as the implementation of the regulations outlined in Article 36 paragraphs (1)–(3), shall be defined by statute.

Article 38

(1) The property of the State and the local governments shall constitute national assets. The aim of the management of the national assets shall serve public aims, such as to suffice the common needs and to protect environmental sources, as well as to take into account the needs of future generations. The requirements of preserving and protecting the national assets and regarding their responsible management shall be defined by cardinal statute.

(2) The sphere of the exclusive property and of the exclusive economic activities of the State, as well as the conditions and limits of the alienation of national assets of outstanding importance for the national economy, shall be defined by cardinal statute with regard to the aims referred to in paragraph (1).

(3) National assets may be alienated only for the purposes defined by statute, besides taking into account the requirement of proportionality to values, with exceptions defined by statutes.

(4) Contracts regarding the alienation and utilisation of national assets shall be concluded only with organs whose proprietary structure, construction and activity regarding the management of the alienated and utilised national asset is transparent.

(5) Economic organisations owned by the State and by local governments operate in a manner defined by statute, independently, responsibly, according to the requirements of expediency and efficiency.

Article 39

(1) Support from the central budget may be granted to or expenditures based on a contract may only be performed by those organisations whose proprietary structure and construction, as well as their activity in allocating the support, are transparent.

(2) Every organisation managing public finances shall publicly account for their management regarding public funds. Public money and national assets shall be managed according to the principles of transparency and purity of public life. Data regarding public finances and national assets shall be data of public interest.

Article 40

The fundamental rules of general taxation and of the pension system on behalf of the calculable contribution to the common needs as well as of the decent living conditions for the elderly shall be defined by statute.

Article 41

(1) The National Bank of Hungary shall be the central bank of Hungary. The National Bank of Hungary shall be responsible for the monetary politics in the manner defined by cardinal statute.

(2) The Governor and the Deputy Governors of the National Bank of Hungary shall be nominated by the President of the Republic for a term of six years.

(3) The Governor of the National Bank of Hungary shall report to the Parliament annually on the activity of the National Bank of Hungary.

(4) Upon the authorisation granted by statute, the Governor of the National Bank of Hungary, within his or her competence defined in cardinal statute, issues decrees that shall not conflict with statutes. In issuing decrees the Governor of the National Bank of Hungary may be substituted by the Deputy Governor whom he or she assigned in a decree.

(5) The detailed regulations on the organisation and operation of the National Bank of Hungary shall be defined by cardinal statute.

Article 42

The regulation on the organ supervising the financial mediation system shall be defined by cardinal statute.

Article 43

(1) The State Audit Office shall be the financial and economical audit agency of the Parliament. The State Audit Office in the sphere of its competence defined by statute shall audit the implementation of the central budget, the management of the budget, the utilisation of the resources from the budget, as well as the management of the national assets. The State Audit Office shall conduct its audits from the perspectives of legality, expediency and efficiency.

(2) The President of the State Audit Office shall be elected by the Parliament for a term of twelve years with a two-thirds majority of the votes of its Members.

(3) The President of the State Audit Office shall report to the Parliament annually on the activity of the State Audit Office.

(4) The detailed regulations on the organisation and

operation of the State Audit Office shall be defined by cardinal statute.

Article 44

(1) The Budget Council shall be an organ supporting the legislative activity of the Parliament, and shall examine the feasibility of the central budget.

(2) The Budget Council shall participate in the preparation of the Act on the central budget as defined by statute.

(3) The adoption of the Act on the central budget, in order that it complies with Article 36 paragraphs (4) and (5), shall be the subject of the preliminary consent of the Budget Council.

(4) The President of the Budget Council, the Governor of the National Bank of Hungary and the President of the State Audit Office shall be members of the Budget Council.

(5) The detailed regulations on the operation of the Budget Council shall be defined by cardinal statute.

Hungarian Defence Forces

Article 45

(1) The armed forces of Hungary shall be the Hungarian

Defence Forces. The fundamental task of the Hungarian Defence Forces shall be the military protection of the independence of Hungary, the territorial integrity and the country's borders, the fulfilment of duties regarding common defence and peacekeeping arising from international treaties, as well as performing humanitarian activities in accordance with the rules of international law.

(2) Unless an international agreement provides otherwise, the Parliament, the President of the Republic, the Defence Council, the Government and the competent minister shall have the right to direct the Hungarian Defence Forces, according to the framework defined by the Basic Law and by cardinal statute. The operation of the Hungarian Defence Forces shall be directed by the Government.

(3) The Hungarian Defence Forces shall participate in the prevention of disasters, as well as in the removal of and recovery from their consequences.

(4) The professional members of the Hungarian Defence Forces shall not be members of political parties, and shall not engage in political activity.

(5) The detailed regulations on the organisation, tasks, direction and management, as well as the operation of the Hungarian Defence Forces shall be defined by cardinal statute.

Police and National Security Services

Article 46

(1) The fundamental task of the Police shall be the prevention and detection of criminal offences, as well as the protection of public security, public safety and state borders.

(2) The Police shall operate under the direction of the Government.

(3) The fundamental task of the National Security Services shall be the protection of the independence and legal order of Hungary, as well as the enforcement of the country's national security interests.

(4) The National Security Services shall operate under the direction of the Government.

(5) The Police and the professional members of the National Security Services may not be members of political parties and may not engage in political activities.

(6) The detailed regulations on the organisation and operation of the Police and the National Security Services, the rules of applying the methods and techniques of the secret services, as well as the rules regarding national security activities shall be defined by cardinal statutes.

Decisions on Participation in Military

Operation

Article 47

(1) The Government shall decide on troop movements of the Hungarian Defence Forces and of foreign armed forces that involve border crossing.

(2) The Parliament with a two-thirds majority of the votes of its Members (of the Parliament) at present shall decide – with the exception of the cases referred to in paragraph (3) – on the use of the Hungarian Defence Forces abroad or within the territory of Hungary, on its foreign stationing, as well as on the use of foreign armed forces within or departing from the territory of Hungary, or on their stationing in Hungary.

(3) The Government shall decide on the troop movements of the Hungarian Defence Forces and of foreign armed forces, referred to in paragraph (2), on the basis of the decision of the European Union or the North Atlantic Treaty Organisation, as well as on other troop movements thereof.

(4) The Government shall immediately inform the President of the Republic and report to the Parliament its decision made in accordance with paragraph (3), or on authorising the participation of the Hungarian Defence Forces in peacekeeping missions or in humanitarian operations in foreign areas of operation.

Special Legal Order

Common Rules for the State of National Crisis and the State of Emergency

Article 48

(1) The Parliament shall:

a) declare a state of national crisis and set up the National Defence Council in the case of declaration of the state of war or the immediate danger of armed attack by a foreign power (danger of war);

b) declare a state of emergency in the case of armed actions aimed at subverting the lawful order or at the acquisition of exclusive power, as well as in the case of grave and violent acts committed in arms, by force of arms, or by greatly endangering life and property.

(2) For the declaration of the state of war, conclusion of peace, and for the declaration of the special legal orders determined in paragraph (1), a two-thirds majority of the votes of the Members of the Parliament shall be required.

(3) The President of the Republic shall have the right to declare the state of war, the state of national crisis, and to set up the National Defence Council, as well as to declare

the state of emergency, in case the Parliament is prevented from reaching such decisions.

(4) The Parliament shall be considered being prevented from reaching such decisions if it is not in session and its convening encounters insurmountable obstacles due to the lack of time, or to the events necessitating the declaration of the state of war, the state of national crisis, or the state of emergency.

(5) The Speaker of the Parliament, the President of the Constitutional Court and the Prime Minister shall jointly determine whether the Parliament is being obstructed, or whether the declaration of the state of war, the state of national crisis or the state of emergency is justified.

(6) At the first sitting following the end of its obstruction, the Parliament shall review whether the declaration of the state of war, the state of national crisis, or the state of emergency was justified, and shall decide on the legality of the measures taken. A two-thirds majority of the votes of the Members of Parliament shall be required for this decision.

(7) During a state of national crisis or a state of emergency, the Parliament may not dissolve itself, nor may it be dissolved. During a state of national crisis or a state of emergency the date of the general parliamentary elections may not be set and may not be held; in such cases a new Parliament shall be elected ninety days from the termination of the state of national crisis or the state of

emergency. If the general parliamentary elections have already been held, but the new Parliament has not held its inaugural sitting, the President of the Republic convenes the inaugural sitting for a date within thirty days from the termination of state of national crisis or the state of emergency.

(8) If the Parliament dissolved itself or it was dissolved, it may be convened by the National Defence Council during a state of national crisis, or by the President of the Republic during a state of emergency.

State of National Crisis

Article 49

(1) The President of the National Defence Council shall be the President of the Republic, and its members shall be the Speaker of the Parliament, the leaders of the parliamentary fractions, the Prime Minister, the ministers and – with an advisory capacity – the Chief of Defence Staff.

(2) The National Defence Council shall exercise:

- a) the powers transferred to it by the Parliament;
- b) the powers of the President of the Republic;
- c) the powers of the Government.

(3) The National Defence Council shall decide on

a) the use of the Hungarian Defence Forces abroad or within the territory of Hungary, the participation of the Hungarian Defence Forces in peacekeeping, humanitarian affairs in foreign areas of operation and the stationing of the Hungarian Defence Forces in a foreign country;

b) the use and stationing of foreign armed forces in Hungary either if they are deployed within or departing from the territory of Hungary;

c) extraordinary measures as defined by cardinal statutes.

(4) The National Defence Council may issue decrees, in which – as defined by cardinal statutes – it may suspend the application of certain statutes, or may derogate from statutory provisions; furthermore, it may take other extraordinary measures.

(5) The decree of the national Defence Council shall cease to have effect upon the cessation of the state of national crisis, unless the Parliament extends the effect of such decrees.

State of Emergency

Article 50

(1) The National Defence Forces may be used during a

state of emergency if the use of the Police and the National Security Services are insufficient.

(2) During a state of emergency in the case of the obstruction of the Parliament the President of the Republic shall decide on the use of the Hungarian Defence Forces pursuant to paragraph (1).

(3) During a state of emergency the extraordinary measures defined by cardinal statutes shall be introduced by the decree of the President of the Republic. The decree of the President of the Republic may suspend the application of certain statutes, or may derogate from statutory provisions; furthermore, it may take other extraordinary measures, as defined by cardinal statute.

(4) The President of the Republic shall immediately inform the Speaker of the Parliament about the extraordinary measures taken. The Parliament, or in the case of its obstruction the Parliamentary Defence Committee, shall continuously remain in session during a state of emergency. The Parliament or the Parliamentary Defence Committee shall have the power to suspend the application of extraordinary measures introduced by the President of the Republic.

(5) Extraordinary measures introduced by decree shall remain in force for a period of thirty days, unless the Parliament, or in the case of its obstruction, the Parliamentary Defence Committee, extends their effect.

(6) The decree of the President of the Republic shall cease to have effect upon the cessation of the state of emergency.

State of Preventive Defence

Article 51

(1) In case of an imminent threat of foreign armed attack, or in order to perform an obligation arising from an alliance treaty, the Parliament shall declare a state of preventive defence and shall simultaneously authorise the Government to introduce extraordinary measures as defined by cardinal statutes. The duration of the state of preventive defence may be extended.

(2) For the declaration and extension of the special legal order determined by paragraph (1), a two-thirds majority of the votes of the Members of Parliament present shall be required.

(3) After proposing the motion for declaring a state of preventive defence, the Government may, in a decree, introduce measures by way of derogation from the acts governing the administrative system and the operation of the Hungarian Armed Forces and the law-enforcement agencies, of which measures the Government shall continuously inform the President of the Republic and the

competent standing committees of the Parliament. Such measures shall remain in force until the decision of the Parliament on the declaration of the state of preventive defence, but not exceeding sixty days.

(4) The Government may issue decrees during a state of preventive defence, which may suspend the application of certain statutes, or may derogate from statutory provisions; furthermore, it may take other extraordinary measures, as defined by cardinal statute.

(5) The decree of the Government shall cease to have effect upon the cessation of the state of preventive defence.

Unexpected Attacks

Article 52

(1) Should the territory of Hungary be subjected to unexpected attack by foreign armed groups, the Government shall take immediate measures to repel such an attack, with forces duly prepared and proportionate to the gravity of the attack, to defend the territory of Hungary with the domestic and allied anti-aircraft and stand-by air forces, in order to protect legal order, life and property, public order and public safety – if necessary in accordance with the armed defence plan approved by the President of the Republic – until a state of emergency or a state of

national crisis is declared.

(2) The Government shall immediately inform the President of the Republic about the measures taken in accordance with paragraph (1).

(3) The Government may introduce extraordinary measures in the case of an unexpected attack as defined by cardinal statute; furthermore, it may issue decrees, which may suspend the application of certain statutes, or may derogate from statutory provisions; furthermore, it may take other extraordinary measures, as defined by cardinal statute.

(4) The decree of the Government shall cease to have effect upon the cessation of the unexpected attack.

State of Danger

Article 53

(1) In the case of a natural or industrial disaster endangering lives and property, or in order to mitigate the consequences thereof, the Government shall declare a state of danger, and may introduce extraordinary measures as defined by cardinal statutes.

(2) The Government may issue decrees which may suspend the application of certain statutes, or may

derogate from statutory provisions; furthermore, it may take other extraordinary measures, as defined by cardinal statute.

(3) The decree of the Government issued in accordance with paragraph (2) shall remain in force for fifteen days, unless the Government – on the basis of the authorisation of the Parliament – extends the effect of the decree.

(4) The decree of the Government shall cease to have effect upon the cessation of the state of danger.

Common Rules of Special Legal Order

Article 54

(1) During a special legal order the exercise of fundamental rights – with the exception of the fundamental rights defined by Article II and Article III, and furthermore by Article XXVIII paragraphs (2)–(6) – may be suspended or restricted beyond the extent defined by Article I paragraph (3).

(2) During a special legal order the application of the Basic Law may not be suspended, and the functioning of the Constitutional Court may not be restricted.

(3) The special legal order shall be terminated by the organ competent to introduce it, if the conditions of its

declaration cease to exist.

(4) The detailed regulations applicable during a special legal order shall be defined by cardinal statute.

Final Provisions

1. The Basic Law of Hungary shall enter into force on 1 January 2012.

2. This Basic Law was adopted according to Article 19 paragraph (3) item a) and Article 24 paragraph (3) of Act XX of 1949.

3. The transitional provisions of this Basic Law shall be adopted separately by the Parliament according to the procedure defined in item 2 above.

4. The Government shall submit the bills to the Parliament necessary for the implementation of the Basic Law.

We, Members of the Parliament elected on 25 April 2010, being aware of our responsibility before God and man, in exercise of our power to adopt a constitution, have hereby determined the first unified Basic Law of Hungary as above.

Let there be peace, freedom and concord.

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