Perspectives on Global Constitutionalism

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The Use of Foreign and International Law

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For Péter, Tamás and Lilianna

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Preface

This book is about the eventual globalization and convergence of constitutionalism. My research, which started in Heidelberg at the Max Planck Institute for Foreign Public Law and International Law and concluded in Princeton at the Law and Public Affairs Program at Princeton University, was especially influenced by the Constitution-making processes in my home country, Hungary, as well as in Egypt, which I was also able to study, thanks to a research project on the future of the Western liberal order of the Transatlantic Academy. Unfortunately, none of these personal experiences regarding the migration of liberal constitutional ideas were very encouraging, and the backsliding of constitutionalism also raised one of the most basic questions of this book, namely how the international community and well-functioning democratic states long ago governed by the rule of law can help emerging democracies in the Constitution-making process and later through transjudicial communication among judges to build up and maintain liberal constitutionalism, and how this help affects the sovereignty of the constitution-makers. Both the Hungarian government and the followers of ousted President Morsi of Egypt claimed illegitimate intervention into their constitutional order by the European institution, and the military coup was probably also supported by foreign countries. So both the events and many others leave open the question as to whether and how the constitutional law of non-liberal states can be internationalized and the international law be constitutionalized to achieve the ideal of a global constitutionalism. I hope it is understandable that the constitutional aspects of the backsliding of democracy in my own country left their mark especially on the first version of this book, published in Hungarian by L'Harmattan in Budapest. As for this substantially improved and supplemented English edition, I especially thank my colleague Kim Lane Scheppele, one of the best foreign experts in Hungarian constitutional law, with whom I had the opportunity not only to discuss the manuscript of this book, but also to work on and teach comparative constitutional law during my stay in Princeton. I thank many colleagues at Princeton University, especially Jan-Werner Mueller, as well as at the Transatlantic Academy in Washington, DC, who provided valuable input for my work or otherwise influenced my thinking on the topic. I also thank my colleagues and students at the Eötvös Loránd University's Social Science Faculty for agreeing to my long absence from teaching duties in Budapest. Finally, I am grateful for the love and support of my dear wife, Marianna, and our schoolgoing daughter Lilianna.

Gábor Halmai
Princeton, March 2014

Introduction

This work investigates the problem of how constitutionality and the internationally increasingly accepted global principles of human rights can influence state action, which is still considered sovereign. International human rights regulations are of pre-eminence in this context since they are virtually, by definition, based on limitations of national constitutional law, in order to assert internationally shared constitutional principles. The evolution of international human rights – triggered by the Holocaust trauma – was the first serious challenge pertaining to any kind of domestic action within the sovereignty of states. This new type of global morality that manifests itself in international relations largely owes itself to the emergence of the notion that certain states bear responsibility for the horrors of World War II.[1]

The first part will review the resultant limitation of sovereignty in the context of the creation, amendment and interpretation of national constitutions, seeking to answer the question of how far the process of the internationalization of (national) constitutional law has progressed; how far are the framers of constitutions or the courts that construe constitutions willing to accept alien, foreign or international principles and rules. What underlies the decision by the constitutional organs of certain states to accede to such constitutional migration and the rejection of such migration by their respective counterparts in other countries?

The second part will address the constitutionalization of the small segment of international law that manifests itself in the assertion of international human rights standards in the case law of national courts. In such instances we may refer to a limitation of national sovereignty if that jurisdiction is taken away from a state that refuses to act according to international law. Simultaneously, some sense of self-restraint also obtains here, insofar as national legal systems are willing to allow foreign citizens to bring suits in their own courts with the objective of asserting international human rights norms, whereby the accountability for rights violations becomes globalized.

As will be apparent, the transformation of the Hungarian constitutional order between 2010 and 2013 receives substantial space in the book, especially in its first part. This restoration is not only a personal disappointment for me in light of all the hopes and illusions triggered by two decades of liberal constitutionalism, but is also relevant in terms of the book's subject matter: while the globalization of constitutional law and human rights has emerged in numerous parts of the world, Hungary appears to have moved in an antithetical direction since the 2010 national elections, namely towards the deconstruction

1 Elazar Barkan's book, for example, argues that the indemnification for damages caused by the Holocaust, especially compensation for victims by Switzerland, was the decisive moment that triggered the emergence of this new international morality. *See* E. Barkan, *The Guilt of Nations*, W.W. Norton & Company, New York, 2000, pp. IX-XII.

of global and European constitutional values.[2] I have been reproached by many voices for bidding farewell to the rule of law – presumably – precipitately, as well as for characterizing this illiberal turn as a counter-revolution. Alas, it appears that this assessment of the Hungarian constitutional process has been borne out by the harsh criticisms that the Council of Europe and the European Union put forth on this issue. In an op-ed published during the summer of 2010, I predicted the end of the rule of law,[3] and in 2012 I used the term 'constitutional counter-revolution' to describe the Hungarian constitutional restoration in several foreign language publications and presentations.[4] At the same time my view is that the illiberal turn, which significantly weakened the rule of law safeguards instituted by the 1989-1990 constitutional process, has not resulted in the restoration of the single-party state or of police state structures.[5]

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2 I am aware, of course, that there are assessments quite worthy of serious consideration that differ from my own, which argue that despite its problematic elements, the new constitutional regime continues to comply with European values. *See*, for example, H. Küpper, 'Mit Mängeln. Ungarns neues Grundgesetz', *Osteuropa*, December, 2011. Our differing assessments caused the editors to contrast Küpper's study, which emphasizes the deficiencies of the new Fundamental Law, with my own article, which immediately follows his in the volume and points to the rather problematic character of the new constitution: G. Halmai, 'Hochproblematisch. Ungarns neues Grundgesetz', *Osteuropa*, December, 2011b. At the same time I do not think that the English language study by L. Csink, B. Schanda & A.Zs. Varga (Eds.), *The Basic Law of Hungary. A First Commentary*, Clarus Press – National Institute of Public Administration, Dublin, 2012, is scientifically grounded analysis. For a vitriolic critique of the aforementioned, *see* B. Majtényi, 'Alkotmánypropaganda. Megjegyzések az Alaptörvény barátainak "első kommentárjához"' ['Constitutional Propaganda. Comments on the "First Commentary" by the Friends of the Fundamental Law'], *Fundamentum*, Vol. 16, No. 2, 2012, pp. 147-150.

3 *See* G. Halmai, 'Búcsú a jogállamtól' ['A Farewell to the Rule of Law'], *Élet és Irodalom*, Vol. LIV, No. 29, 2010. After the adoption of the Fundamental Law, Péter Tölgyessy wrote the following regarding this article: "Half of country, the opposition half bases its identity, with ever more resolve, on denying Fidesz's Hungary. Once again, the opposition in the Hungarian National Assembly is an anti-system opposition whose adherents have an interest in exaggerating to the utmost any real faults of the new constitution." *See* P. Tölgyessy, 'A magyar parlamentáris hagyomány íve és az újabb alkotmányozás' ['The Trajectory of Hungarian Parliamentary Tradition and the Renewed Constitution-Making'], *in* A. Jakab & A. Körösényi (Eds.), *Alkotmányozás Magyarországon és máshol* [*Constitution-Making in Hungary and Elsewhere*], MTA TK PTI, Új Mandátum Kiadó, Budapest, 2012, pp. 284-285.

4 *See* G. Halmai, 'From the "Rule of Law Revolution" to an Illiberal Democracy in Hungary', *in Festschrift für Klaus Stern*, Duncker & Humblot, Berlin, 2012a; G. Halmai, 'From the "Rule of Law Revolution" to the Constitutional Counter-Revolution in Hungary', *in* Benedek *et al.*, *European Yearbook on Human Rights*, Neuer Wissenschaftlicher Verlag, Vienna, 2012b; G. Halmai, 'Towards an Illiberal Democracy. Hungary's New Constitution', *Eurozine*, 25 January 2012.

5 Here I part ways with my Princeton colleague, Kim Lane Scheppele. For my discussion with her, *see* '"In Their Own Interest, Hungarians Need to Realize Their Constitutional Renewal Themselves." Gábor Halmai in conversation with Princeton University Professor Kim Lane Scheppele' (*Fundamentum*, Vol. 16, No. 1, 2012c). This despite the fact that during our joint work our views on the Hungarian constitutional state were similar enough that in the springs of 2012 and 2013, we jointly edited two amicus briefs for the Venice Commission (M. Bánkuti *et al.*, 'Vélemény Magyarország új alkotmányos rendjéről: amicus brief a Velencei Bizottságnak az Alaptörvény átmeneti rendelkezéseiről és a legfontosabb sarkalatos törvényekről.' ['Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws'], *Fundamentum*, Vol. 16, No. 1, 2012, and M. Bánkuti, 'Amicus Brief a Velencei Bizottságnak az Alaptörvény Negyedik módosításáról' ['Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary'], *Fundamentum*, Vol. 17, No. 3, 2013). Our differing assessments probably stem from differences in temperament.

I think the Hungarian constitutional system after 2010 is better characterized as a kind of 'democradura' rather than as a dictatorship.[6] Also, the research project I was involved in at the Transatlantic Academy of the German Marshall Fund of the United States on the future of the Western liberal order classifies the nature of the Orbán era as a 'hybrid' regime, which is neither democratic nor authoritarian.[7]

Concerning the most intriguing questions of the current processes in Hungary, the failure of the elite (including my own, of course) that built liberal democracy in Hungary is only one of the issues here[8]; the other crucial one is why the first twenty years of regime transition has not seen the emergence of greater respect for constitutional values (which would have prevented the rapid deconstruction of democracy or would at the very least have made this process more difficult).

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

Europe's inability to properly defend its common values has set off an avalanche that in the summer of 2012 threatened to bury Romanian constitutionalism, after having done the same to Hungary already. If in the wake of the economic crisis the European Union will not be able to offer these countries even the potential for recovering from the effects of the crisis, then the prospects of rule of law and democracy will be even worse

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6 *See* A. Arato, 'Is There a Dictatorship in the E.U.?' (<www.booksandideas.net>, 1 May 2012.). The term was drawn from Guillermo O'Donnell & Philippe Schmitter, who used it to describe certain Latin American regimes in the 1970s and 1980s. In 2011, Arato and I jointly edited an amicus brief for the Venice Commission on the newly adopted Fundamental Law (Z. Fleck *et al.*, 'Vélemény Magyarország Alaptörvényéről' ['Opinion on Hungary's Fundamental Law'], *Fundamentum*, Vol. 15, No. 1, 2011). Generally, the similarities between Arato's and my own assessment of the situation extended even to terminology. *See* G. Halmai, '"Én az alkotmányosság dimenziójában beszélek 'ellenforradalomról'". Beszélgetés Arató András szociológus-politológussal' ['"I Speak of 'Counterrevolution' in the Context of Constitutionalism". Conversation with the Sociologist/Political Scientist Andras Arato'], *Fundamentum*, Vol. 15, No. 1, 2011a.

7 *See* S. Benhabib, D. Cameron & A. Dolidze *et al.*, *The Democratic Disconnect, Citizenship and Accountability in the Transatlantic Community*, Transatlantic Academy, Washington D.C., 2013, Chapter 7.

8 Naturally, I do not conflate the elite with politics here. I agree with Helmut Schmidt's wise assertion that it is not incumbent on politics – and much less on reigning governments – to make the public accept a set of 'proper' values, even though in reality there are political leaders from time to time who also wish to be cultural leaders of their respective peoples. *See* H. Schmidt & F. Stern, *Unser Jahrhundert*, C.H. Beck Verlag, München, 2010, p. 139. Still, I am also aware of the intellectuals' historic responsibility in conveying value systems. The literary icon, Paul Auster, makes a similar observation on the total absence of any influence exerted by intellectuals, especially in anti-intellectual America. *See* 'Dies ist ein geteiltes Land. Der amerikanische Autor Paul Auster spricht über seinen neuen Roman, Sunset Park' und über Amerika vor der Präsidentenwahl im Herbst', *Die Zeit*, 19 July 2012.

than they seem right now.[9] In other words, at the time this manuscript was written, it was demonstrated – regrettably with Hungary setting the precedent – that the migration of constitutional ideals is not necessarily a one-way road, that the globalization of constitutionalism has not been concluded, not even within Europe. On the contrary, the phenomenon of 'reverse globalization'[10] also presents itself at this time as a result of immigration flows to Europe from the Middle East, Africa and Southeast Asia.

This leads to conflicts such as the *Salman Rushdie* case in the United Kingdom or the debates over headscarves in France or Germany. But even some countries that boast otherwise stellar constitutional traditions stand athwart the globalization of constitutional law and human rights; so does the United States, for instance, as the presidential campaign ongoing during the writing of this book or the exceptionalist approach of the U.S. Supreme Court – which serves as a model for all constitutional democracies – have also demonstrated.

Nor ought we to forget that even the process of globalization itself does not always indicate a spread of Western order. The faint signs that appear to point towards some type of convergence towards liberal constitutionalism in a globalizing world are nowhere near alone among the processes that shape the global world order. Serious research shows, for example, that Eastern (primarily Chinese and to a lesser extent Russian) non-liberal values are gaining ground in the area of human rights through the mediation of global institutions, such as for instance the organs of the United Nations, including its General Assembly, the Security Council and the Human Rights Council.[11] The question is whether and how much this process will upset the migration of the idea of Western constitutionalism, which I have been observing and which I welcome.

9 This is the danger that Andrea Capusella alerts us to in discussing the European Union's potential disintegration and the possible introduction of secondclass EU membership ('Why the Eurozone Crisis Threatens Liberal Reform in the East', *The Guardian*, 5 August 2012).

10 On the use of the term, *see* S. Benhabib, *Another Cosmopolitanism, With Commentaries by Jeremy Waldron, Bonnie Honig, Will Kymlicka*, Oxford University Press, Oxford, 2006, p. 51.

11 According to surveys conducted by the European Council on Foreign Relations 10 years ago, 43% of the UN General Assembly supported China in the context of human rights, while Europe enjoyed a support of 78% in the same body. In 2010-2011, however, Europe's support dropped to 50%, while China's grew to 60% (cited in M. Leonard, 'The End of the Affair', *Foreign Policy*, 24 July 2012).

The Internationalization of Constitutional Law: Patterns in Constitution-Making and Constitutional Interpretation

A growing constitutional cross-fertilization takes place between national constitutional systems. This process may contribute not only to the emergence of better constitutions and improved (constitutional) court decisions, but also to the rise of a 'global legal system'.[1] Ultimately, the globalization of constitutional law implies that constitutionalism is no longer the sole prerogative of nation states, but emerges instead as a set of standards for an international community that is in the process of taking shape.[2] This internationalization is bolstered especially by the expansion of commercial ties and communication and the increasing depth of political, economic, cultural and legal relations.[3] However, as economic globalization also implies rivalry – for investments and labour – between states, internationalization is primarily limited to countries that partake in the international competition for capital and labour[4]; and at least those among the latter segment that use international models for designing, amending or construing their constitutions. Also, modern computer technology, personal connection between justices, and development in legal education have made the circulation of case law easier and more frequent.[5]

To illustrate the various ways in which comparative law materials are used, academic literature also turns to the use of metaphors. One of these is the so-called legal transplant, which designates the translation of rules between legal systems.[6] Another metaphor

1 This possibility is proposed by A.-M. Slaughter, *A New World Order*, Princeton University Press, Princeton, 2004, pp. 65-103.

2 A leading American constitutional scholar had already envisioned this future towards the end of the 1990s. *See* B. Ackerman, 'The Rise of World Constitutionalism', *Virginia Law Review*, Vol. 87, 1997, p. 771.

3 In certain analyses they emphasize the potential effects of globalization via market processes on constitutional rights. *Cf.* D.S. Law, 'Globalization and the Future of Constitutional Rights', *Northwestern University Law Review*, Vol. 102, 2008, p. 1277, and especially p. 1280.

4 *See* M. Tushnet, 'The Inevitable Globalization of Constitutional Law', *Virginia Journal of International Law,* Vol. 49, 2009, pp. 985-1006.

5 *See* T. Groppi & M.-C. Ponthoreau, 'Introduction. The Methodology of Research: How to Assess the Reality of Transjudicial Communication?', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges,* Hart Publishing, Oxford, 2013b, p. 7.

6 In his early work, Alan Watson argued that he needs to address the transplantation of the science of comparative law; *see* A. Watson, *Legal Transplants: An Approach to Comparative Law*, Scottish Academic Press, Edinburgh, 1974. Watson himself has been careful to note that his conclusions are properly applicable to the development of private law. Christopher Osakwe is even more certain that public law, much more than private law, is infused with indigenous political, social and economic realities, and therefore is closely linked to national traditions. *See* C. Osakwe, 'Introduction: The Problems of Compatibility of Notions in Constitutional Law', *Tulane Law Review*, Vol. 59, 1984, pp. 875, 876. In his critique of Watson, Pierre Legrand claims that transplantation is not a viable enterprise; in rejecting convergence he emphasizes differences, *cf.* P. Legrand, 'What "Legal Transplants"', *in* D. Nelken & J. Feest (Eds.), *Adapting Legal Cultures*, Hart Publishing, Oxford, 2001. On the role transplantation played during Hungarian regime transition, *see* Cs. Varga, 'Transfer of Law. A Conceptual Analysis,' *in Hungary's Legal Assistance. Experience in the Age of Globalization*, Center for Asian Legal Exchange, Graduate School of Law, Nagoya University, Nagoya, 2006. On the transfer of constitutional law from West to East, *see* A. Nussberger, 'Verfassungstransfer von West nach Ost. Illusion, Desillusion, Neubeginn', *Osteuropa*, 2010, pp. 81-96.

employed is the opposite of the aforementioned, namely constitutional borrowing.[7] Those who employ the metaphor of the 'migration' of constitutional ideals argue that that is the only concept capable of capturing the versatile impact of constitutional ideals on the judicial practice that incorporates them, as well as of expressing both constitutional differences and the commitment to a comparative approach, though the latter does not necessarily imply the assertion that constitutions and judicial practice converge.[8]

The migration of constitutional ideals discussed here may manifest itself in the use of foreign constitutional solutions, in the process of drafting constitutions,[9] as well as in the application of comparative law in construing constitutions. Addressing these important manifestations of constitutional migration must begin by treating the preliminary theoretical question of how far the sovereignty of the branches of powers that make and construe the constitution, respectively, extends in terms of applying external constitutional solutions or completely disregarding those.

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7 *See* the published materials of the scientific symposium on 'constitutional borrowing': *International Journal of Constitutional Law*, Vol. 1, 2003, pp. 177-324.

8 On the metaphors, *see* S. Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law', *in* S. Choudhry (Ed.), *Migration of Constitutional Ideas*, Cambridge University Press, Cambridge, 2006. In another study, Choudhry uses the term 'dialogical interpretation' in the context of constitutional interpretation, which falls outside the scope of 'constitutional borrowing', but is within the scope of the 'migration' of constitutional principles; *see* S. Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation', *Indiana Law Journal*, Vol. 74, 1999, pp. 819, 835. This model of comparative constitutional law interpretation bears similarities to Vicki C. Jackson's 'engagement' model, *see* V.C. Jackson, *Constitutional Engagement in a Transnational Era*, Oxford University Press, Oxford, 2010; as well as to Sarah K. Harding's model, also based on 'dialogue', *see* S.K. Harding, 'Comparative Reasoning and Judicial Review,' *The Yale Journal of International Law*, Vol. 28, 2003, pp. 409-467.

9 This is the context in which Frederick Schauer distinguishes between imposed, transplanted, indigenous and transnational constitutions. *See* F. Schauer, 'On the Migration of Constitutional Ideas,' *Connecticut Law Review*, Vol. 37, 2005, p. 907.

1 The Limits of Constitution-Makers' Sovereignty

In the current chapter, I examine the sovereignty of Constitution-making organs from the perspective of whether they are subject to any internal or external constraints in terms of the substantial solutions or procedures they may employ in drafting new constitutions or amending existing ones. One aspect of this issue is the legitimacy of the constitutional order (its sociological recognition and status as worthy of recognition), a problem that may be expressed thus: is it preconditioned on legality, in other words, is there a requirement that the constitutional order must be designed or amended lawfully? The answers may vary a great deal depending on whether what is at issue is a new constitution or merely an amendment. In the case of a constitutional amendment, a further question is whether the said amendment only involves changing individual provisions or a comprehensive revision of the constitutional document.[1] When a new constitution is created, a fundamental question arises as to whether it establishes a wholly new system of government or merely harmonizes the existing order with prevailing power constellations.[2]

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1 For this distinction, *see* W. Murphy, 'Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity', *in* S. Levinson (Ed.), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Princeton University Press, Princeton, 1995, pp. 163, 177.

2 *See* more detail on these two types of constitutions in: C. Möllers, 'European Union: Pouvoir Constituant-Constitution – Constitutionalisation', *in* A. von Bogdandy & J. Bast (Eds.), *European Constitutional Law*, 2nd rev. edn., Hart Publishing, Oxford, 2010, pp. 169-204. The original German version of the study was published in 2003, the second revised edition in 2009: 'Verfassung – Verfassunggebung – Konstitutionalisierung. Begriffe der Verfassung in Europa', *in* A. von Bogdandy & J. Bast (Eds.), *Europäisches Verfassungsrecht*, Springer, Heidelberg, 2009, pp. 227-277. Möllers traces the distinction between the two constitutional traditions back to Hannah Arendt's classic work *On Revolution*, The Viking Press, New York, 1963b. Here Arendt defines revolution the following way: "[o]nly where change occurs in the sense of a new beginning, where violence is used to constitute an altogether different form of government [...] where the liberation from oppression aims at least at the constitution of freedom can we speak of liberation" (p. 34). We cannot disregard the fact that Arendt assessed the American and French Revolutions, which created similar constitutional traditions, very differently indeed. While in the United States the transformation of the organic thinking was formed practically without violence – not considering violence against the native population – until the Civil War, in France this was only achieved with bloody violence (*Id.*, p. 25). Nor does Arendt forget to note that one of the key elements of the new American constitutional order, the principle of the separation of powers, had no effect on the French Revolution (*Id.*, p. 24). Arendt's interpretation was most probably influenced by Condorcet's definition of revolution: "The word 'revolution' can be applied only to revolutions whose aim is freedom" (p. 29). One can distinguish the liberal conception moored in inalienable and universal human rights from the conservative or Jacobin-socialist interpretations of revolution, which is associated with notions that either reject or differ from the ideal of universal human rights and constitutional principles.

1.1 Models of Constitution-Making

Revolutionary constitutions – exemplified by the models of the American and French Revolutions – establish an entirely new order rather than merely constraining the reigning power in place.[3] In the order created by such constitutions, all forms of exercising public power require an immanent justification, which is provided by the new constitution. The new constitution determines the form and substance of the sovereign exercise of power, and in so doing it liquidates the previous political order; in other words, it severs continuity. The establishment of a new political order is associated with the concept of 'democratic *pouvoir constituant*', which designates the people as subjects of the founding act. This legality manifests itself in democratic procedures and emerges subsequently as the basis for the constitution's legitimacy. This explains why most constitutions only make provisions concerning the amendment of the existing document, while they are silent on the formal requirements of its comprehensive revision, not to mention the adoption of a new constitution. The Spanish Constitution and the constitutions of some states of the United States are exceptions to this general observation, since they also regulate the possibility and procedures of a revision. Another exception is the German Grundgesetz of 1949, which in its Article 146 holds out the prospect of its own replacement by a new constitution to be adopted following German reunification (as we know, this promise went ultimately unfulfilled in 1990: the six new federal states joined the Federal Republic within the framework of the Grundgesetz). Similarly, the preamble of the comprehensive constitutional amendment act of 1989 in Hungary also promises the adoption of a new constitution. Nevertheless, even though in the Hungarian case, formally speaking, no new constitution was adopted in 1989 – though substantially speaking it did – academic literature qualifies this act not as an amendment or revision, but as a 'constitutional revolution or new founding'.[4] However, this procedure is called 'chaste constitution-making'[5] by some academics.

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3 This *ex nihilo* constitution making is referred to as 'revolution-based' by Michel Rosenfeld. *See* M. Rosenfeld, *The Identity of the Constitutional Subject*, Taylor & Francis, Abingdon, 2009b, Chapter 6. Dawn Oliver and Carlo Fusaro, in their comparative analysis, use another categorization of the birth of new constitutions. They consider the following ways in which new constitutions come into existence: (a) granted and patriated constitutions are granted by another state, as happened in the case of New Zealand's constitution in 1852 by the Constitutional Act of the British Parliament, and patriated first in 1947 by the right to amend the 1852 Constitutional Act, and finally by the New Zealand Constitutional Act of 1986, (b) independence constitutions, like India's, adopted upon independence in 1948, based on the Constituent Assembly formed for that purpose, (c) regime change constitutions of the former communist countries or that of South Africa's in 1996, and (d) post-war constitutions of both Germany and Italy. *See* D. Oliver & C. Fusaro, 'Changing Constitutions: Comparative Analysis', *in* D. Oliver & C. Fusaro (Eds.), *How Constitutions Change – A Comparative Study,* Hart Publishing, Oxford, 2011, pp. 381-383.

4 *Cf.* S. Holmes & C.R. Sunstein, 'The Politics of Constitutional Revision in Eastern Europe', *in* S. Levinson (Ed.), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Princeton University Press, Princeton, 1995, p. 285.

5 *See* A. Bozóki, 'Szemérmes alkotmányozás. Rendszerváltás és jogállami forradalom 1989-ben' ['Chaste Constitution-Making. System Change and Rule of Law Revolution'], *in* A. Jakab & A. Körösényi (Eds.), *Alkotmányozás Magyarországon és máshol [Constitution-Making in Hungary and Elsewhere],* MTA TKPTI, Új Mandátum Kiadó, 2012, pp. 202-239.

Non-revolutionary tradition seeks to legalize an existing system of government – and in the case of the *German and British constitutional evolution*, which may be regarded as the prototypes of this model, it also strives to constrain royal powers – by adopting a new constitution. In contrast to the revolutionary tradition that establishes a new order, the non-revolutionary tradition that seeks to reshape power arrangements does not necessarily require democratization. In fact, democratization may be counterbalanced by strong judicial review, as in England, or by the powers of a constitutional court, as in Germany. But those constitutions that are non-revolutionary in a political sense need not necessarily even aim to transform the existing power arrangements. It is conceivable that a new constitutional order is established while the previous power structures continue to prevail. According to Ran Hirschl, the constitutional developments in 1982 in Canada, in 1990 in New Zealand, between 1992 and 1995 in Israel, and indeed, the United Kingdom's situation following the adoption of the Human Rights Act in 1998, are precisely such instances of 'no apparent transition'. In these cases the constitutional reforms are neither concomitants of a political-economic transition nor the outcome thereof.[6] Instead of a 'revolutionary/non-revolutionary' dichotomy, Andrew Arato distinguishes between sovereign and post-sovereign constitution making. By sovereign, he means a Constitution-making process conducted by parliament, while the essence of the post-sovereign model is that Constitution-making power is not concentrated in a single body or an organ specially constituted and authorized for the purposes of Constitution-making, but that each of the organs involved in constitutional politics are bound by laws.[7] According to Arato, the roots of this new form of Constitution-making reach as far back as the American Revolution, as well as the post-World War II constitutional processes in France and Germany; its renaissance can also be observed in the 1970s in Spain, in the regime transitions in Central and Eastern Europe in the late 1980s and early 1990s, and in South Africa in the mid-1990s. A basic feature of the process – especially in the latter cases – is the two-step Constitution-making, which features intervening free elections and the use of a provisional constitution. Another basic feature is that the principle of constitutionalism does not extend to the final product only, but also to the process whereby the constitution is adopted. Arato believes that where this model is consistently applied it could be a viable democratic alternative to revolutionary constitution making, which often results in dictatorships. Where the second step fails to take place, however, as in the case of Hungary, this omission can easily doom the entire constitutional process.[8]

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6 *See* R. Hirschl, *Towards Juristocracy*, Harvard University Press, Cambridge, 2004, pp. 7-10.

7 *See* A. Arato, *Constitution Making under Occupation. The Politics of Imposed Revolution in Iraq*, Columbia University Press, New York, 2009, pp. 59-97. Arato himself indicates that the term was first used by Ulrich Preuss in the context of the round-table talks in the German Democratic Republic, that is, East Germany. *Cf.* Arato, 2009, p. 61.

8 In the context of Hungary, he spoke only of partial failure in 2010: A. Arato, 'Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?', *South African Journal of Human Rights*, Vol. 26, 2010a, p. 19. In 2011 Arato argued that the adoption of the Fundamental Law was a move against post-sovereign constitution making: *Cf.* G. Halmai, '"Én az alkotmányosság dimenziójában beszélek 'ellenforradalomról'". Beszélgetés Arató András szociológus-politológussal' ['"I Speak of 'Counterrevolution' in the Context of Constitutionalism". Conversation with the Sociologist/Political Scientist Andras Arato'], *Fundamentum,* Vol. 15, No. 1, 2011a.

A fate similar to the Hungarian case threatened the Egyptian constitutional process concluded in December 2012, unless it was followed by a second phase later. In Egypt, the post-sovereign character stems from the fact that the Constitutional Court dissolved the legislature set up pursuant to the 2011 democratic elections and then proceeded to draft a constitution with the separate body established by Parliament.

Hence the draft constitution was drawn up by a body that had lost its legitimacy. Both the opposition parties, as well as the professional and general public, were excluded from this process – similar to circumstances in Hungary. Even though a referendum did take place in Egypt and none took place in Hungary, the electoral masses that participated in both instances were mostly uninformed.[9]

The main question for the Egyptian constitutional process in 2012 – nearly two years after the revolution in Tahrir Square – was whether it would be possible to put in place two crucial preconditions of liberal democracy: the requisite set of institutions and the acceptance of liberal democratic values by the elite and the masses. The institutional aspect includes political institutions – from a party system with competing parties, over the main organs of a constitutional state, all the way to a strong civil society – as well as the organizations of an efficient market economy. Designing and creating the most important elements of the institutional structure is one of the most important responsibilities of the constitutional process.

The greatest challenge facing Egyptian regime transition is the deep moral conservatism and hierarchical nature of society – a challenge that obviously impacts the design of the institutional structure. Sunni Muslims make up 90% of the Egyptians. Their religious conservatism and acquiescence in social hierarchies is antithetical to the values of liberal democracy, for example the ideal of citizenship based on equal human dignity, which defined the Tahrir Square Revolution of January 2011. That is why revolutionaries spoke of their revolution as having been 'hijacked'. According to the Arab Spring's more pessimistic critics, the notion of 'revolution' misrepresents the events and processes in the region. What was happening instead was a slow and gradual but deliberate establishment of Islamic societies. The latter interpretation of events suggests that, at least in the short run, Islamists did not intend to transgress against the values and interests held dear by the West.[10] One indication that this may have been the case was the involvement of Egyptian President Mohamed Morsi in brokering the Gaza armistice. This interpretation can also explain why the Muslim Brotherhood's representatives – who, incidentally, tend to be educated and speak foreign languages – assured their foreign partners of their commitment to liberty,

9 Andrew Arato and his co-author, Ertuğ Tombuş, suggest that the post-sovereign solution may be applicable in the Egyptian constitutional process as well. *See* A. Arato & E. Tombuş, 'Learning From Success, Learning From Failure. South Africa, Hungary, Turkey and Egypt', *Philosophy and Social Criticism*, Vol. 39, 2013, pp. 427-441. In October 2012, I spent a week in Cairo to conduct research in the framework of an already mentioned project by the Washington-based Transatlantic Academy.

10 *See* H. Agha & R. Malley, 'This Is Not a Revolution', *The New York Review of Books*, 8 November 2012.

democracy, human rights and free elections. Yet, at the same time, this new type of Islamic language, which relegates anti-Western and anti-Israel rhetoric to the background, could easily have alienated supporters of the 'Brotherhood'. An early indication of such a trend was that the Islamic parties' support dropped from 60% in the parliamentary election to 45% in the presidential election. This translated into 18 million votes. Moreover, the latter share of voters represented merely 5 million votes, since nearly half the voting age public failed to turn out, and almost half of those who cast a ballot opted for Mubarak's former prime minister. An optimistic reading of these numbers could have been that the people simultaneously long for Islam and welfare on the one hand and some form of democracy on the other, even if they do not conceive of the latter as liberal.

The 2012 constitutional process was dominated by two Islamist parties, the Muslim Brotherhood and the Salafists. Although the Constitutional Court, which was elected during the Mubarak era but achieved some measure of independence from the regime, dissolved the elected parliament and the committee in charge of drafting the Constitution, President Morsi appointed another constitutional committee by decree. To avert the dissolution of the current committee, which most leftist and liberal representatives in the minority have since left, Morsi exempted all his acts from the Constitutional Court's review, pursuant to a decree issued on 22 November 2012. A few days later, bowing to protests by the judiciary and the threat of an impending strike by its members, Morsi signalled a willingness to narrow the range of acts exempted from constitutional review, but persisted in his refusal to submit the decree on the establishment of the constitutional drafting committee to constitutional scrutiny. Consequently, Egypt's new Constitution was drafted in line with ideas espoused by Islamists, which resulted in the constitutional incorporation of the Islamic character of the state, though in a more moderate formulation than the one observed in its Iranian counterpart. Article 2 of the new Constitution – similarly to Article 2 of the 1971 constitution – proclaims Islam as the state religion and Sharia as the fundamental underlying principle of legislation. Incidentally, even the secular left and liberal parties accept this formulation; the Salafist Al-Nour Party was the only one opposed to it, demanding that not only the principles of the Sharia, but its individual rules too, be designated as sources of legislation, including the legalization of female genital mutilation, which was banned in 2008, as well as the setting of the age of marriage at nine years. The new Article 3 provides that the principles of religious law of Egyptian Jews and Egyptian Christians are the main source for legislation governing their religious communities and family relations. The new Article 4 provides enhanced stature for the Azhar, the mosque college that represents the official religious establishment in Egypt.[11] This Article, in addition to recognizing the Azhar as an independent institution, also

11 *See* M. Fadel, 'Judicial Institutions, the Legitimacy of Islamic State Law and Democratic Transition in Egypt: Can a Shift Toward a Common Law Model of Adjudication Improve the Prospect of a Successful Democratic Transition?', *International Journal of Constitutional Law (ICON),* Vol. 11, No. 3, 2013, pp. 646-665, at 647.

provides that "the views of the Committee of the Senior Scholars are to be taken into account with respect to all matters having a connection to Islamic law". Most controversial was the new Article 219, which provides that

> the 'principles of Islamic law' include its universal textual proofs, its rules of theoretical and practical jurisprudence, and its material sources as understood by the legal schools constituting Sunni Islam.[12]

In the rights section of the constitution, Article 43 – also similar to Article 46 of the 1971 constitution – declares freedom of belief as an inviolable right, adding to the 1971 text that the state shall guarantee the freedom to practice religious rites and to establish places of worship for the divine religions as regulated by law. Article 10 of the constitution – which was also similar to Article 9 of the 1971 text – states that the family is the basis of the society and is founded on religion, morality and patriotism.

The only political force opposed to establishing Islam as the state religion was the Free Egypt Party, which enjoys little popular support. It demanded a 'civic state', enshrining the principle of the separation of state and church, indeed, even a constitutional prohibition on religious parties. While an adoption of this alternative was not realistic, the question was whether the 'Brotherhood' acquiesces to a moderate jurisprudence resembling the previous judicial practice. Because in terms of how (liberal) democratic the character of the new Egypt would be, the question of the extent to which the Constitution can, in reality, safeguard the independence of ordinary courts and of the Constitutional Court, as key elements of the system of checks and balances, as well as rein in the military's political and economic power, will prove decisive. (The military remained influential and continued to control 40% of the economy, while 70%-75% of local municipal leaders were still being recruited from the ranks of retired members of the army and police.) Another question with relevance to the separation of powers was whether the Muslim Brotherhood, which supported a parliamentary form of government while in opposition, will continue to adhere to its previous position even as it controls the presidency, and how far it will accede at least to checks on presidential power. In any case, President Morsi's aforementioned decree of November 2012 did not point in this direction, and neither did the fact that the committee, fearing another ruling by the Constitutional Court to dissolve it, has rapidly adopted the text designated as final, which was then hurriedly submitted to a referendum by President Morsi. Following protests by those opposed to the draft on 5 December 2012, ten days before the planned referendum, blood was spilt again on the streets of Cairo, while the president's supporters chanted, "We fight for divine laws against the secularists and liberals." Finally, the Constitution was approved by the Egyptian Constituent Assembly on 30 November 2012 and ratified at a referendum on 15 and 22 December 2012. That

12 For an overview of the new Art. 219, and its relationship to Arts. 2 and 4 in the 2012 Constitution, *see* N. Brown & C. Lombardi, 'Islam in Egypt's New Constitution', *Foreign Policy,* 13 December 2012.

Constitution was in force as the Constitution of the Arab Republic of Egypt,[13] until 3 July 2013, when the military officers, following a 48-hour ultimatum handed down by Egypt's military commander, Abdel Fattah El-Sissi, to President Mohamed Morsi, asking him to end the political impasse and respond to the demands of the people, removed the country's first democratically elected president and announced suspension of the Constitution coupled with early presidential and parliamentary elections and named the head of the Supreme Constitutional Court as interim president.[14]

What preceded the coup was a deepening division of the country, with an arrogant Muslim Brotherhood that misread electoral gains for a political blank cheque along with an incompetent and unpopular President on the one hand and a reckless opposition that appeared ready to sink the country in order to bring down the Islamists on the other. But besides the opposition parties, Tamarrod (Rebellion), an activist group of young people has managed to collect 22 million signatures to reject Morsi's presidency. This has been indeed the greatest mass movement in Egyptian history, even if the petitions had an amateurish quality, since they did not contain any identification of the signatories.[15] On 30 June millions of people (the counts vary according to whom you choose to believe) took to the streets to demand Morsi's departure; smaller, yet still large, numbers responded to insist on his remaining in office. It is hard to know what ultimately pushed the military – which for some time had sought to avoid direct political involvement – to enter the fray as blatantly

13 Constitution of the Arab Republic of Egypt, 2012, unofficial English translation prepared by International IDEA, available online at <http://constitutionaltransitions.org/wp-content/uploads/2013/05/Egypt-Constitution-26-December-2012.pdf>. *See* one of the first assessments of the document: Z. Al-Ali, 'The New Egyptian Constitution: An Initial Assessment of Its Merits and Flaws', *Open Democracy*, 26 December 2012, available online at <www.opendemocracy.net/zaid-al-ali/new-egyptian-constitution-initial-assessment-of-its-merits-and-flaws>. Later evaluations were provided by the working paper series of the International IDEA and The Center for Constitutional Transition at NYU Law No. 1, June 2013. Z. Al-Ali & M. Dafel, 'Egyptian Constitutional Reform and the Fight against Corruption', The Center for Constitutional Transition at NYU Law, *Working papers,* No. 1, June 2013; A. Welikala, 'The Legislature under the Egyptian Constitution of 2012', *2013 Working Paper Series – Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia,* No. 8, The Center for Constitutional Transitions at NYU Law, June 2013.

14 Owing to early indications that there will be amendments to the 2012 Constitution, a memorandum of International IDEA and The Center for Constitutional Transitions at NYU Law issued in July 2013 offers a brief analysis of those provisions of the 2012 Constitution that established the horizontal distribution of powers between the legislature, president and prime minister. The study argues that in the pre-Arab Spring era, countries in the Middle East and North Africa (MENA) region were dominated by a strong president who centralized political power, dominated political processes and established a one-party state in which the president's political allies controlled the state bureaucracy and security services. Constitutional rules facilitated these constitutional failures by failing to limit presidential power, undermining the capacity of the legislature to act as a check on presidential power and eliminating institutional procedures and safeguards. Constitutional design for the MENA region after the Arab Spring must therefore be driven by principles that guard against a repeat of these constitutional failures, while at the same time ensuring that government can proceed effectively and efficiently. S. Choudhry & R. Stacey, *The 2012 Constitution of the Arab Republic of Egypt: Assessing Horizontal Power Sharing within a Semi-Presidential Framework,* International IDEA, The Center for Constitutional Transitions at NYU Law, July 2013.

15 *See* P. Hessler, 'The Showdown. Winners and Losers in Egypt's Ongoing Revolution', *The New Yorker*, 22 July 2013.

as it did on 1 July when, though ambiguous as to precise meaning, it essentially ordered the president to yield to critics' demands or face the consequences. According to senior advisers of the president, just before the military takeover was about to begin, President Morsi refused to accept a final offer submitted by an Arab foreign minister, who said he was acting as an emissary of Washington. The unspecified foreign minister asked if Morsi would accept the appointment of a new prime minister and cabinet, one that would take over all legislative powers and replace his chosen provincial governors.[16] Morsi said no.

This refusal might be a sign of President Morsi's inability to achieve political consensus, and that he was veering towards a more overtly Islamist agenda, as evidenced by the appointment of a member of a militant group as governor of Luxor and his overt support for calls for jihad against the Syrian regime. But he was the democratically elected president of the country. Regardless of what one thinks about his presidency, his removal has constituted a blow to Egypt's fragile democracy, entrenching the view that mass protests backed by the army and foreign governments can trump the ballot box, and that investing in a peaceful democratic process is simply not worthwhile.[17]

This time Morsi's supporters said, "The democratic process has been hijacked."[18] On 14 August 2013 Egyptian security forces confronted tens of thousands of supporters of ousted president Morsi. According to the Egyptian Health Ministry, 638 people were killed that day. Of those, 595 were civilians and 43 were police officers.[19] On 19 August 2013,

16 D.D. Kirkpatrick & M. El Sheikh, 'Morsi Spurned Deals, Seeing Military as Tamed', *New York Times*, 6 July 2013.

17 The analysis of the International Crisis Group goes even further, saying that the military's attempt after the ouster of the President to crack down on Islamists and deprive them of their political rights – coupled with restrictions on the media, not to speak of the killing of more than 50 pro-Morsi demonstrators in the aftermath of the coup – would be almost certainly driving Islamist groups underground and giving rise to a generation of radicalized Islamists, in Egypt and beyond, who will have lost faith in peaceful, democratic change. *See*: *A Difficult Way Forward in Egypt*, International Crisis Group, Cairo/Brussels, 3 July 2013.

18 This was the reason Thomas L. Friedman talked about three revolutions in Egypt, the first being when the Egyptian people and the Egyptian military toppled Hosni Mubarak and installed the former defence minister, ageing Field Marshal Mohamed Hussein Tantawi, as the *de facto* head of state. He was replaced via a revolutionary election by the Muslim Brotherhood's party, led by President Morsi, who was ousted by the third revolution of a new generation of military officiers. T.L. Friedman, 'Egypt's Three Revolutions', *International Herald Tribune*, 25 July 2013. Yasmine El Rashidi argues that the real coup in Egypt was on 11 February 2011, when Mubarak left office, and one wonders when the real revolution might come. *See* Y.E. Rashidi, 'Egypt: The Misunderstood Agony', *The New York Review of Books,* 26 September 2013.

19 Y.E. Rashidi, 'Scenes From a Crackdown: What Really Happened in Cairo?', *The New York Review of Books Blogs,* <www.nybooks.com/blogs/gallery/2013/sep/11/scenes-from-crackdown-what-happened-cairo/?utm_medium=email&utm_campaign=September%2017%202013&utm_content=September%2017%202013+CID_5c4b53ac77698b48afb26772737aef3b&utm_source=Email%20marketing%20software&utm_term=Scenes%20from%20a%20Crackdown%20What%20Really%20Happened%20in%20Cair>. On August 14, when Egypt's security services stormed two squares in Cairo where Morsi's supporters were holding sit-ins, the interim government imposed a state of emergency as well as a night-time curfew, which was lifted after three months. *See* K. Fahim, 'Government in Egypt Eases Restrictions', *The New York Times*, 14 November 2013.

a court ordered the release of former President Hosni Mubarak. Some analysts said that this provided a sign of the return of his authoritarian style of government. As proof of this, on 23 September 2013, a court issued an injunction dissolving the Muslim Brotherhood and confiscating its assets, banning all activities "emanating from it" and any institutions "belonging to it or receiving financial support of any kind from it".[20] According to the court, the organization "used the Islamic religion as a cover for their illicit activities, pushing people to go out in protest on 30 June". The Brotherhood's leadership is now in jail, accused of inciting violence and colluding with foreign organizations such as Hamas. Its assets were frozen. Some schools and hospitals run by the organization were raided and closed. Many thousand members were detained after 3 July, and some of them were reportedly mistreated.[21]

According to a new law promulgated by the interim president at the end of November, the government must be notified of all gatherings of more than ten people.[22] Demonstrations overnight or at places of worship are banned. Moreover, the Interior Ministry, which controls the country's police force, has full discretion to reject applications, and the law threatens those who take part in banned protest with jail or heavy fines. On 22 December, three activists who played central roles in the uprising against former President Hosni Mubarak were convicted of participating in recent protests and sentenced to three years in prison, raising fears that the new government was seeking revenge against opponents of Egypt's old order.[23] Also social and charitable groups even loosely associated with the Brotherhood struggled after their funds were frozen by the state. It was a new level of disruption to a society already riven by violence and suspicion in the month since the military ousted President Morsi. In 25 December the military-backed government declared the Muslim Brotherhood a terrorist group, giving the security forces greater latitude to stamp out a group deeply rooted in Egyptian social and civic life.[24] The government had also sought to deny the group foreign help or shelter, urging other Arab governments to honor an antiterrorism agreement and shun the organization.

One of the more theoretical questions regarding the failure of the original democratic aspirations of the Arab Spring in Egypt so far is whether the failure proves again the robustness of authoritarianism in the Middle East. For most Middle East specialists, the events of the Arab Spring proved especially jarring, even if welcomed, because of their extensive investment in analysing the underpinnings of authoritarian persistence, long

20 D.D. Kirkpatrick, 'Egyptian Court Shuts Down the Muslim Brotherhood and Seizes Its Assets', *The New York Times,* 23 September 2013.

21 U. Lindsey, 'Ban of Brothers', *The New York Times*, 26 September 2013.

22 D.D. Kirkpatrick, 'New Law in Egypt Effectively Bans Street Protests', *The New York Times,* 25 November 2013.

23 K. Fahim, 'In Blow of Leadership of '11 Revolt, Egypt Activist Are Given 3 Years in Prison', *The New York Times,* 22 December 2013.

24 K. Fahim & M. El Sheikh, 'Egypt Broadens New Crackdown on Brotherhood', *The New York Times,* 26 December 2013.

the region's political hallmark. The empirical surprise of 2011 raised the pressing question as to whether the specialists needed to rethink the logic of authoritarianism in the Arab world? One of these specialists argues that the Middle East was not singularly authoritarian because it lacked the prerequisites of democratization (whether cultural, socioeconomic or institutional), because of the exceptional will and capacity of the coercive apparatus (firstly the military and then the security forces too) to repress. The main question in the period January-February 2011 in Cairo was whether the military would shoot the protesters. As we know, they did not, because these events in Egypt (as well as similar events in Tunisia two months earlier), highlighted an empirical novelty of the Arab world, namely the manifestation of huge, cross-class popular protests in the name of political change, as well as a new factor that abetted the materialization of this phenomenon, the spread of social media.[25] As we know now, the attitude of the military changed during the summer of 2013, which may be another reason for the reconsideration of the nature of authoritarianism in Egypt. The Egyptian army, a state within a state that used to protect its interest from the shadows, with the new constitution voted in mid-January 2014, took bolder steps to cement its power and asserting overtly, that it is accountable to no one. Article 234 gives the military the final say over who may be appointed as defense minister. Other articles mandate the military's budget to be listed as a single entry in national accounts and civilians may be tried before military courts if they assault members of the armed forces in military zones and military-owned properties, which in Egypt includes at least a quarter of the country's economy.

The lessons to be learned from the failure is that one party cannot rule alone at a time of sociopolitical polarization and transformation, and that the new Constitution, as a long-term social contract among Egyptians of varying ideological bents and ethnic, class and religious backgrounds, must be redrafted in ways acceptable to key political players and constituents, including the Muslim Brotherhood and their allies. International support, including that of the United States, could have been important in limiting the creation of partisan Constitutions in a situation of deep political division and power concentration in one group. Unfortunately in the case of Egypt, outsiders, such as the United States or the European Union, have not really found proper mechanisms for doing this. As a result, they are awkwardly defending, through their lack of condemnation of events, a *de facto* military coup, which cannot be a legitimate tool against a democratically elected president.[26]

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25 *See* Eva Bellin's article, published in 2004 under the title 'The Robustness of Authoritarianism in the Middle East', *Comparative Politics*, Vol. 36, 2004, pp. 139-157. Eight years later she reconsidered her earlier writing. *See* E. Bellin, 'Reconsidering the Robustness of Authoritarianism in the Middle East. Lessons From the Arab Spring', *Comparative Politics,* Vol. 44, No. 2, 2012, pp. 127-149.

26 These are different approaches by two *New York Times* columnists. For the first, *see* T.L. Friedman, 'Can Egypt Pull Together?', *The New York Times*, 7 July 2013, and for the second, *see* D. Brooks, 'Defending the Coup', *The New York Times*, 4 July 2013. Brooks is 'defending the coup', because "Egypt […] seems to lack even the basic mental ingredients for democracy."

Many argue now that following the Arab Spring, the society was too deeply divided for an election and for a new Constitution.[27] But if these decisions were taken by the people of Egypt, even if not all of them were listened to in the process, the consequences of their choices have to be fixed by them, too, and not by any external forces, even in the current extreme, emergency situation. It would have been ideal, if the new, suspended Constitution had provided a legitimate solution on getting rid of an incompetent and unpopular president. This is the fault of the Muslim Brotherhood, but also those who supported the transition. In the absence of such a constitutional approach, not the coup but a real revolution is the only solution, since in the case of the involvement of the military there are no guarantees against a military dictatorship. Of course, even after a revolution, guarantees are needed to secure the consensual character of the transitional process.

After the Muslim Brotherhood's Constitution was suspended, Egypt's military-backed government began a two-phase process of creating a new constitution. During the first phase, the regime tasked a committee of ten judges, law professors and legal scholars with drafting a list of constitutional amendments. In the second phase, it appointed a committee of 50 representatives from various state institutions and social groups to build upon these amendments and write a new constitution. According to its president, Amr Moussa, a former minister of foreign affairs for Egypt in the Mubarak era and secretary general of the Arab League, the Committee of 50 gave everyone a seat at the table, including Egyptian feminists, young people, and religious groups, including the Muslim Brotherhood, which did not respond to the invitation. Moussa argues that the document, which was finalized on 1 December 2013 and voted on 14 January 2014 as the start of a two-day referendum turns the page decisively on both the 1971 and the 2012 Constitution, marks a historic step on our path to a government that is of, by and for the Egyptian people.[28] External observers, like myself, should me more cautious, remembering that the previous Constitution prepared almost exclusively by the Muslaim Brotherhood was also approved by a referendum with 63 percent of the vote. This new Constitution seems to go into the other extreme of an illiberal constitution, as it was drafted with minimal input from Islamist perspectives and could further crush the Brotherhood by banning political parties based on religion. Therefore for those who saw the military as a better alternative to the Brotherhood in July 2013, the new Constitution, which gives special privileges to

27 *See* P. Collier, 'Democracy in Dangerous Places: Egypt – What Went Wrong?', *Social Europe Journal*, 7 July 2013. There are similar arguments after the coup and the massacres of Morsi's supporters that, rather than forcing Cairo to hold elections and threatening to suspend aid if it does not, suggest that Washington should press the current leadership to adhere to clear standards of responsible governance, including ending the violence and political repression, restoring the basic functions of the state, facilitating economic recovery, countering militant extremists and keeping the peace with Israel. *See* C. Kupcan, 'Democracy in Egypt Can Wait', *The New York Times*, 16 August 2013.

28 A. Moussa, 'Blueprint for a New Egypt', *The New York Times,* 8 January 2014.

the military, certainly cannot be considered a revolutionary one, but rather a document of Egypt's counterrevolution.[29]

The 2014 constitution has removed Article 219 favored by the Islamist, and added Article 11 to the provision on the family saying that the state commits to achieving equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution, which means with Article 2 on the principles of Islamic sharia. Despite these changes, however, the 2014 text in all religious matters is very similar to the 2012 constitution, which was itself based on the previous constitution adopted in 1971.

Comparing the Constitution-making in Hungary and Egypt after 2011, there are three major aspects of comparison. The first relates to the democratic nature of the Constitution-making process; the second to the impact on liberal constitutionalism in the substance of the Constitutions; and the third is the influence of global, transnational or foreign actors in the process.

As regards procedure, the common characteristic is that *the constitutional drafting procedures were non-inclusive and non-consensual.* The governing forces from different factions both in Hungary and Egypt were not ready to agree on the rules of the game and the desired constitutional system. So instead, each winning side proceeded with *a winner-takes-all mentality* that was sure to alienate and frighten losers. Instead of consultations and consensus-building with other political parties and NGOs, the processes of constitutional preparation – in which Fidesz and the Muslim Brotherhood excelled – became arbiters of an ever more polarized political stand-off. Fidesz did not even try to hold a referendum on the final text of the Constitution, while in Egypt the referendum was put before an under-informed and manipulated electorate.

Both Fidesz and the Muslim Brotherhood perceived their successive electoral victories as a mandate to shape the polity as they deemed fit, overlooking the need to share power, weakening checks and balances in the new Constitutions. Dismissing their admittedly ineffective opposition, both Fidesz and the Muslim Brotherhood instead focused on trying to first sideline and later co-opt state actors they deemed more important, and thus potentially more threatening, namely the Constitutional Courts and the ordinary judiciary. Sometimes even the tools used were the same. For instance, to have more loyal judicial leaders and judges, both governments threatened judges with early retirement on grounds that they were Mubarak- and Kádár-era holdovers. Also, both governments have taken control of state media outlets and censored commercial media channels. In addition, curtailment of freedom of religion of the more than a hundred deregistered smaller non-Christian churches in Hungary and the non-Islamic churches in Egypt is a common characteristic of the two constitutional systems.

Both Prime Minister Viktor Orbán and the supporters of the removed President Morsi claim that the sovereignty of their constitutional order has illegally and illegitimately

29 S. Khorshid, 'Egypt's Counterrevolution', *The New York Times,* 30 December 2013.

been threatened.[30] In the case of Hungary, they claim that sovereignty has been threatened by the many criticisms and potential sanctions of the European institutions, and in Egypt, it is challenged by the military coup supported by foreign powers. There is a significant difference in this respect between the two countries. While Hungary is a voluntary member of both the European Union and the Council of Europe, these value communities have the legitimacy and some legal means to enforce the compliance with the joint principles and rules, which are violated by a member state. So Hungary has not reached the point yet where only extra-constitutional ways of getting rid of Orbán's Constitution are available. There are still hopes for an impact of transnational constitutional enforcement mechanisms, which were decided in early July 2013 with the enactment of the so-called Tavares report by the European Parliament.[31] And more importantly, there are constitutional solutions even in Hungary's new Fundamental Law to get rid of this illiberal Constitution; first and foremost, the coming parliamentary elections in 2014, when Hungarians could prove that they want to live in a European liberal democracy. And we should also not forget the biggest difference of all: Orbán is still in power while Morsi is under house arrest. These facts prove the simple wisdom: guys with guns are more powerful than guys with reports.

In the case of Egypt, the international community has less legal possibility to intervene, unless serious violations of international human rights norms occur. Of course, every state, including the United States, can think over the moral and financial support of another polity, whose system does not fulfill the requirements of a liberal democratic constitutional system, but supporting a military coup, even in combination with such a great popular uprising, and even if they may have decisive leverage over Egypt,[32] does not belong to the set of legitimate tools.

But providing help to build up a new consensus both in Egypt and Hungary is the duty of every responsible player of the global constitutionalism, for instance by tying the military aid to a consensual transitional process in the case of Egypt, and by closely monitoring the development by the European Union in Hungary. Otherwise, there are good chances that the United States and Europe together will miss a revolution in these two important parts of the world.

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30 Actually an editorial in *Magyar Hírlap*, the Hungarian daily, loyal to the government, made this comparison by claiming that Morsi was ousted because of his attempt to become independent. *See* Fáraó reggelire (Pharaoh for Breakfast, 9 July 2013).

31 The Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament prepared a report on the Hungarian constitutional situation, including the impacts of the Fourth Amendment to the Fundamental Law of Hungary. The report is named after Rui Tavares, the Portuguese MEP who was the rapporteur. The European Parliament, at its plenary session on 3 July 2013, passed the report.

32 *See* J.M. Sharp, *Egypt: Background and U.S. Relations*, Congressional Research Service, 27 June 2013. The report, which was published some days before the coup, overviews the significant military and economic assistance the United States has provided to Egypt since the late 1970s, and still plans to provide for 2014, as President Obama is requesting $1.55 billion in total bilateral aid to Egypt ($1.3 billion in military aid and $250 million in economic aid).

1.2 Standards of International Law

This section will address the question of how national Constitution-makers are influenced or constrained by standards of international law. This influence may be direct – that is what we will discuss first – in states that rely on international help to reframe their constitutional system following a crisis situation, or indirect, as a result of global international agreements that bind nation states in designing their constitutional system.

1.2.1 Constitutional Drafting under International Influence

Following the establishment of the UN, the international community offered several states in crisis help in designing their constitutional orders. This constitutional model is referred to as 'internationalized *pouvoir constituant*',[33] or as the 'internationally grounded'[34] model, distinguishing it from the post-World War II model, wherein the victors exercised decisive influence over the losing nations' (Germany and Japan) constitutional processes. At the same time, there is also a different categorization, which raises the question whether external involvement is ever legitimate and whether it potentially constitutes a breach of national self-determination. Pursuant to this approach, Constitutions in both previous categories may of course be considered as 'imposed' to a greater or lesser degree.[35] Nonetheless, the goal of international involvements is to restore people's right to self-determination, sovereignty, peace and security after severe conflict situations. In that sense such instances may also be perceived as procedural manifestations of the internationalization of national Constitutions.

As far as the depth of involvement is concerned, that may range from the wholesale exclusion of national constitutional framers all the way to marginal forms of influence, such as advice proffered by outside advisers. An example of the former is the constitutional process of Bosnia-Herzegovina, which – as part of the agreement between the participants in the international peace talks – did not even take place in the country's territory. National actors were not involved in either the drafting or the adoption of the Constitution. The other extremes are the constitutional processes in South Africa and Central and Eastern Europe in the early 1990s – including the Hungarian – where external influence certainly did not impact the sovereignty of the national Constitution-makers.

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33 *Cf.* P. Dann & Z. Al-Ali, 'The Internationalized Pouvoir Constitutant – Constitution-Making under External Influence in Iraq, Sudan and East Timor', *Max Planck Yearbook of United Nations Law,* Vol. 10, 2006, pp. 423-463.

34 On the 'internationally grounded' model, *see* Rosenfeld, 2009b.

35 On the related debate, *see* N. Feldmann, 'Imposed Constitutionalism', *Connecticut Law Review*, Vol. 37, 2004, pp. 857 *et seq.*, and M. Sunder, 'Enlightened Constitutionalism', *Connecticut Law Review*, Vol. 37, 2004, pp. 891 *et seq*.

Thus, in most cases we can speak of partial 'constitutional intervention'. In a substantial portion of these cases it was the UN itself that offered assistance, as for instance in Cambodia in 1992 (Security Council Resolution No. 745), in East Timor in 2001 (Security Council Resolution No. 1338), in Afghanistan in 2005 (Security Council Resolution No. 1589) and in Yemen (Security Council Resolutions No. 2014 (2011) and 2051 (2012)).

1. In the case of East Timor, the UN had already played a significant role in encouraging independence from Indonesia. First, it helped organize the successful independence referendum of 30 August 1999. During the subsequent interim period, Security Council Resolution No. 1272 of 25 October set up the United Nations Transitional Administration in East Timor (UNTAET) to govern the country. Although the latter was endowed with comprehensive legislative and administrative powers, UNTAET delegated the task of drafting the Constitution to a constitutional assembly that was created on the basis of national and regional elections. UNTAET's regulation contained clear and specific instructions concerning the constitutional process, but all it said about the substance of the Constitution for an 'independent and democratic' East Timor was that it would need to contribute to the protection of the "inalienable human rights of the people of East Timor, including freedom of conscience, freedom of expression, freedom of association and freedom from all forms of discrimination […]".[36]

2. The international community, especially the United States and various European states, intervened in the Bosnian civil war by negotiating and enforcing the General Framework Agreement for Peace in Bosnia and Herzegovina, often referred to as the Dayton Peace Accords, which came into force in 1995. The General Framework sought to end the conflict by setting fixed boundaries between the two warring factions, namely the Federation of Bosnia and Herzegovina (BiH) and the Republica Srpska (referred to as 'entities'). The new Constitution for BiH was set out in Annex 4 to the General Framework. External actors were involved in the discussion that led to the adoption of the 1995 Constitution and also spearheaded the efforts to reform it in 2006. The Constitution establishes a delicate system of checks and balances, which is designed to provide equal representation and veto power over all essential decision-making to each of BiH's 'constituent peoples,' namely Bosniaks, Croats and Serbs, in each of the national institutions. This regime was endorsed by all the external actors that participated in the drafting process, including the United States and the European Union, with a view to seeking accommodation between the three warring factions and ending the conflict.

While the new Constitution and the other parts of the Dayton Peace Accords have successfully achieved this objective, the rights of minorities and fundamental freedoms

36 *Cf.* Point 1.1 of the United Nations Transitional Administration in East Timor's (UNTA ET) Regulation 2001/2 of 16 March 2001. Reviewed in J. Morrow & R. White, 'The UN in Transitional East Timor: International Standards and the Reality of Governance', *Australian Yearbook of International Law*, Vol. 22, 2002, p. 1.

such as the right to racial and religious equality were subordinated to the Constitution's horizontal distribution of powers. In the decade following the enactment of the Constitution the two 'entities' failed to cooperate towards a strengthening of the state, with all three 'constituent peoples' entrenching themselves in ethno-sectarian positions, often leading to paralysis within parliament and government.[37] In 2005, a number of external actors, including the United States and the European Union, encouraged the eight major political parties that were represented in the Parliamentary Assembly to form a constitutional working group with a view to making amendments to the Constitution. But the final draft amendment explicitly sought to maintain the Constitution's discriminatory horizontal distribution of powers between the three 'constituent people'. The proposal was put to vote in the House of Representatives in April 2006, but it failed to meet the two-thirds majority required by the Constitution and therefore did not take effect. Finally, two private citizens, one Jewish and one Roma, brought a complaint against the state before the European Court of Human Rights (ECHR), concerning the issue of their ineligibility to stand for elections to the House of Peoples and to the Presidency based on their ethnic and religious backgrounds. In 2009, the ECHR decided that the complainants' "continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks objective and reasonable justification".[38]

3. In the Iraqi constitutional process the UN's role was limited to recognizing the United States' and the United Kingdom's status as 'occupying powers' in its Security Council Resolution 1483 of 22 May 2003. Therefore, the key characteristic of this Constitution-making is that it occurred after the occupation of the country by allied troops. Before offering help in designing the constitutional framework the foreign occupation affected an imposed revolution in the country and then proceeded to demolish the existing Iraqi state. This was followed by what Andrew Arato referred to as a two-step Constitution-making process.[39] The first phase began following the 2003 invasion by the 'Coalition' and ended with the election of the Transitional National Assembly (TNA) in January 2005. During this time, with the inclusion of certain Iraqi actors selected by them, the occupying authorities drew up the schedule and terms for drafting a final Constitution. The second phase, which was the period when the actual Constitution-making took place, commenced after the elections of 30 January 2005 and ended with the constitutional referendum of 15 October 2005.

During the first phase the Coalition Provisional Authority (CPA) initially sought to leave Constitution-making in the hands of a national conference appointed by the Authority.

37 *See* Venice Commission, 'Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative', 11 March 2005.

38 *Sejdic and Finci v. Bosnia and Herzegovina* (2009).

39 For a critical review of the entire constitutional process, *see* Arato, 2009.

Ultimately, however, succumbing to pressure by the UN and Iraqi religious leaders, it agreed that Constitution-making should occur only after democratic elections. The schedule for the election was laid out by the so-called Law of Administration for the State of Iraq for the Transitional Period (TAL), drafted and adopted by the Iraqi Governing Council (IGC) between January and April 2004. American influence manifests itself very vividly in the substance of this law: thus, for instance, similarly to the First Amendment to the U.S. Constitution, it posits that fundamental rights are absolute. The National Assembly elected based on this schedule would have six months to draft a final Constitution, which would then have to be reaffirmed in a national referendum by the votes of the majority of eligible voters and two-thirds of eligible voters in at least three governorates. The UN Security Council's Resolution 1546 of 8 June 2004 gave this schedule international recognition. President Bush, for his part, proclaimed that the occupation concluded with the appointment of a government consisting of Iraqis on 28 June.

The actual process of drafting a final constitutional text began following the election, with the establishment of a Constitutional Committee comprising 55 members of the newly elected National Assembly. Since a significant majority of the Sunni community had boycotted the elections, its delegations were under-represented in both the National Assembly and the Constitutional Committee. Although foreign and international experts were officially excluded from the Committee's work, American influence was apparent all throughout the drafting of the constitutional text. Thus, for instance, the Committee initially planned to create a European-style separate Constitutional Court, but the final draft of the Constitution saw the establishment of an American-style supreme court instead, which also discharges the functions associated with constitutional review. It was also due to American pressure that a reference to international human rights standards ratified by Iraq was dropped from the Constitution.[40] Probably the only positive impact of the external influence is that the reference to women's undefined obligations "towards family and work in society" in the July 2005 draft Constitution has been cancelled from the final text.[41]

Although the Constitution laid down an obligation to have its text reviewed, this happened neither in the context of the second democratic elections of March 2010, nor since then, even though a parliamentary committee charged with this responsibility has been continually at work, and the draft on the law transforming the Supreme Court's legal status and powers, for example, has been available since 2007.[42]

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40 *Cf.* Dann & Al-Ali, 2006, p. 441.

41 *See* Z. Al-Ali, 'Constitutional Drafting and External Influence', *in* T. Ginsburg & R. Dixon (Eds.), *Comparative Constitutional Law*, Edward Elgar, Cheltenham, 2011, p. 79.

42 This information was shared at a conference held in Heidelberg between 27 and 29 July 2011, organized jointly by the Max Planck Institute and the Iraqi Supreme Court: Max Planck Colloquium: The Separation of Powers – Relations Between the Judiciary and the Legislature in Iraq. It was chaired by Prof. Dr. Rüdiger Wolfrum (MPIL Germany) and Chief Justice Medhat Al-Mahmood (FSC Iraq).

On the basis of this, Andrew Arato assesses the Iraqi events as a failure of post-sovereign Constitution-making. The process followed none of the previously tried and tested methods of post-sovereign Constitution-making, and the ratification of the Constitution by a referendum hewed closer to the traditional sovereign Constitution-making model instead. Arato believes that the main reason underlying the failure is that the unwarranted occupation of Iraq was followed by the unwarranted liquidation of the Iraqi state, which has rendered the otherwise desirable democratic transformation inordinately difficult.[43]

4. As constitutional discussions began in Afghanistan after the 2001 war, the international community was involved through the participation of various institutions, including the Center on International Cooperation at New York University, the United States Institute of Peace and also the United Nations, even though the latter wanted to leave only a light footprint on the discussions in theory to avoid establishing a culture of dependency on the part of the Afghan authorities.[44] As the constitutional negotiations accelerated in late 2003, a number of external actors participated in the discussions, made clear to the Afghan drafters that the international community would not accept an outcome that would subject women's rights to Islamic Sharia and that would not uphold international standards on fundamental rights.[45] These objectives were mostly achieved. Although the 2004 Constitution provides that "the sacred religion of Islam is the religion of the Islamic Republic of Afghanistan, followers of other faiths shall be free within the bounds of law in the exercise and performance of their religious rituals" (Art. 2) and that "no law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan" (Art. 3). The following specific reference was included to international law so as to avoid any ambiguity as to how issues relating to human rights should be decided: "The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights" (Art. 7).

The intention of the external actors was not that clear regarding the system of government. The first proposals provided for a semi-presidential system of government, while the final draft that took shape in December 2003 provided for a powerful, directly elected president. Although some advisers suggested that this solution will concentrate too much power in the hands of one individual, none of these concerns were realised officially by the international community, most probably because – as some commentators argue – both the United States and the United Nations had a

43 *See* Arato, 2009, pp. 251-264.

44 *See* M. Schoiswohl, 'Linking the International Legal Framework to Building the Formal Foundation of a "State at Risk": Constitution-Making and International Law in Post-Conflict Afghanistan', *Vanderbilt Journal of Transnational Law,* Vol. 39, 2006, p. 819.

45 *See* B.R. Rubin, 'Crafting a Constitution for Afghanistan', *Journal of Democracy*, Vol. 15, No. 3, 2004, p. 13.

vested interest in ensuring a strong presidential system centred around the person of Hamid Karzai.[46]

5. In Sudan neither the UN nor its member states were directly involved in the Constitution-making that concluded two decades of civil war between the country's northern and – since seceded – southern parts. International participation was limited to mediating the peace talks between the two parties, and, correspondingly, the sovereignty of the Constitution-making power was impaired only to the slightest conceivable degree. All through this time, *i.e.*, the civil war, the peace talks and the subsequent constitutional process, the state's sovereignty remained intact, even when the Islamist central government lost control over the southern part of the country, which is largely inhabited by Christians. The new Constitution adopted in 2005 supplanted the Islamic Constitution of 1998, which had been adopted by the Islamic Republic of Sudan proclaimed in 1983.

At the same time, the country's peace process, and as a result, its new Constitution, could hardly have materialized without external help, but this help was devoid of any military intervention and consisted mostly of diplomacy-related involvement. In Sudan, the process was also performed in two stages. The first was concluded on 9 January 2005 with the Comprehensive Peace Agreement (CPA). The actual Constitution-making occurred subsequently, between May and July 2005. The peace agreement, however, had a substantial impact on the formal procedure of Constitution-making and also on the substance of the Constitution.

The organizer and host of the peace talks was the regional East African Intergovernmental Authority on Development (IGAD), which the parties to the civil war had first called on to mediate in 1993. The only document that served as the basis for talks was a declaration of principles drafted by IGAD and signed by the parties on 20 July 1994. The organizer was represented by one delegate from each of the member states (Kenya, Eritrea, Ethiopia and Uganda). Additionally, four non-African countries (Italy, Norway, the United Kingdom and the United States) were involved in the talks in various ways – not least as financiers – as were some international players, such as the Max Planck Institute in Heidelberg, which primarily offered expertise in comparative constitutional law and international law.

The peace agreement that resulted from the Kenya talks was signed and ratified by the parties and contains almost all the important elements of the subsequent Constitution, from the bill of rights over the distribution of natural resource income and other government revenues all the way to the federal structure of the state. The peace agreement also contained a description of the Constitution-making procedure,

46 *See* A.J. Thier, 'The Making of a Constitution in Afghanistan', *New York Law School Law Review,* Vol. 51, 2006, p. 557.

including the creation of the National Constitutional Review Commission (NCRC). From May 2005 on the 180-member Commission drafted the Interim National Constitution of the Republic of Sudan, which was adopted on 6 July 2005. The provisional nature was made necessary by the peace agreement itself: it provided that within six years of the Constitution's adoption, a referendum would have to be held on the fate of the country's southern region and its relationship to the north. (This referendum took place between 9 and 15 January 2011, and the Republic of South Sudan was established on 9 July 2011, as a result of the vote.)[47] As is apparent, therefore, in contrast to East Timor and Iraq, none of the previously relevant international actors, *i.e.* neither the UN nor any of its member states, played a decisive role in drafting the Constitution. Although the mediating international organization promoted the emergence of a new constitutional order in Sudan (and, consequently, six years later in South Sudan as well) by encouraging and mediating the peace talks, it did not constrain the autonomy of the national *pouvoir constituant* in drafting the contents of the Constitution. Some observers even say that Khartoum's negotiators reacted by downgrading the international community's entire involvement in the drafting process.[48]

6. In the wake of the Arab Spring in early 2011, protests in Yemen against the rule of then President Ali Abdullah Saleh began in early February and continued through the end of that year. Political crisis escalated into an armed conflict, with many protestors and members of the security forces killed or injured, with the perspective that Yemen's fragile state could collapse into civil war. The situation in Yemen has been of serious concern for the international community, with the country facing multifaceted threats to its stability. Following the escalation of violence and the political impasse in 2011, the Gulf Cooperation Council (GCC) developed an initiative to resolve the crisis. The Security Council further adopted resolution 2014 (2011) on 21 October, which, *inter alia*, called on all parties in Yemen to commit themselves to implement a political settlement based upon the GCC initiative without further delay. Face-to-face negotiations between the Yemeni sides facilitated by the UN Special Adviser, Mr. Jamal Benomar, exercising the good offices of the UN Secretary-General, resulted in the signing of a political transition agreement in Riyadh on 23 November 2011. The Agreement provides a detailed roadmap for a transition led by a Government of National Unity over two years.

Members of the Security Council have reaffirmed their intention to continue to actively monitor the security, political and humanitarian situation in Yemen. In a democratic election held in February 2012, Abdrabuh Mansur Hadi has been elected the Yemeni President. On 12 June 2012, the Security Council passed a new resolution 2051 on Yemen

47 Of those who voted, 99% opted for the independence of the southern region. The UN accepted the new state among its members on 14 July 2011, and the African Union followed suit on 28 July of that year.

48 Dann & Al-Ali, 2006, p. 423.

(S/2012/2051) in which they reaffirmed the need for the full and timely implementation of the Transition Agreement in accordance with resolution 2014 (2011) including "convening an all-inclusive National Dialogue Conference". The National Dialogue Conference is critical to the political transition as a mechanism to build consensus on a new vision for the State, ultimately contributing to a durable peace. The Yemen National Dialogue and Constitutional Reform Trust Fund (YNDCRTF) was established in October 2012 under the sponsorship of the Government of Yemen and the United Nations, represented by the Office of the UN Special Adviser of the Secretary General on Yemen, in consultation with the UN Country Team.[49] In a press statement issued in April 2013, members of the Security Council reiterated the need for the transitional period in Yemen to be a Yemeni-led process, "underpinned by a commitment to democracy, good governance, rule of law, national reconciliation and respect for the human rights and fundamental freedoms of all people in Yemen".[50] The National Dialogue Conference is designed to be a Constitution-making process and to plan for the general elections to be held in 2014. As of today, not much has happened regarding the preparation of the Constitution, since in September 2011, Interpeace, an independent, international peace-building organization and strategic partner of the United Nations, launched a handbook, 'Constitution-making and Reform: Options for the Process', a comprehensive resource for national Constitution-makers and their advisors, the first of its kind. The UN still does not have any office and drafter to prepare the new basic law of the country,[51] and cannot do anything but threaten Yemen with economic sanctions if the political process is blocked,[52] even though the transition timeline remains a serious challenge, with less than a year remaining to conduct the Constitution-making process, including the referendum, electoral reforms and the general elections.

1.2.2 UN Impact

International law, as traditionally understood, does not impact the constitutional arrangements of nation states. Article 2(7) of the Charter of the United Nations also prohibits the UN from intervening in matters within the domestic jurisdiction of states – except in cases when it applies enforcement measures, which will be discussed separately – and it does not oblige member states to submit issues to a settlement procedure compatible with the Charter. Global and regional international human rights conventions, whose main

49 The Yemen National Dialogue and Constitutional Reform Trust Fund (YNDCRTF) Terms of Reference, 15 October 2012.

50 <www.un.org/News/Press/docs//2013/sc10969.doc.htm>.

51 *See* the lecture of David S. Law, professor of the Washington University Law School, on the Constitution-making Infrastructure of the United Nations in Yemen at the Annual Meeting of the Law and Society Association on 31 May 2013 in Boston.

52 <www.upi.com/Top_News/World-News/2013/02/16/UN-threatens-Yemen-with-sanctions/UPI-93501361048250/>.

function is precisely to compel states to respect universal human rights norms, constitute the main exceptions to this ban on interventions.

As of today, the international community lacks a global constitutional document. At most we can speak of the growing influence of transnational standards on national Constitution-making and constitutional interpretation in some regions of the world. At the same time, in a global context, international *ius cogens* constitutes a higher order of norms in international norms and prevails over international agreements or common law when they conflict. In other words, in a formal sense it qualifies as constitutional law. Furthermore, many argue that under *ius cogens*, the UN Charter too may be considered a constitutional document of international law.[53] This means, in other words, that in addition to the external hierarchical relations between international law and national law, there is also an internal hierarchy in international law.

The adoption in 1948 of the United Nations Universal Declaration of Human Rights was the first step in the direction of making human rights legally binding requirements. Richard Falk traces the emergence of international human rights back to the Declaration, questioning as it does the notion of unfettered state sovereignty within national boundaries. Through the Declaration, signatory governments made a pledge of sorts to undertake all in their power to avert genocides similar to the Holocaust.[54] Jürgen Habermas also argues that human rights were endowed with subsequent moral content derived from the notion of human dignity, which emerged in response to the Holocaust. This was first manifested in the UN documents and then in the Constitutions of the successor states of those regimes that bore responsibility for the grand moral catastrophe of the 20th century, to wit Germany, Italy and Japan.[55] Nevertheless, once the Declaration was adopted, it was seen more as a non-binding principle for states, as a guiding standard rather than a document that serves as a basis for decisions rendered by national judicial or administrative bodies. This situation changed with the Spanish and Portuguese democratic transformations, and then, in the 1990s, with the regime transitions in Central and Eastern Europe, when the constitutional framers in the respective countries drew from the Declaration and its bill of rights, which offered a wider spectrum of rights – including economic, social and cultural – than the European Convention on Human Rights. Correspondingly, it is no coincidence that the countries in which judicial decisions explicitly refer to the Declaration and the rights therein most frequently in international comparison are Spain, Portugal and Poland. Interestingly, in Hungary, which was not a UN member in 1948, the Declaration

53 *See*, *e.g.*, B. Fassbender, 'The United Nations Charter as Constitution of the International Community', *Columbia Journal of Transnational Law*, Vol. 36, 1998, p. 529.

54 *See* R. Falk, *Achieving Human Rights*, Routledge, New York, 2009, p. 84.

55 *See* J. Habermas, 'Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte', *in Zur Verfassung Europas. Ein Essay*, Suhrkamp, Berlin, 2011a, p. 15.

was subjected to severe criticisms by prevailing political and legal attitudes at the time of its adoption, especially in respect of its Article 19, on account of the latter's all too libertarian approach towards freedom of speech and its failure to interdict fascist propaganda. Following regime transition, the Constitutional Court expressly based its understanding of the freedom of expression as a pre-eminent right on the very Article 19, among other things.[56] Despite these changes, it is still fair to assert that even today the Declaration can neither be considered a universally accepted principle of international law nor is it part of the documents that fall in the domain of *ius cogens*. Nevertheless, certain articles therein, such as its Article 5 on the prohibition of torture, are obviously part of international common law.[57]

The second step was the creation of the two comprehensive UN human rights covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Precisely because they enjoyed such widespread acceptance in the community of nations,[58] these two agreements can serve as a framework of sorts for international human rights, and they undoubtedly exert some effect even on states that are not parties to the Covenants. Hence some experts also treat these as an International Bill of Human Rights, which provides a basis for examining the legitimacy of any government.[59]

The two Covenants had a discernible impact on both Constitution-making and the constitutional jurisprudence of national courts. As far as Constitutions are concerned, in certain countries, the adopted wording of constitutional texts, or their amendment occurring after the adoption of the Covenants, reflected a direct influence of the Covenants in their entirety. This was the case for the 1993 interim and the 1996 final Constitution of the Republic of South Africa, the 1982 Canadian Charter of Rights and the 1995 amendment of the Finnish Constitution.[60] At the same time in other countries – Columbia, the Czech Republic, Estonia, the Philippines, Spain and Russia – individual provisions of the Covenants are reflected in constitutional provisions.[61] In certain countries, references to

56 *See* G. Halmai & E. Polgári, 'Hungary, the Impact on the Freedom of Expression', *in* V. Jaichand & M. Suksi (Eds.), *60 Years of the Universal Declaration of Human Rights*, Intersentia, Cambridge, 2009, pp. 179-196.

57 *See* V. Jaichand & M. Suksi, 'Concluding Remarks on Europe: Diversity within Unity', *in* Jaichand & Suksi (Eds.), 2009, pp. 445-468, 462.

58 As of June 2012, the ICCPR had been signed by167 states and the ICESCR by 160.

59 *See* C. Tomuschat, *Human Rights. Between Idealism and Realism*, 2nd edn., Oxford University Press, Oxford, 2008, p. 4.

60 *See* the results of the research (conducted in 20 countries: Australia, Brazil, Canada, Columbia, Czech Republic, Egypt, Estonia, Finland, India, Iran, Jamaica, Japan, Mexico, Philippines, Romania, Russia, Senegal, South Africa, Spain, Zambia) about the impact of the United Nations' Human Rights treaties on the legislation and jurisprudence of the member states, in C.H. Heyns & F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, Kluwer International, The Hague, 2012, p. 16.

UN human rights documents, including the two Covenants, are regularly recurring features of constitutional jurisprudence: 844 such references were found in Australia, 169 in Canada, 36 in Finland and 28 each in South Africa and Spain.[62]
And now let us take a look at the specific constitutional manifestations of Constitution-makers' limited sovereignty in certain constitutional regimes!

1.3 'Eternity Clauses' and Unconstitutional Constitutional Amendments

Since John Locke's idea that a Constitution should be "the sacred and unalterable form and rule of government […] forever" did not find any serious followers in the modern world, Constitutions usually do contain rules about constitutional amendments. But there are no general patterns as to the application of amendments. Some countries are more inclined to modify the text of their Constitutions. For instance, the German Basic Law of 1949 was modified on more than 50 occasions, the 1958 Constitution of the Fifth French Republic on 25 occasions, the 1937 Constitution of Ireland on 29 occasions and the 1978 Constitution of Spain only twice.[63] Other countries have separate 'constitutional laws' that also enjoy super legislative authority. In Austria, since 1945, there have been more than 800 modifications to the 1920 Constitution, mostly in the form of a constitutional law or as special constitutional provisions inserted into ordinary laws, while in Italy, besides 14 amendments introduced into the text of the 1947 Constitution, 20 separate 'constitutional laws' have been adopted.[64] In other countries, formal constitutional amendments remain exceptional. In the United States, the Constitution has been changed only 27 times on the federal level since 1787, and the last changes were adopted in 1964, 1967, 1971 and 1992. This does not mean that the meaning of the federal Constitution has not been changed by way of interpretation. The state rate of amendment is almost 10 times the federal rate.[65]
The authority to amend the Constitution does not include the authority to enact a new one. To limit the amendments to the Constitution safeguards the sovereignty of the people, especially in cases where the Constitution is easily amended. One of the crucial

61 *Id.* Note that Hungary (which was not part of the research), in its 1989 Constitution-making process, used the philosophy and often the wording of the covenants in many of its laws. From the countries included in the research, only Egypt and Iran did not observe the impact of the covenants on their national Constitutions.

62 *Id.*, p. 18. Even though references in the remaining countries researched were not systematic, there were only three – Iran, Mexico and Senegal – out of the twenty investigated where courts did not refer at all to the Human Rights documents of the UN.

63 *See* L. Garlicki & Z.A. Garlicka, 'Review of Constitutionality of Unconstitutional Amendments (An Imperfect Response to Imperfection?)', *Anayasa Hukuku Degrisi: Journal of Constitutional Law*, Vol. 1, 2012, p. 185.

64 *Id.*

65 *Id.*

questions concerning the limits of Constitution-making sovereignty is whether there are any limits to constitutional change. In other words, are there certain principles, institutions, rights and liberties or, as John Rawls calls them, 'constitutional essentials,' that must be and remain part of the Constitution, and may not be removed by means of the amending power.[66] In discussing Article V of the U.S. Constitution[67] and the role of the Supreme Court, Rawls argues that there are limits to what can be a valid constitutional amendment.[68] Rawls cites with approval[69] the work of Stephen Macedo, who argues that parts of the Constitution are more fundamental than other provisions, and an amendment that repealed fundamental constitutional freedoms would be "unintelligible and revolting from the perspective of the Constitution as a whole".[70] Therefore, according to Macedo,

> the first freedoms of speech and the press, the requirement of warrants for police searches, the right to confront witnesses, and to a trial by jury, even the elaborate procedures required to amend the Constitution, all these provisions and more represent basic structural commitments to institutionalizing a process of free and reasonable self-government.[71]

Thus, he concludes that

> an amendment which sought to expunge that basic commitment and to wipe out basic political and personal freedoms intrinsic to reasonable self-government suggest a desire to revolutionize rather than correct and amend […] and so it would properly be held by the Supreme Court to be a nullity.[72]

Also, Walter F. Murphy has argued for a position that is similar to Rawls's and Macedo's, on textual, semantic and normative bases. His textual argument is based, for instance,

66 *See* this question posed concerning Rawls's idea of 'constitutional essentials' by C.A. Kelbey, 'Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality', *Fordham Law Review*, Vol. 72, 2004, pp. 1487-1536.

67 Article V originally forbade the abolition of the African slave trade until 1808, and without time limits, prohibits the deprivation of a state of equal representation in the Senate without its content. The idea of explicitly limiting the amendment power also appeared in the state Constitutions between 1776 and 1783. For instance, the Delaware Constitution (1776) prohibited amendments to the Declaration of Rights, the articles establishing the state's name, the bicameral legislature, the legislature's power over its own officers and members, the ban on slave importation, and the establishment of any one religious sect.

68 *See* J. Rawls, *Political Liberalism*, 2nd edn., Columbia University Press, New York, 1996, p. 231.

69 *Id.*, p. 238.

70 S. Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism*, Clarendon Press, Oxford, 1990, p. 183, n. 116.

71 *Id.*

72 *Id.*

on the wording of the First Amendment, which prohibits its own repeal by an Act of Congress:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[73]

The semantic meaning of the word 'amend' means correcting or improving, not deconstructing, reconstructing, or replacing and abandoning the fundamental principles of the Constitution. Murphy also notes that normative constraints impose prohibition on the amending power:

> Any change that would transform the polity into a political system that was totalitarian, or even so authoritarian as not to allow a wide space for human freedom, would be illegitimate, no matter how pure the procedures and widespread the public support.[74]

Murphy uses the hypothetical case – which very much reminds me of the constitutional counter-revolution in Hungary from 2010 onwards – that the people decide to abolish constitutional democracy in return for a charismatic leader's promise of prosperity in a time of severe economic downturn. Although the people can agree to such a transformation, Murphy asks:

> May a people who accepted constitutional democracy democratically or constitutionally authorize such a political transmutation? May the new system validly claim to draw its authority from the consent of the governed?[75]

Murphy thinks not.

But there are also scholars opposing this position. Jed Rubenfeld, for instance, argues – very much in line with Hungarian Prime Minister Viktor Orbán – that "constitutionalism always permits the possibility of legitimate rupture, of a revolutionary process of popular rewriting that takes place, in part or in whole, outside every existing political institution".[76] Also, Christopher L. Eisgruber shares this opinion referring to Article V of the U.S. Constitution that

> a constitutional procedure that enables people to entrench good rules and institutions will also enable them to entrench bad rules and institutions. A people must have the freedom to make controversial political choices, and that freedom will necessarily entail the freedom to choose badly.[77]

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73 *See* Murphy, 1995, p. 179.

74 *Id.*

75 *Id.*, p. 175.

76 J. Rubensfeld, *Freedom and Time: A Theory of Constitutional Self-Government*, Yale University Press, New Haven, 2001, p. 174.

77 C.L. Eisgruber, *Constitutional Self-Government*, Harvard University Press, Cambridge, 2001, p. 120.

Similarly, Walter Dellinger claims that "the formal amendment process set forth in Article V represents a domestication of the right to revolution".[78] On the basis of this procedural argument, Dellinger also rejects the Supreme Court's power to exercise judicial review of the substance of constitutional amendments: "Judicial review of the merits of proposed amendments is illegitimate for the simple reason that the Constitution places virtually no limits on the content of amendments."[79]

Opposing this view on possible judicial review, Rawls, also considering a hypothetical amendment, questions

> whether an amendment to repeal the First Amendment, say, and to make a particular religion the state religion with all the consequences of that, or to repeal the Fourteenth Amendment with its equal protection of laws, must be accepted by the Court as a valid amendment.[80]

For Rawls, the First Amendment is

> entrenched in the sense of being validated by long historical practice. They may be amended but not simply repealed and reversed […] The successful practice of its ideas and principles over two centuries place restrictions on what can now count as an amendment, whether was true at the beginning.[81]

1.3.1 Judicial Review of Constitutional Amendments

The underlying serious constitutional law problem behind the problem of the constitutionality and judicial review of constitutional amendments is in how far the power amending the Constitution may be regarded as sovereign in terms of changing the provisions of the Constitution, maybe even its entire structure.

What amounts to the grossest interference with the sovereignty of the power to amend the Constitution are those provisions that qualify themselves as immutable. This implies – either expressed explicitly or assumed implicitly, but logically, as in Germany – that constitutional amendments themselves are subject to the Constitutional Court's review to determine whether they are in breach of 'eternal clauses.' As the example of India and many other states shows, the review of constitutional amendments by the Constitutional

78 W. Dellinger, 'The Legitimacy of Constitutional Change: Rethinking the Amendment Process', *Harvard Law Review*, Vol. 97, 1983b, p. 431.

79 W. Dellinger, 'Constitutional Politics: A Rejoinder', *Harvard Law Review*, Vol. 97, 1983a, pp. 447-448.

80 *See* Rawls, 1996, p. 238. Rawls here refers to Bruce Ackerman, who suggests that the Supreme Court must look upon the amendment under discussion as valid. B. Ackerman, *We the People: Foundations*, The Belknap Press of Harvard University Press, Cambridge, 1992, pp. 319-322.

81 *Id.*, pp. 238-339.

Court is conceivable without the presence of immutable provisions in the Constitution, and even without the explicit authorization of the courts by the Constitution.[82]

In Switzerland, on the other hand, explicit limits to the amendment power are present in the Constitution without judicial review. According to Articles 193(4), 194(2) of the 1999 Constitution, when there is a partial or even total revision of the Constitution, "The mandatory provisions of international law must not be violated."[83] In 1996, both chambers of the Federal Assembly (Bundesversammlung) declared a People's Initiative (Volksinitiative) to amend the Constitution to be invalid for violating the internationally recognized peremptory prohibition of refoulement. According to the Volksinitiative, for the revision of the Constitution by more than 100,000 people eligible to vote, asylum seekers who enter the country unlawfully would be deported immediately and without the option of appeal. In response to the initiative, the Federal Council issued a recommendation noting the peremptory (or *ius cogens*) character of the non-refoulement principle, and proposed that the Federal Assembly invalidate the Volksinitiative, which it did on 14 March 1996; consequently, the Volksinitiative did not form the subject of a referendum to amend the Constitution.[84]

The high degree of rigidity in constitutional arrangements, as well as the constitutional review of constitutional amendments, is not only a reflection of distrust towards future framers of new Constitutions or those who might wish to amend the existing documents, but in the view of some, it is an outright interference with the sovereignty of future generations. Louis Michael Seidman goes even further in his recent book in which he argues that the American people, notwithstanding the Constitution's preamble, did not consent to be bound by the document, to which only a small minority of the population at the time of the framing could vote, and of course none of them are still around. The fact, Seidman says, that the framers chose to assert authority over the generations hundreds of years later hardly justifies their following the old dictates.[85] One can argue that because the U.S. Constitution may be amended, and the future generations have generally not or have only

82 As Aharon Barak observes, the silence of the Constitutions of Germany, Austria and Turkey (until 1971) regarding the court's authority to examine constitutionality of an amendment to the Constitution did not lead the Constitutional Courts of those countries to conclude that they do not have such authority. *See* A. Barak, 'Unconstitutional Constitutional Amendments', *in* H.G. Schemers & D.F. Waelbroeck (Eds.), *Judicial Protection in the European Union*, 6th edn., Kluwer, The Hague, 2001, p. 736.

83 As opposed to amendments, total or partial revisions are reserved for a change that affects the most important constitutional structures or arrangements and cannot be adopted without following very demanding procedural requirements. *See* G. Biaggini, 'Switzerland', *in* D. Oliver & C. Fusaro (Eds.), *How Constitutions Change – A Comparative Study*, Hart Publishing, Oxford, 2011, pp. 316-317.

84 With regard to the initative to ban the construction of minarets, however, the Federal authorities did not find any violation of peremptory norms, claiming that the freedom to exercise one's religion and the prohibition on dicrimination does not form part of ius cogens. Botschaft zur Volksinitiative, 'Gegen den Bau von Minaretten', *Bundesblatt,* 2008, pp. 7603, 7609-7612.

85 L.M. Seidman, *On Constitutional Disobedience*, Oxford University Press, Oxford, 2013.

very rarely done so, they have consented to be bound by it. But as Seidman points out, the American Constitution is the most difficult to amend in the world: even if a solid majority of the American public and their representatives in Congress agree that the Constitution should be changed, the amendment will often be unsuccessful, since it requires an affirmative vote of two-thirds of both houses of Congress and approval of three-quarters of the states. In any event, the argument for constitutional obligation based on the amendment clause is circular, because it begs the question of why we should be bound by the amendment clause in the first place; therefore, this argument does not legitimate to disobey the Constitution,[86] and the real question is whether future generations should be totally free to amend it.

According to the critics, judicial review of constitutional amendments also exacerbates tensions between the legislature and Constitutional Courts by depriving parliaments of the possibility to interpret 'eternal clauses' and placing the latter responsibility exclusively in the hands of the courts.[87]

Of course, future generations generally deserve the lack of trust – evinced by these eternal clauses – which the foregoing generations, or more specifically the framers of their Constitutions, had in them. For if we peruse the list of those countries – from Germany through Turkey, India, Brazil and the Republic of South Africa all the way to the former Soviet republics such as Azerbaijan, Kyrgyzstan, Moldova and the Ukraine – where such solutions have been employed, we will usually find former despotic or colonial regimes. In these cases, the constitutional provisions set in stone serve to prevent a restoration of dictatorship.[88] Similarly, to prevent the restoration of a former dictatorship, there is an argument that Constitutional Courts defending Constitutions should be given the right to review the constitutionality of constitutional amendments.[89]

The post-independence Constitution of Zimbabwe represents a unique eternity approach, which is a mixture of substantial and procedural rules. According to the 1979 Lancester House Agreement that ended the war and led to the democratic elections in 1980, the text of the Constitution provided that there could be no amendment to specific clause for the first ten years of independence. Together with the guarantee of a specific number of white seats in the new Parliament was the inclusion of the clause that protected

86 *See* D. Cole, 'Should We Discard the Constitution?', *New York Review of Books,* 10 July 2013.

87 *See* M.F. Mohallem, 'Immutable Clauses and Judicial Review in India, Brazil and South Africa. Expanding Constitutional Courts' Authority', *The International Journal of Human Rights*, Vol. 15, No. 5, 2011, pp. 765-766.

88 It is undeniable that this instrument was not always capable of preventing the return of dictatorships. *See* for example the case of Uganda, in spite of the decision reviewing the 2004 constitutional amendment: *Semogerere et al. v. Attorney General,* Constitutional Appeal No. 1 of 2002 (2004). Cited by G.J. Jacobsohn, *Constitutional Identity,* Harvard University Press, Cambridge, 2010, p. 37, n. 6.

89 *See* this argument in R. Dixon, 'Transnational Constitutionalism and Unconstitutional Constitutional Amendments', *Chicago Public Law and Legal Theory Working Paper,* No. 349, 2011.

existing property rights and specified that land could only be obtained by the new government for purposes of land reform on the basis of the 'willing seller, willing buyer' principle. The reason for the ten years' limit was that the new 1980 Constitution continued the tradition of parliamentary sovereignty that Zimbabwe had inherited from Britain.[90]

Also, the Brazilian Constitution of 1988 is very mistrustful of the legislature. For one, its Article 60 formulates very strict requirements *vis-à-vis* the adoption of constitutional amendments (a three-fifth majority and two rounds of deliberations in both chambers of the National Congress, the House of Representatives and the Senate), and at the same time it imposes rigid limitations on the substance of amendments, too. Pursuant to the latter, proposed constitutional amendments may not: (a) seek to alter the federal nature of the state; (b) universal, direct and confidential suffrage; (c) the assertion of the principle of separation of powers; and (d) the individual rights and safeguards regulated by Article 78, which the jurisprudence of the Federal Supreme Court subsequently extended to all fundamental rights.[91] The third limitation on the power to amend the Constitution is the extraordinarily expansive judicial review designed in the course of the 2004 constitutional reform, which amalgamates elements of the Continental European and the American systems. Even though the Brazilian Constitution – similarly the German Grundgesetz – does not expressly provide for the authority to review constitutional amendments, such a practice is widely accepted by the Brazilian Supreme Court. Despite these strong requirements, the Constitution has been amended 71 times from 1988 to the present. In 1926, the Court held that all constitutional amendments are subject to judicial review by the Supreme Court of Brazil.

In Columbia, the Constitution of 1991 can be amended in three forms: by Congress' legislation, by a constituent assembly or by a referendum, approved by Congress. Article 241(1) of the Constitution empowers the Constitutional Court to review constitutional amendments 'exclusively for errors of procedure' and not substance. The newly established

90 In 1990, the Zimbabwean legislature moved very quickly to remove the 'willing buyer, willing seller' limitations in the Constitution, and when the ruling ZANU (PF) party and its President Robert Mugabe began to face a serious electoral challenge in the late 1990s the slow pace of land redistribution became a focus of government rhetoric, and Zimbabwe adopted even more aggressive policies of land acquisition, which, after 2000, led to a wave of farm invasions and a subsequent collapse of the economy. *See* H. Klug, 'In the Shadow of Zimbabwe: Land Property and Constitutional Amendment in Southern Africa', Paper for the panel 'Amending and Revising Constitutions: New Theory and Practice in Comparative Perspective' at the Law and Society Annual Meeting, Boston, 31 May 2013, pp. 3-4.

91 To reinforce the principles of the 1988 Constitution, the framers of the Constitution themselves put into the document the possibility of a referendum and a potential revision within five years of its adoption. The referendum did indeed take place in 1993, when 66% of the voters opted for the republican form of government, while 10% would have preferred a monarchy. A presidential system was favoured by 55% against the 25% who wished to adopt a parliamentary system. A comprehensive constitutional revision did not take place, however. *See* K.S. Rosenn, 'Conflict Resolution and Constitutionalism. The Making of the Brazilian Constitution of 1988', *in* L.E. Miller (Ed.), *Framing the State in Times of Transition. Case Studies in Constitution Making*, United States Institute of Peace Press, Washington D.C., 2010, p. 453.

Constitutional Court began gradually extending its protection to the constitutional order even without an eternal clause in the constitution that would expressly authorize the judicial body to review constitutional amendments.

By the end of 2012, 37 reforms had been approved by Congress and one by referendum. These amendments adopted by Congress can even be challenged by an individual citizen through an *actio popularis*, as ordinary statutes have been challenged in Colombia since 1910. The so-called action of unconstitutionality may only be filed within a year following the enactment of a constitutional amendment. This legalization of politics began as the Court proceeded to subject the government's decisions regarding the proclamation of a state of emergency to strict constitutional review.[92] As a result, the country spent less than 20% of the period between 1991 and 2003 in a state of emergency, in marked contrast to the period between 1949 and 1991, when this status prevailed 80% of the time. In the former 13-year period, the Constitutional Court affirmed the government's decision regarding a state of emergency five times, on three occasions in its entirety, while it rejected these decisions in four instances.[93] In its efforts to guard the values of the constitutional order, the Constitutional Court first gave a wide definition of the concept of 'procedural error' in the constitutional amendment procedures.

In 2003, the Court noted that the amendment power does not extend to the replacement of the Constitution with a different one. Procedure and substance are thus related because when the amending power 'substitutes' the Constitution it acts in *ultra vires*. The Court recognizes this as 'substitution theory'.[94] The Constitutional Court is also competent to decide *ex officio* on the constitutionality of a call for a referendum to amend the Constitution, exclusively for 'errors of procedure'. This doctrine, entailing a review of competence of the amending organ, was introduced in the previously mentioned 2003 decision when the Court examined the constitutionality of a call for a referendum to amend several articles of the Constitution.

During the last ten years, almost all constitutional amendments have been challenged on grounds of substitution of the Constitution. The most controversial decision was rendered in the so-called First Re-election Case. In 2005, the Court held that an amendment that allowed for presidential re-election was not a substitution of an essential element of the basic identity of the Constitution. Since 1991, presidential re-election has been forbidden. The Court concluded that allowing a president to be re-elected for one additional four-year term increased presidential power, but did not destroy the principle of separation of

92 *Cf.* D.T. Fox, G. Gallón-Giraldo & A. Stetson, 'Lessons of the Colombian Constitutional Reform of 1991. Toward the Securing of Peace and Reconciliation?', *in* L.E. Miller (Ed.), *Framing the State in Times of Transition. Case Studies in Constitution Making*, United States Institute of Peace Press, Washington D.C., 2010, p. 483.

93 *See* R.U. Yepes, 'Judicialization of Politics in Colombia: Cases, Merits and Risks', *International Journal of Human Rights*, Vol. 4, No. 6, 2007, pp. 51-52.

94 *See* Decision 551/03, 8 July 2003. The Constitutional Court repeated this concept in its opinion C-1040/05 regarding presidential re-election.

powers or the system of checks and balances. The amendment did not replace the principles with opposing ones.

The Court struck down four amendments for excess of competence. First, in this same case, the Court found unconstitutional a norm that gave to the Council of State (the highest court for administrative law cases) the power to adopt the rules concerning the rights and duties of candidates if the president decided to run for re-election. Second, in 2009 the Court declared unconstitutional a legislative act that sought to enrol civil servants in administrative careers who had previously not competed for them.

Third, in 2010 the Constitutional Court went so far in a 26 February decision as to nullify the law that would have called for a referendum on the constitutional amendment allowing the President of the Republic to run for a third term of office. According to the judges of the Constitutional Court, this reform would have violated a basic principle of democracy, which would have affected the constitutional order in its entirety.[95] Fourth, in 2012 the Constitutional Court declared unconstitutional an amendment that provided that rules on conflict of interest would not apply to members of Congress participating in the deliberation and voting on constitutional amendments.

In Peru, the Supreme Court – also lacking an express constitutional mandate – laid down the foundations of its authority to review constitutional amendments during a review of the pensions reform of 2005, even though it did not hold that a violation of the Constitution had taken place in that particular case.[96] In another decision in 2005, the Court emphasized what it regarded as the material limits of a reform, namely the fundamental principles that give identity to the Constitution. These are the principles of human dignity, the republican form of government, the democratic rule of law, the people's sovereign power and any other fundamental matter the Constitution recognizes.[97]

In the Ukraine, a request for a preliminary opinion by the Constitutional Court is one of the procedural elements that are necessary for a valid constitutional amendment. This is why in its decision dated 30 September 2010, the Constitutional Court nullified constitutional amendment No. 2222-IV, which Parliament had adopted in 2004. Although the judges of the Constitutional Court had been asked for their opinion on the first draft, changes were subsequently made to the draft that Parliament failed to return for preliminary judicial review.[98]

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95 *See* A.R. Brewer-Carias, *Presentation of the General Report on Constitutional Courts as Positive Legislators in Comparative Perspective,* XVIII International Congress of Comparative Law of the International Academy of Comparative Law at the George Washington University Law School, Washington, 27 July 2010, p. 5.

96 Opinion No. 0050-2004-AI/TC, No. 004-2005-PI/TC, No. 007-2005-PI/TC, No. 009-2005-PI/TC. Cited in G.J. Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective', *International Journal of Constitutional Law*, Vol. 4, No. 3, 2006, p. 37, n. 7.

97 Opinion No. 0024-2005-PI/TC, at para. 12 (2 November 2005).

98 20-rp/2010. For details *see* A. Nussberger, 'Neujustierung der Rolle zentraler Verfassungsorgane im politischen Prozess. Zur Aktuellen Verfassungsentwicklung in der Ukraine, Kirgistan und Russland', *in* H. Küpper (Ed.), *Von Kontinuität und Brüchen: Ostrecht im Wandel der Zeiten. Festschrift für Friedrich Christian Schroeder zum 75. Geburtstag*, Peter Lang, Frankfurt am Main, 2011, p. 323.

In Kyrgyzstan, citing formal grounds, the Constitutional Court first nullified two constitutional amendments – adopted on 9 November 2006 and 30 November 2006, respectively – in its 14 September 2007 decision, but did so without being authorized by the then effective constitution to do so.[99] Since the Constitutional Court had been compromised in the Akayev-era, it was suspended in April 2010 after the early phase of democratic transition, immediately prior to the adoption of the first constitution based on the rule of law. Indeed, even the Constitution affirmed in a popular referendum on 27 June only re-established the court as a division of the Supreme Court, still allowing for the possibility of removing judges with the votes of two-thirds of Parliament.[100] It was only later, with the 2011 constitutional amendment on the Constitutional Law Panel of the Supreme Court, that the judicial body was endowed with the authority to offer its opinions in the context of a preliminary review of constitutional amendments.[101]

Initially the immutable features of constitutions mostly tended to be the republican form of government and the federal arrangement of the state, but later they came to encompass the protection of fundamental rights, as – in addition to the above-mentioned Brazilian example – the cases of Greece (1975), Portugal (1976), Namibia (1990) and the Czech Republic (1993) also illustrate. It can even be said that at the time when their respective constitutions were solidified, these countries were, to say the least, in a tough spot in terms of their social and economic situations, which made guaranteeing these fundamental rights difficult. This contributed to the efforts to seek safeguards to help avoid temptation.[102]

Pursuant to Article 9 of the Czech Republic's Constitution of 1993, the Constitution may only be amended through the adoption of constitutional laws. According to Paragraph (2) of the very same provision, no kind of amendment may prejudice the substantive requirements of the democratic rule of law. The Constitutional Court's interpretation of this provision suggests that the underlying reasons for this limitation are to be found in

99 *See* Nussberger, 2011, p. 324.

100 For the Venice Commission's opinion on the new Constitution *see Opinion on the draft Constitution of the Kyrgyz Republic* (version published on 21 May 2010), adopted by the Venice Commission at its 83rd Plenary Session, Venice, 4 June 2010, <www.venice.coe.int/docs/2010/CDL-AD(2010)015-e.pdf>.

101 The constitutional act was adopted on 12 May 2011. For the opinion of the Council of Europe's Venice Commission on the law, *see Opinion on the draft constitutional law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan*, adopted by the Venice Commission at its 87th Plenary Session, Venice, 17-18, June 2011, <www.venice.coe.int/docs/2011/CDL-AD(2011)018-e.pdf>.

102 In an interview with the Austrian *Neue Kronen Zeitung,* the Hungarian prime minister, Viktor Orbán, proudly proclaims that in light of the country's difficult economic situation he wishes to use the new Basic Law to constitutionally subject the next 10 governments' economic policy measures to a requirement of seeking a consensus (he would do this by enshrining some fundamental tenets of economic policy in so-called supermajority laws). Since, in this case, the freezing of economic policy had occurred with the simultaneous exclusion of the judicial review of the pertinent revisions' constitutionality, this measure – in contrast to the solution of 'eternal clauses' – actually guarantees the possibility of violating fundamental rights. *See* 'Nur toter Fisch schwimmt mit dem Strom', *Neue Kronen Zeitung*, 10 June 2011, <www.krone.at/Nachrichten/Orban_Nur_toter_Fisch_schwimmt_mit_dem_Strom-Krone-Interview-StoryDrucken-267398>.

the tragic experiences of the 20th century, especially in the context of Weimar Germany, which led to the usurpation of power by the Nazis and the totalitarian communist regimes. On the basis of the aforementioned Article 9, as well as Article 35(4), which lays down the procedural rules for adopting constitutional laws, the Constitutional Court's jurisprudence examines the constitutionality of constitutional laws from three angles: the constitutionality of the procedure used for their adoption, whether those passing the constitutional amendment had the legitimate authority to do so, and, with regard to substance, whether the provisions satisfy the requirements of democratic rule of law. It was based on the latter two that in its 10 September 2009 decision the Court nullified constitutional law 195/2009 that, in the interest of quickly resolving the Czech crisis of government, would have cut short the term of the House of Representatives. The judges of the Court saw this act as a singular measure that may not be used to amend the Constitution and, moreover, they also judged that the act is in violation of the ban on legislation with retroactive effect, which is part and parcel of the rule of law.[103] In its reasoning, the Court particularly considered Article 9(1) of the Czech Constitution, according to which "this Constitution may be supplemented or amended only by constitutional acts", and Article 9(2), which reads "any changes in the essential requirements for a democratic state governed by the rule of law are impermissible". Yaniv Roznai argues against this reasoning, stating that a constitutional act that dissolves a chamber of Parliament in order to go for early elections, this extraordinary 'weapon day judgment' does not constitute in fact an abandonment of the rule of law that deserves an annulment, but deserves a clearer case to be exercised. According to Roznai, Article 9(2) of the Constitution was aimed at securing and maintaining a certain constitutional identity, and it is doubtful that if the constitutional act would be allowed to stand, the Czech's constitutional identity would be altered.[104] Concerning the overall assessment of the decision, I would agree with the Court, because I also see the signs of a slippery slope effect in the case. Let us imagine that a governing majority right after an election, when winners are usually more popular, wants to change the Constitution, introducing a self-dissolution possibility of the Parliament, in order to hold a new election and get even more seats. In this case, the retroactive effect of the constitutional amendment would be violating legal certainty and security, which is an essential part of rule of law. The Czech case has this potential, and I do not think that the good faith of the members of the Czech Parliament makes any difference. If a constitutional amendment can be used against the principle of the rule of law, it is enough. The vulnerability of the constitutional identity seems to be a to high of a standard for the review in this case.

103 2009/09/10 – Pl. ÚS 27/09, *see* <www.usoud.cz/view/pl-27-09>.

104 *See* Y. Roznai, 'Legisprudence Limitations on Constitutional Amendments? Reflections Following the Czech Constitutional Court's Declarations of Unconstitutional Constitutional Amendment', *Vienna Journal on International Constitutional Law,* Vol. 8, forthcoming 2014.

And there is a formal ground too to legitimate the decision of the Constitutional Court, namely to argue that a constitutional act can possibly be only normative, and not concrete, as in the case of the dissolution. This argument is similar to the Hungarian Constitutional Court's reasoning in its Decision 45/2012 (XII. 29.) AB, to be discussed later, in which the Hungarian judges annulled the Transitory Provisions to the 2011 Fundamental Law. The Hungarian judges' procedural argument says that, if the Parliament wanted a provision to be part of the Constitution, it was not enough to declare that the Transitional Provisions had constitutional status. Instead, the Parliament had to use the formal procedure laid out in the Constitution to make a constitutional amendment.

There have also been instances when it was not a domestic court but an international judicial body that offered protection against unconstitutional constitutional amendments. In December 2004, Nicaraguan President Enrique Bolaňos turned to both the Nicaraguan Supreme Court and the Central American Court of Justice (CCJ) to take issue with a constitutional amendment in his country, which he claimed came into existence through a violation of the constitutional provisions concerning constitutional amendments, and at the same time also substantively reduced presidential powers to such a degree that they thereby permanently upset the balance of powers. He argued that the changes did not constitute plain constitutional amendments, but that in reality they had effectively transformed the constitutional order from a presidential system of government to a parliamentary regime, which is a change that falls within the authority not of the power that has the authority to amend the Constitution, but rather of the constituent power. The CCJ accepted jurisdiction over the petition in January 2005 and called upon the National Assembly to suspend the amendment process until a final decision had been made. That same month the Supreme Court of Nicaragua held that it – and not the CCJ – had jurisdiction over the dispute. Meanwhile, the National Assembly ignored the CCJ's interim order and approved the amendments. On 29 March 2005, the CCJ ruled that parliament had indeed violated the Constitution and that the impugned amendments undermined the independence of the executive power. The Court based its jurisdiction in the case on the argument that the peace and stability of the region – the safeguarding of which was the purpose that inspired the establishment of the Court – hinged to a significant degree on the preservation of rule of law in the member states. Since the replacement of the presidential system with a parliamentary system may occur only in the context of the wholesale revision of the Constitution, the Court concluded that the impugned constitutional amendment violated the Constitution.[105] However, the same day, the Supreme Court of Nicaragua delivered its ruling on the case, holding that the CCJ's decision was invalid. Nicaragua was left with 'two Constitutions': valid nationally and invalid internationally. But even if the CCJ's

105 *Cf.* S. Schnably, 'Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal', *University of Miami Law Review*, Vol. 62, 2008, pp. 417-489.

decision failed to invalidate the reform, it certainly played a role in the fact that eventually the president and the Assembly reached an agreement to reconsider the amendments by the next elections and to suspend their application until after that time. Indeed, after the elections, the new government suspended the implementation of the new amendments until the end of Bolaños' term in office in January 2007.[106]

Another example of the role of international tribunals with regard to the domestic validity of laws, especially constitutional ones that contradict international law, is Security Council (SC) Resolution 554 of 1984, regarding the new Constitution of South Africa of 1983 that entrenched apartheid. In that resolution, the SC declared that it "strongly rejects and declares as null and void the so-called 'new Constitution'" owing to its contradiction of the principles of the UN Charter, mainly racial equality.[107] Whereas South Africa had to 'accept and carry out' this decision of the SC in accordance with Article 25 of the UN Charter, the country condemned the resolution as a 'gross interference in domestic affairs'. So although the Constitution was declared 'null and void' by the SC resolution, it remained in force for 10 more years, until the Interim Constitution of 1993 replaced it. The lessons to be learned from these cases is that on the one hand supranational courts can declare constitutional amendments to be unconstitutional, but on the other hand this declaration need not necessarily affect the validity of the amendment within the domestic sphere.

Historically, the first – still effective – rule for eternity appeared in Article 112 of the 1814 Norwegian Constitution, which provided that no constitutional amendment may violate the Constitution's principles or spirit.[108] In terms of immutability, this provision was followed by the 1884 amendment of the 1875 Constitution of the French 3rd Republic with the provision that prohibited changing the republican form of government by way of constitutional amendment: "The republican form of government cannot be made the subject of a proposition for revision." This amendment marked the triumph of the Republicans over the Monarchists. By 1884 it became crystal clear that France desired a republican form of government, but the 1791 Constitution's Preamble stated that the National Assembly "abolishes irrevocably the institutions which were injurious to liberty and equality of rights". The 'eternity clause' of the 1884 amendment is repeated in Article 95 of the Constitution of 1946, and it appears in Article 89 of the 1958 Constitution of the Fifth Republic with slightly different wording: "The republican form of government shall not

106 *See* T. Rogers, 'Nicaragua: Embattled President Negotiates Deal', *Miami Herald*, 12 October 2005. Cited in L.D. Walker & P.J. Williams, 'The Nicaraguan Constitutional Experience. Process, Conflict, Contradictions, and Change', *in* L.E. Miller (Ed.), *Framing the State in Times of Transition. Case Studies in Constitution Making*, United States Institute of Peace Press, Washington D.C., 2010, pp. 503-504, n. 116.

107 S.C. Res. 554, U.N. Doc. S/RES/554 (17 August 1984).

108 Since there is no Constitutional Court in Norway, ordinary courts have the power of review, but it is also true that no such review has taken place with regard to the over 200 constitutional amendments enacted since 1814.

be object of any amendment." But it is important to note that while France was one of the originators of the idea to explicitly limit amending power, contrary to other countries in which this idea led to judicial review of constitutional amendments, France took a rather restrained position, rejecting judicial review of constitutional amendments adopted by way of referendum by the *Conseil Constitutionnel*.[109]

Influenced by ideas from the U.S. Constitution and the French Revolution, during the first half of the 19th century, Latin American states widely used unamendable provisions in their Constitutions. First, the Mexican Constitution of 1824 stated that "the religion of the Mexican Nation is, and shall be perpetually, the Apostolical Roman Catholic" (Art. 3), and that "the Articles of this Constitution, and of the Constitution Act, which establish the Liberty and Independence of the Mexican Nation, its Religion, Form of Government, Liberty of the Press, and Division of the Supreme Power of the Confederation, and of the States, shall never be reformed" (Art. 171). Later, the Venezuelan Constitution of 1830 stipulated that "the authority possessed by Congress to modify the Constitution does not extend to the Form of Government, which shall always continue to be republican, popular, representative, responsible, and alternate" (Art. 228). The Peruvian Constitution of 1839 stated that "The form of the popular Representative Government consolidated in unity, responsible, and alternative, and the division and independence of the Legislative, Executive, and Judicial Power is unalterable" (Art. 183). Ecuador's Constitution of 1843 protects the form of government from amendments (Art. 110), a protection that was extended in the Constitution of 1851 to the State's religion (Art. 139). Ecuador repeated a similar list of unamendable provisions in several of its subsequent Constitutions, with the present Constitution of 2008 prohibiting amendments from altering the "fundamental structure or the nature and constituent elements of the State" and from setting "constraints on rights and guarantees" (Art. 441). The Honduran Constitution of 1848 prohibited amendments "regarding guarantees" unless they extended existing ones, and changes to the division of powers (Art. 91). The Dominican Republic's Constitution of 1865 stipulated that "the power conferred on the Chambers to reform the Constitution does not extend to the form of government that will always be Republican, Democratic, representative, responsible and alternative" (Art. 139). This formula has been repeated, in similar terms, in 22 Constitutions of the Dominican Republic. El Salvador's Constitution of 1886 prohibited amending those articles that stipulated the prohibition of the president's re-election and the duration of the presidential term (Art. 148), a prohibition that was repeated in later Constitutions (Art. 171 of 1945, and Art. 248 of 1983).

The Austrian Federal Constitutional Law *(Bundesverfassungsgesetz)* of 1920 was the first in Europe to provide a separate basis for judicial review with regard to all federal and state laws, also extending to the federal and state constitutional laws, which enjoy constitutional

109 Conseil Constitutionnel 62-20 DC of 6 November 1962.

rank *(Bundes-* and *Landesverfassungsgesetze)*.[110] Over 60 constitutional laws are currently recorded at the federal level. Among these are acts on personal liberty, the implementation of the Conventions on the Elimination of All Forms of Racial Discrimination, the house of Habsburg, and the independence of Austria. Ordinary laws and agreements between states may also contain provisions of constitutional import, and these, too, may be subject to review by the Constitutional Court. An example of the former is Article 1 of the Act on Data Protection, while Article 7 of the Austrian State Treaty illustrates the latter.[111] When it comes to constitutional laws, a review by the Constitutional Court may be initiated either by courts or individual persons whose rights have been violated, or, if the issue is an abstract review of norms, then the government or a third of all MPs may make such a request. The standards for constitutional review are the Constitutional Laws themselves and the fundamental principles enshrined therein.[112]

The Austrian model of constitutional adjudication was followed after World War II by the Italian Constitution in 1947 and the German Constitution in 1949. Article 139 of the Italian Constitution places an obstacle for a Constitution-making power in regard to changing the republican form of governance. Besides the classical amendments to the Constitution, this restriction is prevalent for constitutional laws amending the Constitution too. In 1988, the Constitutional Court reviewed a constitutional law, according to which members of the legislative body of the Trentino-Alto-Adige region are accountable for their opinions expressed and votes cast. The constitutional review was requested because of challenged equality, as the legislators on the national level were immune to this law. The court did not have a substantive inquiry, because of the lack of clarity of the review request, but its decision stated, with the obligatory nature of *obiter dictum,* that Article 139 of the Constitution places an explicit obstacle to constitutional amendments, and the Constitutional Court has jurisdiction to decide about it.[113] According to the operative part of the decision, the Italian Constitution contains some basic principles, relating to the republican system of government, which cannot be amended. Besides equality, the Constitutional Court in its jurisprudence also listed concordance with the Catholic Church, as well as the implementation of duties in relation to community law, among these principles. It is noted that the Austrian, German and Italian Constitutional Courts can review the constitutionality of constitutional amendments, but it does not mean that in practice they would often annul such amendments. The German and Italian courts have never made such decisions. The Austrian Federal Constitutional Court made such

110 Art. 140. For the legal commentary, *see* H. Mayer, *Das österreichische Bundes-Verfassungsgesetz. Kurzkommentar*, Mainzsche Verlags- und Universitätsbuchhandlung, Vienna, 2007, pp. 477-489.

111 *Cf.* C. Grabenwarter & M. Holoubek, *Verfassungsrecht – Allgemeines Verwaltungsrecht*, Facultas, Vienna, 2009, pp. 49-50.

112 *Id.*, pp. 270-272.

113 N. 1146 Sentenza 15-29 Dicembre 1988, La Corte Constituzionale.

a decision on 11 October 2001 for the first time in its practice and for the first time in Europe as well.[114] It was followed by a decision by the Czech Constitutional Court annulling the constitutional law regarding the shortening of the fifth Parliamentary term.[115] On the other hand, some scholars argue that the extended power of judicial review has resulted in a controversy over the power of the legislature to correct or invalidate the decisions made by the Constitutional Court by enacting a statute with constitutional law status.[116] These scholars suggest that the Constitution should be amended by adopting an 'incorporation principle' à la Article 79 of the German Grundgesetz, *i.e.* that all constitutional provisions and all amendments must be incorporated into the constitutional document, and 'incorporated overruling' ought to be exempt from judicial review.[117] According to these recommendations, against a total revision of the Constitution, affecting 'fundamental principles' of the Constitution, such as federalism, parliamentary democracy, republicanism, separation of powers, rule of law (Rechtsstaatlichkeit) and liberalism (*i.e.* Bill of Rights), it is enough guarantee that these must be submitted to a referendum, as it happened in the case of the accession of Austria to the European Union.

After World War II, the Italian Constitution of 1947 also followed the Austrian model of constitutional review, as did the German Basic Law of 1949. As far as the Italian Constitution is concerned, its Article 139 delimits the authority of the Constitution-amending power in the context of changes to the republican form of government. In addition to constitutional amendments, this ban also extends to laws of constitutional effect whose ranking is on a par with constitutional provisions. In 1988 a law with constitutional effect came before the Constitutional Court, mandating that the members of the Trentino-Alto Adige regional legislature are liable for the opinions expressed in their capacity as representatives and for the votes they cast in the proceedings of the said body. The ground for constitutional review was the violation of the principle of equality, since the members of the national legislature enjoyed immunity. Although the court ultimately failed to perform an investigation of the merits owing to the insufficient clarity of the petition, its decision nevertheless held *obiter dicta* that Article 139 constitutes the explicit limit of constitutional amendments and that Constitutional Court has the jurisdiction to review.[118] Pursuant to the decision's operative parts, the Italian Constitution contains

114 G 12/00-17, Erkentnisse und Beschlüsse des Verfassungsgerichtshofes, VfSlg 16.327/2001. About the decision, *see* O. Pfersmann, 'Unconstitutional Constitutional Amendments: A Normative Approach', *Zeitschrift für öffentliches Recht*, Vol. 67, 2012, pp. 81-113, at 83.

115 Pl. ÚS 27/09, 10 September 2009.

116 *See* A. Somek, 'Constitutional Theory as a Problem of Constitutional Law. On the Constitutional Court's Total Revision of Austrian Constitutional Law', *Israel Law Review*, Vol. 32, 1998a, p. 569.

117 B.-C. Funk, 'Wer schützt die Verfassung vor dem Verfassungsgesetzgeber? Pladoyer für ein anderes Verfassungs', *Journal für Rechtspolitik*, Vol. 1, 1998, p. 95.

118 <www.jus.unitn.it/download/gestione/fulvio.cortese/20101209_2054Ccost_1146_1988.pdf>.

some fundamental principles related to the republican form of government, which may not be modified in the framework of a constitutional amendment. In its later practice, the Constitutional Court also included equality among these principles, as well as the agreement with the Catholic Church and the implementation of Italy's undertakings pursuant to the primary Community legislation, *i.e.* the founding treaties.
The Constitutions of Greece were traditionally characterized by a high degree of rigidity. This tradition has been followed by the 1975 Constitution, enacted after the 1967-1974 dictatorship. Article 110(1) of this current Constitution specifies certain provisions that cannot be the subject of revision. This protection includes: maintaining the form of government as a Parliamentary Republic; certain fundamental rights and freedoms, such as human dignity, equality, freedom of personal development, personal liberty and religious freedom; and separation of powers.

1.3.2 Germany

The horrendous horror of Nacism, based on the German positive law of the day and hardly comprehensible by international law, gave a wide prospect for positive and natural law principles and solutions. In the U.S. zone of 1945 Germany, it was legally declared that "those activities that were against Nazism are not to be punished". To question the legitimacy of the illegitimate National Socialist regime, Gustav Radruch used the terms "Statutory Non-Law and Suprastatutory Law" ("Gesetzliches Unrecht und übergesetzliches Recht"):

> The conflict between justice and the reliability of the law should be solved in favor of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered 'erroneous law'. It is impossible to draw a sharper line of demarcation between cases of legal injustice and statutes that are applicable despite their erroneous content; however, another line of demarcation can be drawn with rigidity: Where justice is not even strived for, where equality, which is the core of justice, is renounced in the process of legislation, a statute is not just 'erroneous law', in fact it is not of legal nature at all. That is because law, even positive law, cannot otherwise be defined as a rule that is precisely intended to serve justice.[119]

119 G. Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', *Süddeutsche Juristenzeitung*, 1946, p. 107. Radbruch restated his concept in his book *Vorschule der Rechtsphilosophie*, Scherer, Willbach, 1947.

This is what the German-American political theorist, Hannah Arendt, wrote to his former teacher in 1946: "It may well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems."[120] The view that "radical evil" is unpunishable is maintained by Arendt in her work in the 1950s as well as in her books *The Human Condition* and *The Origins of Totalitarianism*, despite the criticism expressed by Jasper.[121] Modification of the view takes place only in the early 1960s, when in her *Eichmann in Jerusalem* book Arendt (also influenced by Jasper's "banality of evil" and her husband's Heinrich Blücher's view of evil as a superficial phenomenon), recognizes and even (in contrast to Jasper's suspense of the time) defends a legal case against a major Nazi war criminal, even though, later she expresses that it was not Eichmann that was facing trial in Jerusalem but anti-Semitism itself.

Taking all this into account, it is no wonder that following World War II, it was the desire to prevent a return of National Socialism that led those drafting the German Basic Law *(Grundgesetz)* to introduce an eternal clause.[122] Pursuant to Article 79(3) of the *Grundgesetz,* any constitutional amendment that would impinge on the division of the federation into states, the participation of the federal states in the legislative work as well as the fundamental principles laid out in Articles 1 and 20 of the Basic Law, are disallowed. The constitutional principles enshrined in the latter two articles are the following: the protection of human dignity [Article 1(1)], the recognition of human rights [Article 1(2)], the binding of public power to fundamental rights [Article 1(3)], the federal arrangement of the state and the republican form of government (principle of republicanism), the social nature of the state [Article 20(1)], the principle of democracy [Article 20(2)], popular sovereignty [Article 20(2) first sentence], the separation of powers [Article 20(2) second sentence], the binding of the three branches of public power to the Constitution and of the executive and judicial power to the laws [Article 20(3)].

The *Grundgesetz* does not determine a specific scope of powers for the Federal Constitutional Court in terms of reviewing constitutional amendments with a view towards protecting the eternal clauses, but the judges of the Court made clear right at the outset that this would be the only way to adhere to the relevant provisions of the Basic Law. The first such case came before the Constitutional Court in 1951, the year of its establishment,

120 L. Kohler & H. Saner (Eds.), *Hannah Arendt – Karl Jaspers Correspondence, 1926-1969*, Harcourt Brace Jovanovich, New York, 1992, p. 54.

121 "[…] we have to see these things in their total banality, in their prosaic triviality, becasue that's what truly characterizes them. Bacteria can cause epidemics that wipe out nations, but they remain merely bacteria." Kohler & Saner, 1992, p. 62.

122 The members of the *Parlamentarischer Rat* were naturally aware that the provision is incapable of preventing the revolutionary restoration of dictatorship, but they thought that, at the very least, revolutionaries who – like the Nazi party's rise to power in 1933 – seek to take control of the government by operating 'under the guise of legality' would be compelled to turn openly against the *Grundgesetz*. *See* H. Möller, *Die Verfassungsgebende Gewalt des Volkes und die Schranken der Verfassungsrevision,* Dissertation, Universitaet Hamburg, 2004, p. 148, <www.hauke-moeller.org/art79.pdf>.

regarding the formation of the southwestern federal state (Südweststaat) of the Federal Republic of Germany. In its decision, the Court developed its thesis concerning the internal unity of the *Grundgesetz,* arguing that the Constitution is a coherent document whose provisions form a 'logical-teleological unity', express an 'objective system of values' *('objektive Werteordnung'),* part of which are the values expressed in Article 79(3). In its obiter dictum decision, the Court declared:

> A Constitution has an inner unity, and the meaning of any one part is link to that of other provisions. Taken as a unit, a Constitution reflects certain overarching principles and fundamental decisions to which individual provisions of the Basic Law are subordinate.[123]

Two years later, in the process of examining the constitutionality of the new family law regulations that sought to implement the constitutional requirement of giving men and women equal rights (to the so-called gender equality case), some Constitutional Court judges went so far as to contrast positive law with a natural law that is superior to it, and they referred to the concept of justice, which they argued binds not only the power that enacts legislation and the power that amends the Constitution, but even the power that drafts the Constitution itself.[124] The Court refused to find any part of the original Constitution unconstitutional; however, it left the door open for future findings that an amendment added later might be unconstitutional and firmly defended the idea that it had the jurisdiction to make such a determination. The judges acknowledged the possibility of invalid constitutional norms in the extreme case where positive constitutional laws severely transcend the limits of justice. However, the statements were also mere obiter dictum.

In response to the terrorist threat posed by the Red Army Faction and the increasing threat of espionage on account of the latter, in 1970 the German Parliament changed the provisions guaranteeing the confidentiality of correspondence and telecommunications, enshrined in Article 10 of the *Grundgesetz.* The changes allowed for violating the privacy of communication in certain cases specified in a separate law, without informing the person involved and with the possibility of administrative rather than judicial review. Numerous abstract norm control petitions and constitutional law complaints were filed against the 'wiretapping' amendment. The eight members of the Federal Constitutional Court's

123 BVerfGE 1, 14, 32 (1951). Seven years later the court expounded in more detail on the *Grundgesetz*'s 'objective order of values' in its famous *Lüth* judgment. BVerfGE 7, 198, 208 (1958).

124 BVerfGE 3, 225 (1953). The opinion in the judgment explicitly refers to Radbruch's work entitled *Gesetzliches Unrecht und übergesetzliches Recht*, 1946, pp. 105-108. Radbruch is the leading legal philosopher who argued after World War II, and in contrast to his earlier writings, that certain 'minimum standards of justice' exist as a criterion for 'right law'. This idea that supra-constitutional limits on the amendment power exist, and that courts can declare constitutional amendments unconstitutional and thus void, was also developed by Otto Bachof in his book *Verfassungswidrige Verfassungnormen?*, J.C.B. Mohr, Tübingen, 1951. According to Bachof, natural law, which exists 'above' positive law, is an objective order, and the 'higher law', which is characterized as 'natural law', becomes part of the Constitution.

second Senate were evenly divided, and hence the impugned provision remained effective, since pursuant to the law on the Constitutional Court it would have taken a majority to declare it unconstitutional.[125] Ultimately, the four judges who formulated an opinion rejecting the petitions – emphasizing the need for a standardized, coherent interpretation of the *Grundgesetz* – based their reasoning on the concept of 'militant democracy' ('*streitbare Demokratie*'),[126] thus justifying the proportional nature of the restriction. These judges proposed that Article 79(3) only bars the elimination of the foundations of a liberal democracy, but it allows specific measures to be taken in the defence of the rule of law without prejudice to the basic principles. The three dissenting liberal judges, in contrast, considered that Article 79 not only rules out the complete elimination of the principles enshrined in *Grundgesetz* Articles 1 and 20, but any type of restriction imposed on them. And the examined wiretap provisions, they argued, limit human dignity guaranteed by Article 1, and, through the removal of the judicial route, they also violate the separation of powers safeguarded by Article 20, since administrative legal remedies are neither neutral nor independent of the legislature and the executive.

It was in the context of this petition that the Federal Constitutional Court came closest to declaring unconstitutional and nullifying a constitutional amendment. A natural law type of argument, a reference to justice, crops up again in 1991, in the unanimous reasoning of the Federal Constitutional Court in a case concerning expropriations in the former German Democratic Republic.[127] In the Electronic Eavesdropping case, the Constitutional Court held that an amendment permitting eavesdropping in homes does not affect the inviolable human dignity and therefore accords with Article 79(3).[128]

A natural law approach is occasionally discernible in the decisions of the German Federal Constitutional Court to this very day. In its decision of 4 November 2009, the first Senate of the Court declared as constitutional the incitement provisions of the German Penal

125 BVerfGE 30, 1 (1970).

126 Ever since the failure of the Weimar Republic, the concept of 'militant democracy' – coined by German political scientist Karl Löwenstein who emigrated to the United States to escape Nazism – seeks the answer to the question of what political and legal instruments in the service of protecting democracy might render a rule of law setting capable of checking the emotionally based politics proffered by extremist political movements. *See* K. Löwenstein, 'Militant Democracy and Fundamental Rights', *American Political Science Review*, Vol. 31, 1937, p. 417. In acting against the enemies of the Constitution, one of the customary instruments used by a militant state based on the rule of law is restrictions on hate speech and the freedom of assembly for gatherings that are hostile to the constitutional order, as well as the ban on associations and parties that constitute a danger to the constitutional regime. The notion of a "militant state based on the rule of law" (*önvédő jogállam* in Hungarian) was established in the Hungarian legal literature by András Sajó. *See* A. Sajó, 'Önvédő jogállam' ['Militant State Based on the Rule of Law'], *Fundamentum*, Vol. 6, No. 3-4, 2002, pp. 55-68.

127 BVerfGE 84, 90 (1991). Certain representatives of academic constitutional law took issue with the fact that the decision was founded on natural law, arguing that the judges of the Constitutional Court expand the 'eternal clause's scope of application. *See* M.J. Herdegen, 'Unjust Laws, Human Rights, and the German Constitution: Germany's Recent Confrontation with the Past', *Columbia Journal of Transnational Law*, Vol. 32, 1995, p. 605.

128 BVerfGE, 109, 279 (2004).

Code, which had been made stricter in 2005 to allow for the prohibition of neo-Nazi gatherings, such as the annual march at Rudolf Hess' place of internment in the Bavarian town of Wunsiedel.[129] The judges on the Court reasoned that the 'exceptional' treatment provided for by the Penal Code's Article 130(4) with regard to demonstrations that approve of, glorify, or justify National Socialist tyranny, is justified precisely on the grounds that it would be impossible to restrict such events with ordinary legislation because the monstrosities of the unique Nazi regime burst apart the boundaries of ordinary categories, which is why ordinary laws are insufficient against them. And the German Basic Law was enacted precisely with a view to excluding forever the possibility of the illegality of National Socialism. The most surprising element of the reasoning is that in extending constitutional legitimacy to the curtailment of hate speech, the members of the Court – in contrast to the hitherto accustomed solution – do not reach back to the *Grundgesetz*'s provisions on human dignity but refer to a seemingly extra-legal explanation.

Questions about whether the norms of the European Union violate Article 79(3) of the *Grundgesetz* form a special subset of issues under the 'eternal clause.' If the Federal Constitutional Court were to make such a determination, then it would be impossible to apply the given Union legal norm, and as a result, Germany would violate Union law. The constitutional explanation for such a situation is that *Grundgesetz* Article 23(1), which allows for the possibility of transferring powers to the institutions of the Union, calls for applying Article 79(3) to this eventuality as well.

1.3.3 India

At 300 pages and over 370 articles, India's 1949 Constitution is to this day the world's longest. Though it does not contain any immutable provisions, the majority requirements for amending various passages differ, depending on the importance of the provision in question: the greater part of them can be changed with the votes of two-thirds of those present in both houses and the endorsement of the president. The most important articles also need to be ratified by the majority of states in addition to the aforementioned requirements, while a smaller part of provisions may be amended with a simple majority of votes. On the basis of the constitutional interpretation advanced by India's Supreme Court, a judicial review of constitutional amendments may take place only if formal constitutional violations have taken place. The Supreme Court rejected the possibility of reviewing constitutional amendments first in 1951 and again in 1965.[130]

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129 BVerfG, 1 BvR 2150/08 vom 4 November 2009, Absatz-Nr. (1-110), <www.bverg.de/entscheidungen/rs20091104_1bvr215008.html>. For a detailed analysis of the decision *see* G. Halmai, 'A német Szövetségi Alkotmánybíróság a náci rezsimet dicsőítő gyűlések tilalmáról' ['On the German Federal Constitutional Court's Ban on Assemblies Glorifying the Nazi Regime'], *Fundamentum*, Vol. 13, No. 4, 2009a, pp. 143-147.

130 *Shankari Prasad Deo v. Union of India* 1951 (3) SCR 106; *Sajjan Singh v. State of Rajasthan* 1965 (1) SCR 933.

Indira Gandhi, who first ascended to power in 1966, developed a penchant for using constitutional amendments to circumvent judicial review, primarily in the context of property rights issues. The case that brought about a shift in the Supreme Court's attitude was the 1967 *Golak Nath v. State of Punjab case*,[131] in which a majority of the judges took the position that even a constitutional amendment adopted according to proper formal procedures may not violate constitutional rights. As one of the commentators of Indian constitutional development says, "[T]hus commenced the war over primacy between Parliament and the Court."[132] The decision also helped Indira Gandhi's populist campaign, which led to an electoral victory exceeding a two-thirds majority in 1971, and encouraged the prime minister to pass four constitutional amendments shortly thereafter. One of these (the 24th overall) expressly forbade the Supreme Court to review constitutional amendments.

The state of emergency imposed on account of the war with Pakistan and the subsequent nationalizations led to the Court's most important decision, rendered in the *Kesavananda* case in 1973. The 800-page ruling, which resulted from a 7:6 vote, formally recognized Parliament's right to enact constitutional amendments that impinge on fundamental rights, and in that respect therefore overturned the *Golak Nath* decision: "Fundamental rights [....] are given by the Constitution, and, therefore, they can be abridged or taken away by the […] amending process of the Constitution itself."[133] At the same time, the majority of judges reserved the Court's right to invalidate constitutional amendments if those are in breach of the Indian Constitution's 'basic structure'.

In response to the charges of electoral fraud levelled against her, and to avert the threat of losing office, Indira Gandhi declared a state of emergency again in June 1975, and among the first measures introduced in that context she initiated several unprecedented constitutional amendments. The first, No. 39, barred the judicial route in controversies relating to the election of the prime minister, for example. Number 38 ruled out the constitutional review of laws that were enacted under the state of emergency and violated fundamental rights. Gandhi's reasoning in justifying the amendments – which followed Carl Schmitt to the extreme – suggested that the constituent and Constitution-amending power was the unconditional expression of the people's sovereign will. This enraged the members of the Supreme Court so much that they – even while upholding the validity of her election as premier – rejected the two constitutional amendments.[134]

131 *I.C. Golak Nath and Others v. State of Punjab*, AIR 1967 SC 1643.

132 G. Austin, *Working a Democratic Constitution. The Indian Experience,* Oxford University Press, New York, 1999, p. 198. An excellent summary of the fight seen in L.I. Rudolph & S.H. Rudolph, *In Pursuit of Lakshmi. The Political Economy of the Indian State*, The University of Chicago Press, Chicago, 1987, pp. 103-124.

133 *Kesavananda Bharati v. State of Kerala*, 1973 SC, supra note 33, p. 1691.

134 *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299, 2469.

Prime Minister Gandhi struck back one last time with constitutional amendment No. 42 in 1976, which was brought into force with effect from 3 January 1977. This amendment inserted subsections (4) and (5) in Article 368, which read:

> (4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article (whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976) shall be called in question in any court on any ground.
> (5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power – of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

In the case of *Minerva Mills Ltd. v. Union of India*, the Court struck down this amendment, with the following argument:

> Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368,[135] expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one […] if by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity.[136]

In other words, the Supreme Court of India said with this decision that if the requirement regarding the basic structure indeed arises from the language of the entire Constitution, then a new Constitution is necessary in order to remove the requirement regarding the basic structure.

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135 Art. 368 sets up a tripatite amendment formula, by which some provisions can be amended by an absolute majority in both houses of parliament with 2/3 present, and some require an additional ratification by half of the states. An additional set of individual provisions in the Constitution were designated for modification by simple majority in parliament. *See* T. Ginsburg & J. Melton, 'The Challenges of Measuring Amendment Difficulty', Paper for the panel 'Amending and Revising Constitutions: New Theory and Practice in Comparative Perspective' at the Law and Society Annual Meeting, Boston, 31 May 2013, p. 2.

136 *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789, 1798 at para. 22.

Some scholars argue that the basic structure doctrine is linked to the concept of natural law and natural rights,[137] but as we could see, these limitations originate from within the Indian constitutional order itself.

The firm stance adopted by the judges of the Supreme Court resulted in the doctrine of 'basic structure', which has remained a protective element against aspirations to upset constitutionality in India and may serve as a model for other countries to this very day.[138]

The first countries to apply the Indian model were its neighbours, Nepal, Bangladesh and Pakistan. Nepal expressly mentions the basic structure doctrine in its Constitution of 1990. Article 116(1) of the Constitution stipulates that:

> any bill purporting to amend or repeal any Article of this Constitution may be introduced, without contravening the spirit of the Preamble of this Constitution […] provided that this Article shall not be subject to amendment.

Pursuant to this Article, a bill seeking to amend the Constitution may be presented to Parliament only if it is not antithetical to the Constitution's preamble.[139] As is apparent – unlike with the Indian solution that served as a model – in reality this means a preliminary judicial review of unconstitutional constitutional amendments. Similarly to its Indian counterpart, the Nepalese Constitution did not directly refer judicial review into the authority of the Supreme Court, but the general assumption is that the highest judicial forum is entitled to it.[140] Yet before the judicial body had the chance to develop a relevant jurisprudence, the monarchy in Nepal was toppled, and the 1990 Constitution was supplanted by the temporary Basic Law of 15 January 2007, whose Article 148 on the amendment of the Constitution no longer contains the provision that refers to the spirit of the Constitution, which served as a constraint on potential amendments.[141] It is at this point unclear whether the new Constitution that is being drafted will contain a similar provision and, if that is indeed the case, whether the Supreme Court will be willing to render decisions in the relevant cases.

The Appellate Division of the Bangladeshi Supreme Court also adopted the Indian basic structure doctrine in its 1989 case, *Anwar Hossain Chowdhury v. Bangladesh*,[142] which expressly refers to the *Kesavananda* case. The Court reasoned that the 'constituent power', in the sense of the power to create a Constitution, belongs to the people alone, while the

137 *See* N. Samanta & S. Basu, 'Test of Basic Structure: An Analysis!', *NUJS Law Review*, Vol. 1, 2008, p. 516.

138 *See* R. Sudarshan, 'Courts and Social Transformation in India', *in* R. Gargarella, P. Domingo & T. Roux (Eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?,* Ashgate, Aldershot, 2006, p. 165.

139 <www.supremecourt.gov.np/main.php?d=lawmaterial&f=constitution_part_19>.

140 *See* R. Stith, 'Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court', *American University Journal of International Law and Policy*, Vol. 11, No. 1, 1996, pp. 47-77.

141 <www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf>.

142 41 DLR 1989 App. Div. 165.

'constitutional amending power', which is vested in Parliament, is a 'derivative' power and is thus limited.

This line of reasoning was reaffirmed in subsequent decisions. In one of the latest, the Court nullified a constitutional amendment, which would have deprived the body of the right to decide at its own discretion about the transfer of judges between courts. The Court's opinion cites judicial independence as a fundamental principle of the Constitution, and is in this respect reminiscent of those Indian precedents in which the organizational prerogatives of the administration of justice were understood as part of the basic constitutional structure.[143] In its ruling issued on 2 February 2010, the Supreme Court ruled that the Fifth Amendment to the Constitution, which legitimized the governments that were in power from the time of the 15 August 1975 coup through 9 April 1979, was illegal. The decision allows the government to ban religion-based political parties and restores the spirit of the 1972 Constitution, which was based on the four fundamental principles of nationalism, socialism, democracy and secularism.[144]

The basic structure doctrine has also migrated to Pakistan. The case of *Mahmood Khan Achazai v. Federation of Pakistan*[145] is considered a landmark in that it incorporates the Indian *Kesavananda* case into Pakistan's legal system through the Supreme Court's observation that Pakistan's Constitution has a basic structure that may not be altered. But despite this statement, the Supreme Court did not invalidate any amendment yet, holding that it had no jurisdiction to invalidate amendments on substantive grounds:

> [w]hile there may be a basic structure to the Constitution, and while there may also be limitations on the power of the Parliament to make amendments to such basic structure, such limitations are to be exercised and enforced not by the judiciary […] but by the body politic, i.e., the people of Pakistan.[146]

1.3.4 Turkey

Pursuant to Article 4 of the 1982 Constitution, the Basic Law's Article 1, declaring the republic, its Article 2, enshrining the state's democratic, secular, social and rule of law-based character, as well as Article 3, providing for its unitary character, are all essential elements of Turkish constitutional identity that may not be altered. At the same time, Article 148 authorizes the Constitutional Court to exercise judicial review only in the case of formal mistakes when it comes to constitutional amendments. Correspondingly, until 2008 the

143 *See* Jacobsohn, 2006, p. 68, n. 83.

144 'Bangladesh: Restoring Secular Constitution', *The Hindu*, 25 June 2011, <www.thehindu.com/opinion/lead/article2132333.ece>.

145 PLD 1997 SC 426, 458, pp. 479-80.

146 *Id.*, p. 42, para. 56.

Constitutional Court rejected petitions directed at the examination of the substance of constitutional amendments.[147]

In the so-called *headscarf* decision of 5 June 2008, for the first time the judges of the Constitutional Court nullified two acts – which had been adopted by the Grand National Assembly with an 80% majority – amending the Constitution based on a review of their substance, arguing that the amendments violated the protected and non-amendable principle of secularism and were therefore unconstitutional.[148] The amendments had been introduced by the Justice and Development Party (AKP), which is committed to a 'conservative democracy' and 'passive secularism,' and sought to mildly relax the consistent and wide-ranging secularization implemented by Kemal Atatürk, as well as to make religion more visible in the country whose population is 99% Muslim. To this end, the ruling party wanted to ease the ban on wearing a headscarf, which was a key element of Atatürk's secularization programme and which was affirmed by the Constitutional Court in a 1989 ruling,[149] but nevertheless enjoyed the support of only 22% of the populace. The intended amendment sought, above all, to change the Constitutional Court's jurisprudence with regard to prohibiting female university students from wearing a headscarf at school.

In its 9:2 ruling, the Constitutional Court first explained on which interpretation of the Constitution it based its authority to review constitutional amendments. According to its reasoning, Article 148, which provides the authority for reviewing constitutional amendments, and Article 4, which is regarded as the Constitution's 'eternal clause,' must be examined jointly as a unit, and thus the review extends to a protection of fundamental principles as well. The Court at the same time also argued for its expansively construed jurisdiction by saying that the power to amend the Constitution is only a secondary constituent power, which – unlike the primary *pouvoir constituant*– may be subject to limitation. In this instance, therefore, the judges of the Court made clear that the constitutional amendments in question undermine secularism as one of the 'fundamental principles of the republic'.[150] (Following the decision many observers anticipated that the Court would ban the initiator of the amendments, the AKP, in the context of the pertinent case before the Court, as it had previously done in 1998 with the Refah, another Islamist party.[151]

147 For example, *see* decision E.2007/72, K.2007/68 handed down on 5 July 2007.

148 E.2008/16, K.2008/116. About the decisions *see* Y. Roznai & S. Yolcu, 'An Unconstitutional Amendment – The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf', *International Journal of Constitutional Law*, Vol. 10, 2012, p. 175.

149 The decision rendering void this headscarf-friendly legislation was essentially reaffirmed by the Grand Chamber of the European Court of Human Rights' 2005 decision in *Leyla Sahin v. Turkey*.

150 The amendments had an interesting afterlife in that following the letter by the Joint Council of Universities in October 2010, it is forbidden to ask a student to leave university lectures for wearing a headscarf. In effect, the Council – explicitly or implicitly – misunderstood the Constitutional Court's standing jurisprudence that contradicts their stance.

151 In its 3 February 2003 decision in the case of *Refah Partisi (Welfare Party) and Others v. Turkey*, the European Court of Human Rights in Strasbourg reaffirmed this decision ([GC], Nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II).

Ultimately, however, in their decision of 30 July 2008 – adopted with a slim majority – the judges left it at a 'severe warning' for the party to cease its politics of guiding the country towards Islam.)

In March 2010, another package of constitutional amendments, consisting of 23 articles, was presented to Turkish Parliament. While a portion of the proposed provisions undoubtedly improved the constitutional position of fundamental rights,[152] the changes suggested for the Council of Judges and Prosecutors raised serious constitutional concerns that the government was seeking to bring the Constitutional Court and the administration of justice under its control.[153] One of the problematic amendments increased the number of Constitutional Court judges from 11 to 17, with 3 elected by Parliament (in the second round of balloting a simple majority was enough), while 14 would be appointed by the President of the Republic who had previously belonged to the ruling party. Thus, the appointment of the majority of judges was in the hands of the government.[154]

The opposition Republican People's Party (CHP) turned to the Constitutional Court in a petition requesting that the entire package of constitutional amendments, as well as individual parts of it taken separately, be declared unconstitutional. In its decision, the Constitutional Court followed the course charted in 2008, in that it employed a similar reasoning and continued to claim for itself the jurisdiction to review constitutional amendments, yet at the same time accorded the parliamentary majority a greater margin of appreciation in shaping the institutional order created by the Constitution. Although it did nullify some minor measures, its decision overwhelmingly left the constitutional amendment package intact.[155] Following the decision, at the referendum on 12 September 2010, 57.88% of voters supported the constitutional amendment.

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152 The ruling AKP and the Western media viewed the amendments this way. *See* 'Türkische Verfassungsreform – Ein Schritt in die richtige Richtung', *Frankfurter Allgemeine Zeitung*, 13 September 2010 (online edition); T. Seibert, 'Die Türkei, demokratisch wie nie zuvor', *Die Zeit*, 13 September 2010 (online edition).

153 Some – such as Andrew Arato, who has been tracking Turkish constitutional developments for a long time – have even proposed that the fundamental rights changes only served to conceal the objective of subordinating the third branch of government to the executive. *See* the interview with Arato in the August 26-27, 2010 edition of the daily *Miliyet*. Cited in E. Göztepe, 'Eine Analyse der Verfassungsänderungen in der Türkei vom 7. Mai 2010: Ein Schritt in Richtung mehr Demokratie?', *Europäische Grundrechte Zeitschrift*, 37. Jg. Heft 22-23, 2010, p. 686.

154 The similarity between these amendments and the 2010 constitutional amendment introduced by the Hungarian government, which sought to ensure the nomination and elections of Constitutional Court judges loyal to the government, as well as the regulations enshrined in the 2010 Basic Law, are almost uncanny. So is the fact that the Turkish constitutional amendment, just like the Hungarian Basic Law, institutionalized – as a compensation of sorts – genuine constitutional complaints, which is the least political type of jurisdiction of any body safeguarding the Constitution.

155 E.2010/49, K. 2010/87. The provisions thus declared unconstitutional pertained to those rules concerning the election of Constitutional Court judges and members of the Council of Justice, which regulated how many candidates it was possible to simultaneously vote for.

At first glance there are substantial similarities between the decisions of the Indian Supreme Court defending the basic constitutional structure and the Turkish Constitutional Court's ruling in defence of the fundamental principles of the republic, even in the sense that both bodies undertook a review of the substance of the constitutional amendments before them without an express constitutional authorization to do so, which – as we saw above – the Sri Lankan Supreme Court justices refused to do even though they were explicitly authorized to do so. At the same time, as Andrew Arato points out, there is a significant difference between the Indian and Turkish situations: while the principles of the Indian Constitution are the result of a democratic process, the 1982 Turkish Constitution is the product of an authoritarian regime. In other words, unlike their Turkish colleagues, the Indian judges stand up in the defence of a democratic pouvoir constituant.[156] That is another reason why it would be important if following the June 2011 parliamentary elections government and opposition parties in Turkey could agree on drafting a new, democratic constitution.

1.3.5 South Africa

South Africa's post-apartheid constitutional arrangements represent the most extreme form of restrictions on the sovereignty of the Constitution's framers, since the provisional Constitution of 1993 not only provided for the mandatory review of the constitutionality of constitutional amendments, but also for that of the new, final Constitution, as one of the preconditions for its adoption. One of the reasons behind this was of course what Andrew Arato has termed the post-sovereign nature of the process of adopting the constitution, which is the fact that the provisional Constitution created in the first phase of a two-step Constitution-making process was not drafted by a legitimate body.[157] Nevertheless, as we can see in the cases of Hungary and Poland, for example, the case of other, also post-sovereign Constitution-making processes, has not only failed to yield such an exceptionally strong authority, but in fact constitutional courts were not even accorded the power to review constitutional amendments.

Article 73 of the provisional Constitution adopted in December 1993 gave two years – starting with the first session of the new parliament, the National Assembly – for the completion of the new document, while Article 74 enumerated the 34 principles whose fulfilment the Constitutional Court – which had also been set up pursuant to the provisions

156 *See* A. Arato, 'The Turkish Constitutional Crisis and the Road Beyond', *American: A Magazine of Ideas*, 30 June 2008.

157 Arato, 2010a.

of the transitional basic law – would have to review and certify. This approval procedure was meant to legitimate both the new Constitution and the Constitutional Court.[158]

After repeatedly questioning representatives of political parties and civil organizations, and only after having emphasized that the Constitution is a monumental achievement and that it satisfies the requirements of the overwhelming majority of the constitutional principles under review, the Court ultimately ended up formulating a total of 11 constitutional objections concerning 8 of the document's articles, on the basis of which it refused to endorse the draft Constitution in the first attempt.[159] Among the problematic provisions was that the document failed to ensure that detailed rules on constitutional adjudication may only be laid down in an act whose adoption requires a qualified majority and, furthermore, that the fundamental rights and freedoms were not sufficiently protected against modifications by a simple majority of parliament, as well as the document's failure to provide a proper structural framework for municipal governments. Parliament accepted all of the Constitutional Court's objections and amended the pertinent provisions. The document thus altered was unanimously approved by the Constitutional Court.

The Constitution thus created – which is deemed the "crowning success of democratic transition"[160] – itself institutionalizes a rigid system for the process of amending the Constitution in so far as amendments continue to be subject to the Constitutional Court's power of review. The parliamentary majority required for amendments depends on which provisions of the Constitution they envision to change: the fundamental provisions enshrined in the first chapter may only be amended with the votes of at least 75% of all representatives and the consent of at least six of the nine provinces, while the articles of the fundamental rights chapter also require the affirmation of six provinces and at least two-thirds of MPs. For all other amendments – unless they pertain to the provinces – the votes of two-thirds of MPs are sufficient.[161] Amendments are further rendered more difficult by the possibility that the President may send the bill back to Parliament with a political veto or, alternatively, to the Constitutional Court with a constitutional veto. Indeed, if the head of the state fails to do either, then within 30 days a third of all MPs may themselves turn to the Constitutional Court.[162] This differentiated system of rules for adopting constitutional

158 *See* T. Roux, 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court in Democratization and the Judiciary: The Accountability Function of Courts', *in* S. Gloppen, R. Gargarella & E. Skaar (Eds.), *New Democracies,* Ashgate, London, 2004, p. 109.

159 Certification of the Constitution of the Republic of South Africa, Constitutional Court, 1996 CCT 23/96.

160 *Cf.* H. Klug, 'South Africa: From Constitutional Promise to Social Transformation', *in* J. Goldsworthy (Ed.), *Interpreting Constitutions: A Comparative Study*, Oxford University Press, Oxford, 2006, p. 278.

161 To put these majority requirements into perspective, it should be noted that South Africa's leading party, the African National Congress (ANC), won 69% of the votes in the 2004 elections and 65% in 2009. *See* Election Commission of South Africa, <www.elections.org.za>.

162 *See* the Constitution's Arts. 74 and 80, as well as 84(2) (b) and (c).

amendments is one of the characteristics of a 'multilevel' Constitution, the most internally consistent example of which happens to be the South African Constitution.[163]
In the decision on the certification of the Constitution, two justices of the Constitutional Court have made reference to the notion of the basic structure of the Constitution used by the Indian Supreme Court. In a later case in 2002, *United Democratic Movement v. President of the Republic of South Africa* and Others,[164] the Constitutional Court assumed, for the sake of argument, that the basic structure doctrine applies to the South African Constitution.

1.4 Unlimited Power to Amend the Constitution

Let us now consider counter-examples that reject both the limited nature of the constitutional amending power and the judicial review of constitutional amendments by the Constitutional Court.

1.4.1 Sri Lanka, Malaysia and Singapore

The constitutional jurisprudence of these three countries regularly refers to the Indian basic structure doctrine, but this reference serves the rejection of it. Protecting the identity of the Constitution first occurred in Sri Lanka in the context of constitutional amendment No. 13 of 1987. This amendment sought to introduce some level of decentralization – modelled on Indian federalism – in the previously centralized unitary state structure. The ethnic Sinhalese majority, which is overwhelmingly Buddhist, rejected this change – also viewing it as an encroachment by undesirable Hindu influence – and turned to the highest judicial forum citing the Constitution's Article 1, declaring the unitarian nature of the state; Article 2, guaranteeing popular sovereignty and Article 9, which enshrined Buddhism as the dominant religion. By a vote of 5:4, the Court upheld the amendment, which simultaneously implied that it rejected putting it up for a popular referendum. According to Justice Sharvananda, who wrote for the majority, the Constitution's identity is not violated by the amendment, since the planned decentralization does not turn the state into a federation, which means that the basic structure remains unaltered.[165] The argument of the majority is based upon the wording of the Constitutions of 1972 and 1978, which expressly provide for the amendment or repeal of any provisions of the Constitution or

163 *See* A. Arato, 'Multi Track Constitutionalism Beyond Carl Schmitt', *Constellations,* Vol. 18, No. 3, 2011.
164 (11) BCLR 1179 (4 October 2002).
165 *See* The Thirteenth Amendments to the Constitution and the Provincial Councils Bill, 1999. LRC 1 (Const), 325. Cited in Jacobsohn, 2006, pp. 64-65.

for the repeal of the entire Constitution. The Supreme Court held that due to the exhaustive language that allows the repeal of any provisions, there is no basis for the contention that some provisions of the Constitution are unamendable, and therefore, it would be improper to apply the Indian basic structure in Sri Lanka. In his dissent representing the minority view, Chief Justice Wanasundera argued for allowing the issue to be put to a popular vote based on the protection of the Constitution's identity.

Subsequently, the Court's majority rejected putting to a popular vote several constitutional amendments that obviously served the political interests of the ruling party against the opposition, such as depriving the opposition members of parliament of their seats, extending the Parliament's term and the elimination of safeguards against the extension of the state of emergency. The Supreme Court's abstention *vis-à-vis* the government's unconstitutional endeavours led to a general disenchantment with democratic processes and constitutionalism in Sri Lanka.[166]

The Indian basic structure doctrine was presented in Malaysia in several cases, but the Malaysian Federal Court refused to apply it, granting Parliament the right to amend the Constitution without material constraints.[167] The basic structure doctrine also migrated to Singapore's legal discourse, and similarly to the Malaysian cases, the Supreme Court in the case of *Teo Soh Lung v. Minister for Home Affairs*[168] also rejected the argument, reasoning that as an amendment is part of the Constitution itself, it could never be invalid if it was enacted in compliance with the amendment procedure. Had the Constitution's framers intended to prohibit certain amendments, one could reasonably expect them to have included a provision to that effect. Furthermore, the reasoning continued, if the courts were allowed to impose limitations on the amendment power, they would be usurping Parliament's legislative functions.

1.4.2 Ireland

Ireland favours constitutional sovereignty. The case of *State (Ryan) v. Lemmon*[169] came before the Irish courts in 1934. The issue was whether a constitutional amendment violates the plaintiff's right to personal liberty and his right to the application of the *habeas corpus* rule, which is provided by Ireland's 1922 Constitution.[170] According to Chief Justice Hugh

166 For details *see* R. Coomaraswamy, 'Uses and Usurpation of Constitutional Ideology', *in* D. Greenberg, S.N. Katz, M.B. Oliverio & S.C. Wheatley (Eds.), *Constitutionalism and Democracy,* Oxford University Press, New York, 1993, pp. 159-171.

167 *See Government of the State of Kelantan v. Government of the Federation of Malaysia and Anor* (1963) MLJ 355.

168 (1989) 2 MLJ 449, 456-457.

169 *State (Ryan) v. Lemmon*, (1935) 170 IR 197.

170 For a detailed discussion of the case and the judicial decisions, *see* R. O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms', *Journal of Civil Liberties*, Vol. 4, 1999, pp. 48-75.

Kennedy, who constituted the minority of the three-judge panel of the Supreme Court, the amendment is antithetical to the rule of law and would push Ireland into a state of near anarchy. The Chief Justice argued that the court can substantially review constitutional amendments. The 17th Amendment, he stated, is "no mere amendment [...] but effects a radical alteration of the basic scheme and principles of the Constitution [...]". He regarded the 'spectacular assertion of natural law values' as possible limitations to the amendment power. The two other judges (Justice FitzGibbon and Justice Murnaghan) did not share his position: in their view the court has no other responsibility with regard to a constitutional amendment than to examine whether its adoption was formally in order, *i.e.* whether it occurred pursuant to the relevant provisions of the Constitution. The majority held that as no explicit limitations exist on the amending power (with the exception not to violate the Anglo-Irish Treaty), the amendment was therefore formally valid and there could be no substantive judicial review of amendments. It is not for judges, the majority held, to decide whether constitutional provisions are valid or not and whether a hierarchy of constitutional norms exist.[171]

The 1922 Constitution was replaced by the 1937 Constitution and the latter's 14th Amendment – adopted in 1995 – ensured citizens' right to access information about abortion possibilities available abroad.[172] The Amendment was attacked in court on the grounds that it contravenes the 8th Amendment of the Constitution, which secures the fêtes' right to life. The legal representative of the fêtes argued before the court that the judicial body may not apply any legal provision or amendments that are antithetical to natural law. The court, however, rejected this reasoning and upheld the 14th Amendment as the legitimate outcome of the popular will. Pursuant to the court's opinion – similarly to the *Ryan* case – based on the principle of the supremacy of popular sovereignty, no obstacle may be placed in the way of the people's privilege to amend the Constitution. Subsequently, the court reaffirmed its commitment to popular sovereignty in several similar rulings: "There can be no question of a constitutional amendment properly placed before the people and approved by them being itself unconstitutional"[173]; or

> No organ of the State, including this Court, is competent to review or nullify a decision of the people. […] The will of the people as expressed in a referendum providing for the amendment of the Constitution is sacrosanct and if freely given, cannot be interfered with.[174]

171 *Id.*, p. 236.

172 Art. 26 and the regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995 (1995) 9 IESC 38.

173 *Riordan v. An Taoiseach*, (1999) IESC 1, 4, <www.bailii.org/ie/cases/IESC/1999>.

174 *Hanafin v. Minister of the Environment* (1996) 2 ILRM 61, p. 183.

At the same time, the court's democratic positivism must be assessed jointly with the preamble of the Irish Constitution, which begins with a reference to the Holy Trinity and then emphasizes the Irish people's commitment to Jesus Christ.[175]

While the consequent jurisprudence of the Irish Supreme Court repeats the superior right of the people to amend the Constitution, some constitutional scholars argue that the fact that the amendment power is not limited by natural law does not necessarily mean that it may not be limited by other limits, such as explicit limits (*e.g.* the Anglo-Irish Treaty) or implicit limits, for instance, if a constitutional amendment will attempt to change the very basic structure of the Constitution.[176] Since this latter situation has never occurred yet, we can conclude that in Ireland, there is an unlimited power to amend the Constitution. But certainly there is also no explicit ban on the review power of the courts regarding substantive constitutional amendments, as is the case in Hungary since April 2013.

1.4.3 Hungary

In July 2010 the new Hungarian government elected in April adopted a law[177] that imposed a so-called 'special-tax' on severance, bonuses and other rewards for state employees who left the public service and received such financial benefits in excess of 2 million forints (~$9,000). The tax rate was set at 98% and was to be retroactively applied to all money paid out over the preceding year. The government argued that its predecessor had used severance payments as an instrument for rewarding political loyalists in the public service. At the same time, the punitive tax rate applied not only to the presumed target group of high-level former civil servants but also to teachers, doctors and other professional groups who had received such benefits after decades of service.

In October the Constitutional Court struck down the special tax in a unanimous decision.[178] Noting that justice demands the measure, the government on the very day of the decision introduced amendments to the Constitution allowing retroactive legislation in certain cases, and removing the Constitutional Court's jurisdiction to review laws pertaining – among other things – to budgetary and tax policy. According to the latter amendment, the Constitutional Court judges can only review these financial laws from the perspective of those rights (the right to life and human dignity, protection of

175 *See* Jacobsohn, 2006, p. 469.

176 *See* Y. Roznai, 'The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments', *International and Comparative Law Quarterly*, Vol. 62, No. 3, 2013a, pp. 557-597.

177 Act XC on the creation or amendment of certain economic and financial laws (2010. XC. tv. Egyes gazdasági és pénzügyi tárgyú törvények megalkotásáról, illetve módosításáról).

178 Constitutional Court decision 184/2010. (X. 28.)

personal data, freedom of thought, conscience and religion or the right to Hungarian citizenship) that they typically cannot breach. This withdrawal of the right to review financial laws created a solution found nowhere else in the world, since there is no other institution functioning as a Constitutional Court whose right of review has been restricted on the basis of the object of the legal norms to be reviewed. Therefore, in the case of laws that are not reviewable by the court, the requirement that the Constitution be a fundamental law, and that it be binding on everyone, is not fulfilled.

Together with the constitutional amendment the government also reintroduced the nullified law with unchanged provisions, even expanding its retroactive application to the preceding five years.[179] In response to various petitions seeking to invalidate both of the government's constitutional amendments, the Court soon came face-to-face with the question of whether these measures were unconstitutional and if it had the authority to review it. It issued a decision in July 2011, a year after the retroactive special tax was first adopted.

After a presentation of the wide-ranging package of petitions and of the constitutional amendments impugned by the latter, as well as the legal and constitutional provisions that the petitions cited in support of their arguments, the opinion of the majority decision issued by the Hungarian Constitutional Court, written by Judge Mihály Bihari, begins with the Constitutional Court's jurisdiction to review constitutional amendments. The reasoning on this issue is introduced by a comparative analysis that is meant to buttress the majority position, but is tendentious, one-sided, and lacking in any type of scientific foundation.[180] The selectiveness of the examples in the comparative framework is best demonstrated by the fact that even though the analysis focuses on the "constitutional courts of countries following the so-called European model of (centralized) judicial review", it conveniently 'forgets' to mention the Italian and Czech Constitutional Courts, and from outside Europe

179 Ultimately, the Court found a 'loophole' in the constitutional amendment limiting its jurisdiction and nullifying the act again in May 2011, citing a violation of human dignity. At the same time, in the context of many other laws its diminished jurisdiction did stop the Court from intervening. Ultimately, the retroactive effect of the law was greatly reduced, as it only applied to the beginning of 2010 rather than to 2005, as the government's second proposal on the issue intended (Constitutional Court Decision 37/2011. (V. 10.)). One of the civil servants also filed a petition with the European Court of Human Rights, complaining in particular that the imposition of a 98% tax on part of her severance pay under a legislation that entered into force 10 weeks before her dismissal had amounted to an unjustified deprivation of property. In its Chamber judgment of 14 May 2013 in the case of *N.K.M. v. Hungary* (Appl. No. 66529/11), the European Court of Human Rights held, unanimously, that the 98 per cent tax on part of the severance pay of a Hungarian civil servant violated her right to peaceful enjoyment of property, and therefore there had been a violation of Art. 1 of Protocol No. 1 (protection of property) of the European Convention on Human Rights.

180 This is not the first time that the Constitutional Court has employed selective comparisons to bolster its position. This is what happened in decision 154/2008. (XII. 17.), which struck down registered partnership for heterosexual partners. For a critical analysis, *see* G. Halmai, E. Polgári, P. Sólyom, R. Uitz & M. Verman, 'Távol Európától. Kiemelt védelem alacsony színvonalon' ['Far from Europe. A Low Level of Preeminent Protection'], *Fundamentum*, Vol. 13, No. 1, 2009, pp. 89-108.

also the Indian Supreme Court, which – as we saw – has the most expansive jurisprudence in this area, as well as the South African and Columbian Constitutional Courts, and the Peruvian, Brazilian, Sri Lankan and Nepalese Supreme Courts. But the analysis might also have mentioned Azerbaijan, Kyrgyzstan, Moldova and the Ukraine among the successor states of the USSR.[181] If the judge who delivered the opinion had understood the concept of unconstitutional constitutional amendments, and the closely related issue of the function of eternal constitutional clauses, then he would have realized that it makes more sense to look for examples in the those Asian, African, Latin American and European countries that – like Hungary – seek to prevent the return of a totalitarian regime by limiting total sovereignty when it comes to amending or drafting a Constitution. (That is why it should be hardly surprising to find that such legacies are absent in the Western European states that are fortunate enough not to have such a historical background.)

The second serious distortion in the comparative analysis is the argument that, according to the judge delivering the opinion, is meant to substantiate the majority position and claims that the German Federal Constitutional Court has never reached a conclusion of unconstitutionality as a result of judicial review, while the others also have only rarely arrived at such a determination. Apart from the fact that this is not even true with regard to the Indian Supreme Court – left out of the analysis – which has found Prime Minister Indira Gandhi's comprehensive constitutional reforms antithetical to the basic structure of the Indian Constitution, it is also irrelevant with regard to examining the issue of jurisdiction. Even if no constitutional amendment had ever been nullified, the underlying constitutional issue to be decided would still be whether and how the judicial limitation of the power to amend the Constitution could be substantiated. Obviously, the Court need not 'strain itself' with investigating this if the Constitution were to expressly grant it such powers. In the absence of these, however, for example in the case of the Hungarian Constitution, the body performing judicial review must itself find a solution to this dilemma by interpreting the Constitution.[182] The simplest method for doing so – which was a possibility that was open to the Constitutional Court judges – is the Austrian solution, which posits that since the Constitutional Court's right of review extends to all laws, and since laws of a constitutional rank (and in the Hungarian domestic context acts amending the Constitution) are also laws, the jurisdiction is evident.

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181 On the solutions employed by the successor states of the former USSR, *see* the Venice Commission's report: *Report on Constitutional Amendment*. Adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December, 2009); <www.venice.coe.int/docs/2010/CDL-AD(2010)001-e.asp#P310_43455>.

182 That is why it is difficult to understand why the opinion of the majority decision says, "It needs to be emphasized, however, that in all these cases it is either the given state's constitution that determines the constitutional court's right to undertake constitutional (amendment) review, or the judicial body protecting the constitution itself expands – without express constitutional authorization to do so – its jurisdiction to include constitutional review." Indeed. *Tertium non datur.*

The Hungarian Constitutional Court has already several times been confronted with the dilemma of whether unconstitutional constitutional amendments are subject to judicial review. It first faced this question in its ruling 23/1994 (IV. 29.), wherein the judicial body cited lack of jurisdiction when it dismissed a petition to review a constitutional amendment. The antecedent of this case was the Court's 3/1990 (III. 4.) decision, in which the judges ruled unconstitutional the provision of the electoral laws that said that a citizen who is abroad on the day of the balloting is considered to have been obstructed from voting. Parliament did not wish to amend the relevant law before the first democratic election, which is why it enshrined the limitation that the judges of the Constitutional Court had deemed unconstitutional in the Constitution. Prior to the 1994 election, some Hungarian diplomats on a mission abroad attacked this provision in a petition to the Constitutional Court, but the body declared that it lacked jurisdiction, even though it had previously, when the impugned provision had only been a law and not a constitutional clause, declared it to be unconstitutional in terms of substance.

The February 1998 Constitutional Court decision No. 1260/B/1997 extended the rejection of judicial review also to those decrees that give legal effect to regulations amending constitutional rules and expressed that it would only have undertaken an examination if the potential nullification of this decree would not result in any changes to the text of the Constitution. Four judges wrote a dissent to this opinion, while others submitted a concurring opinion. Judge Tamás Lábady, who was one of the dissenters in the case, argued that precisely in the specific case at hand the decree on the entry into effect did not change the text of the Constitution and could therefore have been the subject of review. Another indication of how divided the judges were was an interview statement in 1997 by the Court's president at the time, László Sólyom, who had partaken in rendering the first, unanimous decision, but was not among the signatories of the second ruling: "The majority of the Constitutional Court does not wish to examine the constitutionality of constitutional amendments, even though such a review could be justified on theoretical grounds."[183]

In his respective concurring and dissenting opinions attached to the two Constitutional Court decisions [184/2010. (X. 18.) and 37/2011. (V. 10.)] reviewing the constitutionality of the 98% special tax regulation, which had been backed up by a fairly obviously unconstitutional constitutional amendment, Judge László Kiss expressed his own view, which ran counter to the majority of the judicial body. He argued that the Constitutional Court "must do all in its power to ensure that – as a result of its interpretation of the Constitution – no contradictions exist between various constitutional provisions".

183 *See* G.A. Tóth, "'A 'nehéz eseteknél' a bíró erkölcsi felfogása jut szerephez". Beszélgetés Sólyom Lászlóval, az Alkotmánybíróság elnökével' ["'In the 'Difficult Cases' the Judge's Moral Views Come into Play". A Conversation with László Sólyom, the President of the Constitutional Court'], *Fundamentum*, Vol. 1, No. 1, 1997, p. 34.

The majority opinion on the merits begins with an examination of procedural validity, in other words, with the investigation of the eventual failures of the law-making process. In so doing, the body subjected to intense criticism the constitutional amendment practices of the Parliament constituted on 14 May 2010. Up to the point when the decision in question was handed down by the Court, Parliament had adopted 10 constitutional amendments within thirteen months (and 9 within seven months), which affected 33 provisions of the Constitution. (In other words, it would be no exaggeration to say that even before adopting the Basic Law (*i.e.*, the new Constitution) on 18 April 2011, and in fact partially even subsequently, Parliament substantially transformed the state's constitutional order.) Of these amendments only two were proposed by the government – or rather the Minister for Public Administration and Justice acting in the government's name; the rest – including the restriction of the powers of the Constitutional Court, the special tax that was to be effective retroactively covering a five-year period, the reduction in the number of MPs, the elevation of the National Media and Infocommunications Authority to a constitutional level – were adopted in response to bills presented by individual MPs and were in several cases passed with high priority, resulting in a shorter than usual procedure of law making. As far as the legal basis for the jurisdiction to determine the unconstitutional nature of the constitutional amendment process is concerned, the majority reasoning does not waste much space on explaining why it changes – as it happens, fortuitously – its hitherto generally rejecting jurisprudence; it merely notes:

> [I]t is not possible to rule out the Constitutional Court's jurisdiction with regard to the review of the procedural invalidity of constitutional provisions, since unlawfully or even unconstitutionally adopted legal provisions that suffer from constitutional invalidity are considered automatically void, as if they had never been created in the first place.

The only question the opinion fails to clarify is the following: if from a procedural angle a constitutional amendment is considered a law, then why is it not considered a law in terms of substance, *i.e.* if it may be reviewed as a law in one respect, then why not in the other. Two voices coming from opposite ends point out this contradiction, or, more specifically, this lack of real reasoning. In his concurring opinion joined by the Court's president, Péter Paczolay, Judge István Stumpf recommends dismissing the examination of both procedure and merits, while in his dissent András Bragyova proposes that both should have been undertaken,

In the examination of procedural unconstitutionality, the majority notes that the amendment procedures raise 'problems of legitimacy' because the necessary consultations (*e.g.* with the Constitutional Court regarding the consequences of limiting its powers) failed to take place, and even goes as far as to say that the successive amendment of the

Constitution, performed with the aim of realizing or achieving current political interests and ends, is highly disconcerting with respect to the requirements of democratic rule of law because it jeopardizes the stability of the Constitution. On the basis of the above, the majority notes: the procedure "obviously fails to fully satisfy the requirements of democratic rule of law". This formulation is somewhat reminiscent of Mikhail Bulgakov's 'sturgeon of second freshness' at the buffet in *The Master and Margarita;* according to the majority of the Hungarian Constitutional Court's judges, however, this fish is edible, as the final verdict ends up saying that "formally the procedure has to meet the procedural rules laid out in the Constitution and the Act on legislation". Hence the judicial body denied the petition seeking to obtain a judgment of invalidity on procedural grounds. As far as satisfying the requirements of the Act on legislation, for instance, the opinion itself states that the consultations prescribed by the said act have failed to take place. Thus a more thorough, circumspect reasoning might have at least touched upon the question of why the procedural requirements of the Act on legislation are not constitutional requirements. For example, in a rather extreme situation in which an MP introduced a constitutional amendment on a Wednesday without a preliminary process, without previous consultations or an impact study, etc., the amendment was adopted in a vote on Thursday, was promulgated on Friday, and entered into effect on Monday.

This lack of intellectual depth also extends to the substantive constitutional examination, which is to a significant degree based on the fallacious thesis that since the Hungarian Constitution does not contain any immutable provisions, the Constitutional Court does not have a standard against which to assess the substance of the constitutional amendments. Only few constitutions contain explicit 'eternal clauses,' however. The most famous is undoubtedly the German *Grundgesetz*'s Article 79(3), but as we saw above even this provision lacks an explicit jurisdictional rule that would authorize the Federal Constitutional Court to protect the immutable constitutional provisions during the process wherein constitutional amendments are enacted. It was the judges of the Court in Karlsruhe who endowed themselves with this power by construing the *Grundgesetz* accordingly. The same was true of most judicial bodies which – acting as guardians of their respective constitutions – in the process of reviewing constitutional amendments derived this jurisdiction for themselves even without an 'eternal clause'. The most prominent example is the Indian Supreme Court's doctrine on the 'basic structure' of the Constitution, which the Court used for the purposes of providing a basis for conducting a review even without an unchangeable rule and without express constitutional authorization to do so. Naturally, those who – like the author of the majority opinion – use the instrument of comparative law selectively from the start by acknowledging only solutions that buttress their thesis could easily arrive at the conclusion – which is completely divorced from the facts – that "constitutional courts generally tend to refrain from establishing for themselves the

jurisdiction to review the constitution". (Another distortion is manifest in the terminology employed by the majority reasoning, which consistently refers to reviewing the Constitution, rather than reviewing constitutional amendments, even though a review is possible before these amendments enter into effect; indeed, even a deferment of their entry into effect is conceivable in the interest of conducting a review.) Thus, in spite of the fact that the petitioners offered several standards for review, from the 'invisible Constitution'[184] over the essence and the fundamental values of the democratic state on the rule of law all the way to the *ius cogens* norm and fundamental principle – generally recognized legal principle – of international law, the majority – at least in the context of reviewing the substance of the amendments – has adhered to its previous jurisprudence. They dismissed the petitions even though the Court's reasoning contains the following passages:

> Based on the principles enshrined in international agreements, the Hungarian Constitution has immutable parts whose immutability is not based on the will of the Constitutions' creators, but rather on *ius cogens* and those international agreements to which the Republic of Hungary is party. […] The norms, principles and fundamental values of *ius cogens* together constitute a standard that all future constitutional amendments and constitutions need to satisfy.

184 The concept of an invisible Constitution was developed by the former president of the Constitutional Court, László Sólyom. The idea behind it is that the Court's jurisprudence offers a theoretical framework for evaluating the question of constitutionality, thus complementing the text of the Constitution, and in fact superseding it when the latter is amended in a way that violates crucial constitutional values. In introducing the notion, Sólyom wrote the following in his concurring opinion on the death penalty in 23/1990. (X. 31.): "The Constitutional Court must continue the work of laying down the theoretical foundations of the Constitution and the rights enshrined therein, and to create a coherent system through its decisions. This system may stand above the Constitution – which is still often amended to satisfy current political interests – as an 'invisible constitution,' serving as a stable measure of constitutionality. In so doing, the Constitutional Court enjoys a latitude as long as it remains within the conceptual confines of constitutionality." While it is true that the comments irritating politicians were not repeated by Sólyom, the content has never been negated. In an interview he said: "I have never denied that our constitutional jurisdiction, especially in the 'hard cases' [...] is at the borderline of constitution writing." (Tóth, 1997, p. 37). This was underlined in another interview that he gave in 1998, before the end of his term. He was elaborating on the misinterpretation of the term 'invisible Constitution' when the journalist confronted him with the question whether the metaphor should be unsaid all together; the response was: "No, what I have written is there. In those days the constitution was amended month by month, depending on the political climate. For this reason I wanted to point out that the Constitution is of a higher nature: a firm system based not only on technical rules but on values too. Our decisions were meant to express this value system; to clarify, to expose, to use; because from the one line paragraphs and brief sentences one cannot see it. Some focus purely on the letter in their constitutional adjudication, I have seen it both in Europe and Asia." (Cs. Mihalicz, 'Interjú Sólyom Lászlóval, az Alkotmánybíróság volt elnökével' ['Interview with László Sólyom, Former President of the Constitutional Court'], *BUKSZ,* Winter, 1998, p. 438.).

In these words, the majority binds not only the constitutional amendments reviewed here to these standards, but even the Basic Law adopted on 18 April 2011. At the same time, it appears that the majority believes that it is not within the powers of the Constitutional Court to ensure that the constitutional amendment (or the new Constitution) satisfies these standards, meaning that there is effectively no way to enforce them. Judge Péter Kovács – and he is joined by Mihály Bihari, the Constitutional Court judge who delivered the decision – however, notes that if the constitutional amendment were to contravene or grossly violate an international legal obligation that Hungary had assumed, and that was impossible to withdraw from owing to the legal or political bearings of the obligation in question, and if this conflict could not be resolved by constitutional interpretation, then the Constitutional Court would be entitled to review it. What the opinion fails to address or answer, however, is whether, for example, the requirements concerning democratic rule of law in Article 2 of the Treaty on the European Union (TEU) constitute such obligations, and whether the impugned constitutional amendments violate these requirements. In his concurring opinion, even Judge István Stumpf – who evidently believes that the dismissal of all petitions would have been the right course – points out the contradiction between the operative part of the decision that dismisses the petition and the above-cited reasoning. If that was not, in fact, his view, but in reality he thought that a substantive review of the constitutional amendments was warranted, then at least as far as this particular issue was concerned he would have attached a dissenting rather than a concurring opinion to the majority stance.

Nevertheless, in spite of dismissing the petition on account of lacking jurisdiction, the majority opinion does reserve the Court a signalling right – or rather obligation – that is just as absent from the Constitution as the possibility of judicial review. Indeed, even the standard formulated as the constitutional basis for this obligation is nowhere to be found in the written text of the Constitution. (In describing 'constitutional protection through signalling' as a phenomenon that is beyond the 'Constitutional Court's normative jurisdiction', Judge András Holló evinces a keen appreciation of the fact that signalization is situated outside the Constitution. In other words, it appears that there are indeed jurisdictions outside the Constitution.) And this standard reads as follows: "[T]he attained level of constitutional protection of rights and its system of guarantees may not be diminished." As an example, the opinion invokes a scenario wherein the limitation of the jurisdiction of the Constitutional Court goes as far as to upset the system of separation of powers that is based on checks and balances. What it fails to address, however, is when such a point is reached, nor does it explain whether the present amendment has upset the said balance. The only specifically mentioned example is a situation in which the constituent power wishes to adopt a legal provision, which had previously been nullified by the Constitutional Court, by putting it into the Constitution. As we discussed above, this is exactly what happened in 1990 with the restrictions on

suffrage that had been declared unconstitutional, without the Constitutional Court indicating this to the constituent power.

With regard to the two principal constitutional amendments impugned by petitions, the restriction of the Constitutional Court's jurisdiction and the retroactive special tax, the majority indicated to the constituent power that there are contradictions between the new provisions and some of the Constitution's existing provisions, especially the requirements of rule of law and legal security in Article 2(1). These contradictions, thus the majority, necessitate an intervention by the constituent power. Another distortion crops up here, namely that this signalling is akin to that which the judicial body indicated in its decision 23/1990 (X. 31.) on the unconstitutionality of the death penalty, where the Court called attention to the contradiction between Article 8(2), which provides the basis for the unconstitutionality of the death penalty, and Article 54(1), which fails to unavoidably rule out the most severe penalty. However, the vast difference between the two cases is that in 1990 the majority of the Court's judges resolved the contradiction by offering a constitutional interpretation – specifically in favour of Article 8(2) – while at this point the majority opinion did not see this as a workable solution.

The majority also dismissed the petitions seeking a determination that the Constitution's Articles 32/A and 70/I(2) are in breach of international agreements. The dismissal's holding that the petitions were not filed by someone entitled to make such a submission is in order. After all, pursuant to the law only the National Assembly, a permanent committee thereof, or any member of parliament, the president of the republic, the government or any of its members, the President of the State Audit Office, the President of the Supreme Court, or the prosecutor general were entitled to file such a petition. What is wrong, however, is that the Constitutional Court did not wish to exercise its right to proceed *ex officio*, arguing that the "existence of its jurisdiction or the lack thereof may be the subject of controversy in this case". Yet would it not be self-evident to clarify such controversies in the framework of an *ex officio* proceeding? In his concurring opinion, István Stumpf too points out this contradiction in the reasoning. He does so of course only with the intention of expressing his support for dismissing the petition. If he did not believe that dismissal is the right course of action, but thought instead that a substantial examination would have been necessary with regard to the constitutional omission, then he would have written a dissenting rather than a concurring opinion in this respect as well.

The majority decision also rejects the petitions that request a review of how the restriction of the Constitution Court's jurisdiction is transposed into the Act on the Constitutional Court, arguing that such a review would indirectly examine the constitutional provisions with similar content. Here the majority proved unable to resolve a contradiction, which was a necessary consequence of its wrong decision regarding the constitutional

amendment. What is at issue here is that the judicial body failed again to substantively examine the impugned legal provision, which according to the standing practice should have resulted in a dismissal rather than a rejection. Yet invoking lacking jurisdiction, which always manifests itself in dismissal, would obviously have been difficult to defend in the context of a law.

Three judges filed a dissenting opinion. One dissent was penned by András Bragyova, who saw the Constitutional Court's jurisdiction as given with respect to both petitions, *i.e.* he thought it would have been necessary to undertake a substantive constitutional review of the impugned constitutional amendments, and at least with regard to the limitation of the Constitutional Court's fundamental rights protection jurisdiction he would have held that the amendment in question was unconstitutional. The extraordinarily concise dissent trenchantly sheds light on the contradictions of the majority reasoning, and above all on the following question: If the majority believes that the Constitutional Court lacks the jurisdiction to examine the constitutionality of constitutional amendments, then how can it still proceed to examine their formal validity? With regard to the rejection of substantive examination, Bragyova believes that although the majority has not changed its previous stance, it has nevertheless reached the same conclusion with a different reasoning: while prior decisions argued that it is conceptually impossible to declare constitutional amendments that had become incorporated into the Constitution unconstitutional, now a judicial review was not ruled out on theoretical grounds but rather with reference to the Constitution's lacking express authorization to perform such an examination.

At the same time, Bragyova does not agree with the third possible argument – as we have seen above, the current decision does not unequivocally embrace this – for a rejection, according to which there can be no constitutional law standard for assessing the substance of constitutional amendments. His view is that if a Constitution contains rules with regard to the powers and the substance of constitutional amendments – as the Hungarian does – then the Constitutional Court inevitably has the jurisdiction to review the constitutionality of amendments. Article 19(3), which is a jurisdictional norm that makes amending the Constitution possible, simultaneously demarcates the limits and conditions of amendments. And it is the Constitutional Court's responsibility to review whether the amendment was enacted within the limits imposed by the said authorization. On the other hand, Bragyova argues, the Constitution does not allow certain contents in potential amendments: in that sense certain norms within the Constitution are immutable. The most important among these is Article 8(1), pursuant to which "the Republic of Hungary shall recognize the inviolable and inalienable fundamental human rights". According to this norm, which is not derived from natural law but is self-referential, human rights stem not from the Constitution but from an independent source that is superior to the former. On account of the superior nature of this source, the Constitution cannot abrogate human

rights. Another source of the Constitution's immutable content in Bragyova's view is the preamble of the 1989 Constitution, which establishes the multiparty system, rule of law, parliamentary democracy and social market economy as values that may not be subject to restrictions.

Based on the above, András Bragyova thought that the impugned constitutional amendments could have been subjected to a constitutional review, though unfortunately he himself failed to perform this test. Instead, he found it sufficient to state that the restrictions on the Constitutional Court's power to protect fundamental rights, which the petitions impugned, certainly constitute a restriction of human rights as well, and are hence in breach of the Constitution's Article 8(1).

In contrast to Bragyova's dissent, the dissenting opinion of László Kiss reveals that he not only agrees with the examination of procedural invalidity, but also with its result, which is the rejection of the invalidity claim. This is as far as his agreement with the majority goes, however, since – in concordance with the views of the petition of his earlier colleague at the University of Pécs and predecessor as judge of the Constitutional Court, Antal Ádám – Kiss believes that a substantial review should have been undertaken on the basis of the standard provided by the 'essential core' of the republican Constitution. He argues that among the fundamental structural provisions in the effective constitutional text are the rule of law, the protection of the attained level of human rights, as well as the most important principles of voting rights, furthermore the prohibition on obtaining or exercising power by violent means and on holding absolute power, and the norms regulating the right of resistance *(ius resistendi)*. Viewed in the context of the meaning they have acquired as a result of the Constitutional Court's effort to construe them, they may implicitly be conceived of as eternal clauses.

László Kiss goes a step further than Bragyova in seeking to measure the impugned constitutional amendments against a standard he has developed, in that in addition to viewing as unconstitutional the significant restriction of the Constitutional Court's jurisdiction, he also assesses that the use of a constitutional amendment to include the retroactively effective tax in the Constitution is a cause of serious incoherency and constitutes an inherent contradiction, thus upsetting the previously existing internal consistency of the Constitution, and is as such antithetical to the attained level of rule of law. Kiss' dissent also deserves praise for taking the effort to expose the one-sided comparative analysis advanced by the majority opinion, pointing, for example, to the jurisprudence of the Italian, Czech and Indian Constitutional Courts, which extends to reviews of constitutional amendments – the majority omitted any mention of this.

Judge Miklós Lévay's dissenting opinion differs from the majority opinion on only one point: he believes that the Constitutional Court has the power to review the legal act amending the Constitution. This review should have been conducted on the basis of the Constitution's 'essential core'. As an example of how the Constitutional Court is bound by

the Constitution in interpreting constitutional values, Lévay mentions as an example what Decision 47/2007. (VII. 3.) on the President of the Republic's right of awarding medals and distinctions had to say on the constitutional order of the Republic. On the basis of all the above, Lévay considers that the text of the impugned constitutional amendments contravenes certain provisions that are part of the Constitution's 'essential core', yet he does not believe that these contradictions should have been resolved by declaring unconstitutionality and nullifying the Constitution's new provisions. Instead, the Court ought to have called upon the National Assembly, as the Constitution-amending power, to terminate this contradiction.

In his dissenting opinion, László Kiss views the use of signalling instead of review as insufficient in the case of constitutional amendments that deliberately pursue political ends, such as the ones impugned by the petitions. Signalling, according to Kiss, is at best suitable for giving the constituent power the impression that if it wants to enact something at any price, then it must put it into the Constitution, and the Constitutional Court will "in all such cases stand by with its weapons lowered and unloaded, at most expressing its disapproval".

In this sense the Court created a very bad precedent indeed when the majority of Constitutional Court judges voluntarily signed the death sentence of judicial review. Taking the allegory further, one might of course object that even a decision that would have declared the constitutional amendments unconstitutional, and which would have consequently nullified them, could not have averted the passing of judicial review, neither in the short term in the context of the Constitution in force, nor in the long run in the context of the Basic Law passed on 18 April 2011 and entering into force on 1 January 2012.[185]

A committed German critic of the constitutional amendments and the Basic Law claims in his excellent blog that it would not have served the interests of constitutionalism if the judges of the Court had chosen the occasion of their own powers being at stake to change their previous jurisprudence on this question.[186] Yet, does not the question of the restriction of their jurisdiction point to a larger issue whose significance

185 The Basic Law puts considerable restriction on ex-post control of the Constitutional Court from the challenged amendment for as long as state debt exceeds half of what is referred to in the Hungarian text as 'entire domestic product', the content of which is uncertain. For a detailed critique of the Basic Law, *see* Fleck *et al.*, 2011. Available in English from the page of the Law and Public Affairs, Princeton University: <http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf>; and <www.ConstitutionMaking.org>, Resources for Constitutional Design: <www.comparativeconstitutions.org/2011/06/hungary-petition.html>.

186 <http://verfassungsblog.de/ungarn-orbn-verdoppelt-seinen-einsatz>.

points beyond protecting the Court's interests narrowly understood, and does this issue not concern Hungarian constitutionalism in its entirety? And did not Chief Justice Marshall's opinion in *Marbury v. Madison,* which instituted the previously unknown practice of judicial review in the Court's constitutional jurisprudence thereby revolutionizing constitutionalism across the globe, pertain directly to the Court's powers? The greatest problem of the majority of judges on the Hungarian Constitutional Court is precisely that they gave up on the ideal of constitutionalism.

As the events in 2012 and 2013 have shown, the question of restricting constitutional jurisdiction points to a larger issue whose significance points beyond protecting the Court's interests narrowly understood and concerns Hungarian constitutionalism in its entirety. In the last days of 2011, the Parliament has enacted the so-called Act on the Transitional Provisions to the Fundamental Law with a claimed constitutional status, which partly supplemented the new Constitution even before it came into effect. At the very end of 2012, in the Decision 45/2012. (XII. 29.), the Constitutional Court ruled that those parts of the Transitional Provisions of the Fundamental Law, which are not transitory in nature, cannot be deemed to be part of the Constitution and are therefore invalid. Although this decision did not go into the substance of the constitutionality of the Transitional Provisions, since the petition of the ombudsman asked exclusively for a formal review, the majority of the judges this time emphasized in the reasoning that in order to keep the unity of the Constitution they may consider looking at the substance of a constitutional amendment.

As a reaction to this decision, in March 2013 the MPs of the governing parties enacted the fourth amendment to the Basic Law. One part of the long amendment just elevates the annulled non-transitory provisions of the Transitional Act into the main text of the Basic Law, in some cases with somewhat modified formulation, while in others unchanged. The following provisions were lifted to the constitutional rank without any alteration: the rules on the nationalities, the authorization of mayors with administrative competences, the authorization of both the Chief State Prosecutor and the President of the Judicial Council to select another court, if they think that the competent one is overloaded with cases, as well as the extension of the restriction of the review power of the Constitutional Court in financial matters even after the state debt does not exceed half of the entire domestic product, for laws, which were enacted in the period when the debt did exceed the limit.

Among the amendments there are those that were not part of the Transitional Provisions but are also consequences of a previous CC annulment. One of them is the authorization of the legislature to set conditions for state support in higher education, for instance to stipulate that graduates of state universities remain in the country for a certain period after graduation. (Without a prior Constitutional Court decision the amendment also limits the autonomy of universities by allowing the government to supervise their financial

management.) Another strike back against the Constitutional Court for a declaration of unconstitutionality is the authorization of both the legislature and self-governments to criminalize homelessness. In a recent decision, the Court also declared a ban on political advertisements in the electoral campaign. The reaction to this is the possibility, according to the amended text of the Basic Law, to limit political ads in a cardinal law. At the end of 2012 the Court annulled the very definition of the family in the law on the protection of families as to exclusive. Now the Basic Law defines marriage and the parents–children relationship as the basis of family relationships, not mentioning extramarital relations and parenting. Also, the Constitutional Court expressed constitutional concerns towards private law limitations of hate speech, which violates the dignity of groups. The new amendment allows such limitations, to protect not only racial and other minorities, but also the dignity of the members of the Hungarian nation, who form the overwhelming majority of the population.

Finally, there is a set of amendments related to the power of the Constitutional Court itself, as a direct reaction to recent unwelcome decisions of the judges. As an indirect reaction to the readiness of the Court to review the substance of constitutional amendments, expressed in the decision on the unconstitutionality of the non-transitory elements of the Transitional Provisions, the new text of the Basic Law, while allowing the review of the procedural aspects of an amendment, specifically excludes any substantive review.

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

> The Proposal contains that constitutionality of the Fundamental Law itself and any amendments thereto may be examined by the Constitutional Court from a procedural point of view, in order to check their compliance with procedural law requirements regulated in the Fundamental Law. This is a new competence for the Constitutional Court, because under the Fundamental Law so far it had no legal possibility at all for any review of the amendments to the Fundamental Law. The provision is in accordance with the case law of Constitutional Court based on the former Constitution under which, for the last time in decision 61/2011, the Constitutional Court explicitly reinforced that it had no power to review in merits the amendments to the Constitution. Neither did the decision of 45/2012 on the Transitional Provisions overrule this former practice.

As we have seen, unfortunately none of these arguments are correct. In its mentioned Decision 45/2012. (XII. 29.), the Constitutional Court emphasized in the reasoning that it is the constitutional responsibility of the Court to protect the unity of the Constitution, and to ensure that the text of the Constitution can be clearly identified. The justices added

that an amendment of the Constitution cannot create an irresolvable inconsistency in the text of the Constitution. Therefore, they argued:

> In certain cases, the Constitutional Court can examine the continuous realization of the substantial constitutional requirements, guarantees and values of the democratic state governed by rule of law, and their incorporation into the constitution.

In this decision, therefore, the Court concluded that it had the theoretical power to review constitutional amendments for their substantive constitutionality.

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

This situation has been demonstrated by a decision of the Constitutional Court ruled on 21 May 2013 on the constitutionality of the Fourth Amendment. In its petition the ombudsman argued that, on the one hand, by failing to discuss parts of the suggested modification to the amendment at the plenary session, the Parliament has violated the formal requirements of the amendment procedure, and on the other, some provisions of the amendment, which are in contradiction to provisions of the Basic Law, endanger the unity of the Constitution, which is in his view also a formal requirement of the amendment procedure. The majority of the judges have not found any formal mistake in the amendment procedure and have therefore rejected the first part of the petition, and arguing with the lack of their competence have not reviewed the contradictions among constitutional provisions based on the ombudsman's unity of the constitution argument. The majority of the judges argued that there is no substantial limit to the amendment power, and consequently, the Constitutional Court has no jurisdiction for such a review.

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Despite the recent development in Hungary, and in other countries, like Malaysia, Singapore and Sri Lanka, where courts also reject the notion of implicit limits, claiming that the amending power is unlimited in the absence of any explicit limits, the global trend, especially after World War II, is towards acceptance of the idea of either explicit or implicit limitations on constitutional amendment power, acknowledging by Constitution drafters or courts that certain supra-constitutional principles are unamendable, *i.e.* their amendment is prohibited, and accepting the competence of constitutional courts to review these amendments and annul those that contradict the 'basic structure' or 'constitutional essentials'. A review conducted of 192 written Constitutions reveals that as of 2011, 82 Constitutions include unamendable provisions (42%) and, even more astoundingly, of 537 past and present national Constitutions, 172 Constitutions (32%) include unamendable provisions.[187] Whereas in the past unamendable provisions laconically protected mainly the form of government of the state, after World War II the protection was extended to many other features of the state, including fundamental rights and freedoms, which earlier were only protected from amendment by two constitutions: in Honduras (1848) and in Mexico (1824). The Constitution of Portugal of 1976 protects 14 constitutional subjects from amendment (Art. 288), including, for example, rights of the workers and trade unions. Protected principles in various Constitutions can be universal, common to all modern democratic societies, such as human dignity, or in particular, reflecting the specific ideals and values of a distinct political culture, such as federalism. These universal and particular principles include the state's religion, such as Islam, the official language, secularism or separation of state and church, the rule of law, multiparty system, political pluralism or other democratic characteristics, territorial integrity or independence, judicial review or independence of the courts, separation of powers, rule of the Constitutions, sovereignty of the people and the state's existence, or even such general provision as the spirit of the Constitution. This trend is linked to the general rise of 'world constitutionalism', the global spread of 'supranational constitutionalism', and judicial review, preventing the possibility of abusing the majority rule.

1.5 Transnationalism in Europe

Among the regional international standards that exert an influence on national Constitution-making and constitutional jurisprudence, the subject below will be the European Union; specifically, we will discuss in the context of the European Union and the Council of Europe

187 *See* Y. Roznai, 'Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea', *American Journal of Comparative Law*, Vol. 61, No. 3, 2013b.

how the norms that prevail within the framework of said organizations relate to national constitutional norms, and what happens when European and national norms clash. A recurring bone of contention over the past decades has been the question of what body wields the final power to construe the law: is it the European Court of Justice and/or the ECHR, or is it the respective national court with the authority to apply the national Constitution?

1.5.1 European Union Law and National Constitutional Law

1. Member states can be grouped into three different categories in terms of how they handle the relationship between European Union law and their respective national constitutional laws: states where Union law enjoys unconditional primacy, where this primacy is limited, and, finally, where national constitutional law enjoys primacy over EU law.[188] Union law enjoys unequivocal primacy in the Netherlands and Austria, while national constitutional law reigns supreme in France, Greece and Poland. The Austrian Federal Constitutional Court, for example, does not hesitate to quash constitutional provisions that run afoul of European directives.[189] Article 91(3) of the Constitution of the Netherlands of 1983 gives priority to international treaties over domestic statutes, which most scholars consider to include the Constitution.[190] The French Constitutional Council, on the other hand, deemed the Maastricht Treaty's provisions on Union citizenship, a unified Union currency, as well as the right of non-French citizens to participate in French municipal elections, as being in contravention of the French Constitution. Five years later, the Amsterdam Treaty's provisions on crossings of the external borders of EU member states were also qualified as unconstitutional.[191]

The constitutional courts of the countries that subscribe to a notion of limited Union supremacy reserve the right to review, if necessary, Union statutes in light of the fundamental rights standards set out in their own Constitutions. Italy, Germany, Denmark, Belgium, Spain, Sweden, Ireland and Great Britain, as well as the Czech Republic, Slovakia, Romania, Lithuania and Hungary, among the more recent entrants to the EU, fall into this category of countries.[192] In these new member states, the relationship between domestic constitutional law and international law is still ambiguous.

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188 *See* this categorization in Ch. Grabenwarter, 'Staatliches Unionsverfassungsrecht', *in* A. von Bogdandy & J. Bast (Eds.), *Europäisches Verfassungsrecht*, Springer, Heidelberg, 2009, pp. 121-175.

189 *Cf*. Österr. VfGH, VfSlg. 15427/1999. Cited in Grabenwarter, 2009, p. 124, note 157.

190 *See* A. Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law', *Vienna Online Journal on International Constitutional Law,* Vol. 3, 2009, p. 184.

191 *See* the Constitutional Council's Decision No. I, 92-308 of 9 April 1992 (Maastricht I), and No. I, 97-394 of 21 December 1997. In both cases France ratified the treaties in question only after the National Assembly had first amended the Constitution.

192 On the constitutional law solutions employed by the new member states, *see* A. Sajó, 'Az EU-csatlakozás alkotmányosságra gyakorolt hatása az új tagállamokban' ['The Impact of EU Accession on Constitutionalism in the New Member States'], *Fundamentum*, Vol. 7, No. 2, 2003, pp. 14-26.

For instance, the Constitution of Romania of 1991 (Arts. 11, 20), Slovakia of 1992 (Art. 11) and the Czech Republic of 1992 (Art. 10) grant supranational human rights treaties priority over domestic 'law', but it remains unclear whether this 'law' includes the Constitution.[193] In 2006 the Lithuania Constitutional Court held that EU law is superior to "national legal acts (regardless of what their legal power is), save the Constitution itself".[194]

2. Since the German Constitutional Court is the court that has most often addressed the issue of how constitutional law limits Union law, and its practice has influenced the jurisprudence of other constitutional courts falling into the above-mentioned category — including the Hungarian — it is worthwhile to trace and review changes in the German approach up until the present day.

Over the past close to four decades, the Federal Constitutional Court has developed three distinct methods and functions of performing the constitutional review of the legal norms created by the European Union's organs and institutions. In its 1974 *Solange I* decision[195] the Court examined whether the secondary Union law that the German administrative organs were required to apply was in fact compatible with fundamental rights safeguards enshrined in the German constitution. This method of constitutional control may be referred to as fundamental rights review. Following the Court's reasoning, community law is neither part of the German legal system, nor does it constitute international legal norms. Instead, it is the autonomous source of law of a *sui generis* interstate institution that is in the process of ever-greater integration. And from the existence of two wholly independent legal spheres it follows that the European Court of Justice cannot rule on the compatibility of community law with the German Basic Law, just as the German Constitutional Court cannot adjudicate whether a piece of secondary community law can be reconciled with primary law. For as long (hence the designation of the decision as 'Solange', meaning 'for as long' in German) as the two legal systems are not substantially in conflict, however, this does not constitute a violation of the Basic Law's Article 79(3), the – above-mentioned – 'eternal' clause. In the case of conflict, however, the Basic Law's more rigorous fundamental rights safeguards take precedence, however, especially considering that the Union does not boast a bill of rights codified by a democratically elected parliament. Twelve years later, in the *Solange II* decision,[196] the Constitutional Court held that in the

193 On the relationship between EU law, ECHR law and national law in the Czech Republic, Slovakia and Romania *see* M. Bobek & D. Kosai, 'Report on the Czech Republic', *in* G. Martinicio, & O. Pollicino (Eds.), *The National Judicial Treatment of the ECHR and EU Laws – A Comparative Constitutional Perspective*, Europa Law Publishing, The Netherlands, 2010, p. 117; I. Raducu, 'Report on Romania', *in* G. Martinicio, & O. Pollicino (Eds.), *The National Judicial Treatment of the ECHR and EU Laws – A Comparative Constitutional Perspective*, Europa Law Publishing, The Netherlands, 2010, p. 369.

194 Constitutional Court of Lithuania, Case No. 17/02-24/02-06/03-22/04 on the limitation of the rights of ownership in areas of particular value and in forest land, ruling of 14 March 2006, para. 9.4.

195 BVerfGE 37, 271, 1974.

196 BVerfGE 73, 229, 1986.

meantime the Union had adopted the requisite fundamental rights guarantees that are suitable for eliminating the possibility of conflicts between the European and the national legal systems, and hence the Union's protection of fundamental rights meets the level prescribed by the Basic Law.

The Federal Constitutional Court's 1993 *Maastricht* decision[197] introduced the second method of constitutional court review. The objective of the so-called *ultra vires* review, which emerged in response to petitions impugning the signing of the Maastricht Treaty by the German government, was to determine whether community legal acts were enacted within the powers granted to the EU, and, consequently, whether they may therefore be applied in Germany. Finally, 2009 saw the *Lisbon* decision,[198] which examined whether the Lisbon Treaty can be reconciled with the Basic Law's constitutional identity. Correspondingly, the latter review function may be referred to as a review of constitutional identity. The point of origin in constitutional law of both the latter decisions is the democracy principle in the Basic Law's Article 20. According to the judges of the Court, this principle rules out the possibility of Germany joining a genuine federal state of Europe. The judicial body derives this ban from the Basic Law's Article 79(3).[199] Following an exacting review of the new powers granted by the Lisbon Treaty, as well as a restrictive constitutional interpretation of certain powers, the Constitutional Court ultimately determined that the Treaty is compatible with the Basic Law.[200]

It was also on the basis of protecting German constitutional identity that in a decision in March 2010,[201] the First Senate of the Federal Constitutional Court examined EU data management regulations, holding that part of the aforementioned constitutional identity is the freedom from unwarranted management of telecommunications data, which is only allowed in exceptional cases. The central issue underlying the July 2010 *Honeywell* decision[202] was whether a controversial judgment[203] of the European Court of Justice qualifies as an *ultra vires*

197 BVerfGE 89, 155, 1993.

198 BVerfGE 123, 267, 2009.

199 The decision was subject to numerous criticisms in German academic literature on European law. *See*: A. von Bogdandy, 'Prinzipien der Rechtsfortbildung im europaischen Rechtsraum. Uberlegungen zum Lissabon-Urteil des Bundesverfassungsgerichts', *Neue Juristische Wochenschrift,* Vol. 63, No. 1-2, 2010, pp. 1-5. Bogdandy argues that the Court's reasoning would lead to the conclusion that the foreign policy goals of all the CDU chancellors of the Federal Republic, from Adenauer over Erhard all the way to Kohl, who had all pursued some form of a European federal state, were unconstitutional.

200 On the decisions of the German and some other constitutional courts on the Lisbon Treaty, *see*: The Hon. Justice S. Denham & Ms. G. Burke, 'Constitutional Courts and the Lisbon Treaty', *Irish Journal of European Law,* Vol. 16, No. 1 and 2, 2009, pp. 93-130.

201 1 BvR 256/08, 1 BvR 263/08, 1 BvR 568/08.

202 2 BvR 2661/06.

203 *Case C-144/04, Mangold*, (2005) ECR I-9981. Pursuant to the decision by the European Court of Justice, the German labour law regulations that permit an exemption from the general rule that employers may only enter into time-limited contracts with employees aged 52 or older violate the prohibition on age-based discrimination. In an article published in a daily newspaper, Roman Herzog, former Federal President and a former President of the Constitutional Court, harshly criticized the decision. *See* R. Herzog & L. Gerken, 'Stoppt den Europäischen Gerichtshof', *Frankfurter Allgemeine Zeitung*, 8 September 2010.

act and is as such inapplicable in Germany. The judges ended up rejecting the petition, but in their decision they clearly reaffirmed their theoretical powers of *ultra vires* review, leaving open the possibility of undertaking similar reviews in the future.[204] Several analyses viewed this decision as a step back from the rather pronounced notion of constitutional identity laid out by the Lisbon decision, towards the more moderate stance expressed in *Solange II*.[205]

On 4 May 2011, the Second Senate of the judicial body rendered another decision, this time concerning the constitutionality of preventive detention ('Sicherungswahrung').[206] Although the judges once again qualified the Basic Law as a set of norms superior to agreements of international law, including the European Convention on Human Rights, at the same time they laid down a requirement that the Grundgesetz must be "interpreted in a manner that [is] open to public international law"[207] ("völkerrechtsfreundliche Auslegung"). Some commentators welcome the decision as the first sign of a new notion of sovereignty being adopted by the Federal Constitutional Court, whereby the judges have bid farewell to the national hierarchy of norms, with the Basic Law atop.[208]

The 9 September 2012 decision of the German Constitutional Court judges on the laws pertaining to the Eurozone's permanent crisis management fund, the intergovernmental treaties on the ESM and the ratification of the fiscal pact, adopted by the two houses of German Parliament on 29 June 2012, also points towards a further constriction of constitutional sovereignty.[209] The petitions – including one by CSU politician Peter Gauweiler – asked the Federal Constitutional Court for an interim measure banning the ratification of the two laws pending a subsequent decision on their constitutionality, on the grounds that both the pact and the ESM-based bond purchases by the European Central Bank had been adopted without the endorsement of the German Parliament. The decision rendered by the eight judges of the Second Senate therefore authorized the Federal President to sign the laws,[210] but it did lay down certain conditions to protect sovereignty. One was that if the currently established

204 *See* M. Payandeh, 'Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice', *Common Market Law Review,* Vol. 48, 2011, p. 38.

205 *See* R.C. Van Ooyen, 'Mit "Mangold" zurück zu "Solange II"?', *Der Staat,* Vol. 50, No. 1, 2011. In an interview, Armin von Bogdandy comes to a similar assessment: G. Halmai & O. Salát, '"Léteznek egyetemes emberi jogi standardok, amelyeket mindenképpen be kell tartani". Beszélgetés Armin von Bogdandy német Európa-jogász professzorral'. ['"There Are Universal Human Rights Standards That Must Be Adhered to under All Circumstances." In Conversation with Armin von Bogdandy, Professor of European Law from Germany'], *Fundamentum,* Vol. 15, No. 2, 2011.

206 2 BvR 2365/09.

207 *Kronfeldner v. Germany* (Appl. No. 21906/09) 19 January 2012.

208 M. Steinbeis, 'Sicherungsverwahrung: Abschied von der Normenpyramide', *Verfassungsblog*, 4 May 2011, <www.verfassungsblog.de/bundesverfassungsgericht-sicherungsverwahrung/#>. UOA9T6wkSeE.

209 2 BvR 1390/12.

210 As far as the ESM was concerned, this decision was a precondition for settting up the crisis fund, since even though the other member states of the Eurozone had ratified the treaty, its actual establishment required ratification by member states that jointly provided 90% of its starting capital. For the fiscal pact, ratification by 12 of the 17 states would have been sufficient.

level of German participation in the ESM – set at a maximum of 190 billion euros in the corresponding statute – would need to be exceeded, then that would require a renewed decision by the Bundestag. The other condition was that both houses of the German legislature would need to be informed about decisions pertaining to the ESM (for instance, payments for rescue packages), in spite of the ESM's clause regarding the confidential handling of data. Practically, this serves to hinder the German government from assuming obligations backed by German taxpayers 'behind the back' of Parliament.

3. During the drafting of the 2002 December amendment of the Hungarian Constitution of 1989, which made Hungary's accession to the Union possible, the government and the opposition reached a compromise that reflected numerous elements of the German position concerning the protection of sovereignty. The final text of the amendment (Art. 2/A(1)) reads as follows:

> By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as "European Union"); these powers may be exercised independently and by way of the institutions of the European Union.

This text rather emphatically delimits the transfer of powers. The reservations for national sovereignty, made at the behest of the then-opposition parties, are primarily expressed in the requirement that powers may only be transferred "to the extent necessary in connection with the rights and obligations conferred by the treaties". Ultimately, these limitations constitute an ongoing hindrance to the effectiveness of Union law in Hungary.[211] But it is also a reflection of this understanding of national sovereignty that the reference to the primacy of EU law, which was present in the government's initial draft of the amendment, was not included in the final text.[212] Referring to the German Constitutional Court's *Maastricht* decision – but naturally failing to mention the *Solange II* decision – the former (and since 2010 current) prime minister has argued in several speeches that the primacy of community law would undermine the impact and importance of the Hungarian Constitution.

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211 *See* P. Sonnevend, 'Alapvető jogaink a csatlakozás után' ['Our Fundamental Rights after Accession'], *Fundamentum,* Vol. 7, No. 2, 2003, p. 33.

212 It is no great surprise that the Fundamental Laws of 25 April 2011, which were adopted after the opposition of 2002 took power in 2010, do not contain a primacy clause either. Instead, they incorporate a Europe clause [Article E], which provides a basis for Union co-operation and is substantially similar to that contained in the previous Constitution. In other words, it does not realize any advances, but at least it does not constitute a step back, either. For more details, *see*: N. Chronowski, 'Az alaptörvény európai mérlegen' ['The Fundamental Laws in European Balance'], *Fundamentum,* Vol. 15, No. 2, 2011.

The first test of these constitutional provisions by the Constitutional Court occurred already within the first month of Hungary's EU accession. In its Decision 17/2004. (V. 25.), the Court had to decide on the constitutionality of an act that the National Assembly had adopted on 5 April 2004, immediately before accession, regarding the implementation of two EU regulations on the commercial surplus stock of agricultural products. The President of the Republic asked the Constitutional Court for a preliminary constitutional review on the grounds that he believed the act to have retroactive effect – although it was to enter into effect on 25 May, the obligations specified therein had applied already from 1 May – and hence to be unconstitutional. The Constitutional Court affirmed the President's concerns and, correspondingly, the act could not be promulgated. Practically, the decision allows for two interpretations. The first suggests – as the Court itself argues in its opinion – that the judicial body did not really address community law since the issue fell entirely within the realm of Hungarian law. In effect, therefore, the Court – in cooperation with the President of the Republic – did nothing but convey to the Hungarian Parliament that from here on it must be mindful of the country's Union membership when it drafts and adopts legislation.[213] The other interpretation, however, posits that it was not Parliament, in fact, but the Constitutional Court itself that refused to partake in the European learning process.[214]

It is undeniable that in several subsequent decisions the Constitutional Court did take European Union law into consideration: Constitutional Court Decision No. 1304/B/2007 on waitlists (ABK 2010, 1778.), No. 94/B/2000 on damages caused by lawmaking (ABK 2002, 1098.), No. 942/B/2001 pertaining to the induction of lawyers into the bar association (ABH 2004, 1561.), No. 84/B/2001 on defining the concept of economic activity (ABH 2008, 1804.), No 74/2006 (XII. 15.) on the requirements concerning the grant to leave (ABH 2006, 870.), No. 37/2000 (X. 31.) and 23/2010 (III. 4.) on advertisements as services and advertising media as goods, respectively (ABH 2000, 293.; ABH 2010, 101.), were all mindful of Union freedoms in their given contexts. The Court continued this practice after the entry into effect of the Fundamental Laws in a Decision (32/2012. (VII. 4.)) that held that the Act on National Higher Education granted the government unconstitutional authority to regulate by decree the substance of student contracts concluded with students who received publicly funded scholarships. According to the majority opinion, the student who upon the conclusion of his/her higher education studies chooses to take a job in another

213 Pál Sonnevend, who at the time was working on the staff of the Office of the President of the Republic, argued for this position. *See* P. Sonnevend, 'Offene Staatlichkeit: Ungarn', *in* A. von Bogdandy, P.C. Villalón & P.M. Huber, *Handbuch Ius Publicum Europaeum*, Band II., C.F. Müller Verlag, Heidelberg, 2008, pp. 379-402.

214 For an expression of this critique, *see*: A. Sajó, 'Miért nehéz tantárgy az együttműködő alkotmányosság?' ['Why Is Cooperative Constitutionalism a Difficult Academic Subject?'], *Fundamentum*, Vol. 8, No. 3, 2004, pp. 89-96.

EU member state rather than Hungary, exercises his/her freedom to choose an occupation. And in addition to Hungary's Fundamental Laws, this freedom is also recognized by the European Union's basic treaty (Art. 45(1) and (2) of the Treaty on the Functioning of the European Union), and is also protected by secondary Union law as part of the freedom of movement.[215]

4. It was precisely the Hungarian Constitution-making of 2011 and the resultant cardinal acts – primarily the media law that substantially limited press freedom – adopted in the course of the process that prompted a revolutionary proposal that seeks to transform the European Union's fundamental rights protection system and was the subject of intense academic debates in 2012. The so-called 'reverse Solange' proposal, first published in Hungarian by the director of the Max Planck Institute in Heidelberg, Armin von Bogdandy, and his fellow researchers, aims at the protection of European press freedom – and of course the substance of the other fundamental rights enshrined in the European Charter of the same name – by national courts, following the pertinent, emerging jurisprudence of the European Court of Justice on Union citizenship.[216] The line of thought advanced in the proposal argues that commitment to protect human rights expressed in Article 2 of the Treaty on European Union may be invoked by any citizen in the court of a member state in opposition to such measures by the given member state that substantially violate fundamental rights. This right, which stems from Union citizenship, is derived by the authors

215 Nevertheless, neither the fact that it violated the Fundamental Law nor the breach of Union law has stopped the government from enacting into law a provision that would require students to pay tuition fees after their studies if they choose to work abroad, including the countries of the European Union.

216 Even if the European Court of Justice did not go quite that far, its Advocate General, Miguel Maduro, most certainly did in a 2008 opinion. Indeed, he even used the matching English term for 'solange' to indicate the point from where a citizen, in response to a substantial breach of the rights, laid down in the Charter of Fundamental Rights, may invoke against his/her state the protection of the Charter on the basis of European citizenship. *See*: Opinion of Advocate General Poiares Maduro, delivered on 12 September 2007, Case *C-380/05 Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioniand Direzione Generale Autorizzazioni e Concessioni Ministero delle Comunicazioni*. *See* the study compiled by the research team under Bogdandy's leadership – I had the opportunity to participate in the debate on the study, as well as to contribute to its final form by suggesting the title: A. von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei & M. Smrkolj, 'Reverse Solange. Protecting European Media Freedom against EU Member States', *Common Market Law Review*, Vol. 49, 2012. For the Hungarian language translation of the study, which actually preceded the English, *see* A. von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei & M. Smrkolj, 'Fordított "Solange". Az európai médiaszabadság védelme a tagállamokkal szemben', *Fundamentum,* Vol. 15, No. 4, 2011, pp. 5-22. The German text is in 2012. No 1 of the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*. It was released for public debate by the German-English language public law portal *Verfassungsblog* in February 2012; (*see* A. von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei & M. Smrkolj, *A Rescue Package for EU Fundamental Rights – Illustrated with Reference to the Example of Media Freedom*, Verfassunsblog, 15 February 2012, <www.verfassungsblog.de/en/ein-rettungsschirm-fur-europaische-grundrechte-dargestellt-am-beispiel-der-medienfreiheit/#>.Uenz3hbkVUT>. The debate initiated by the editors (<www.verfassungsblog.de/rettungsschirm-fr-grundrechte-ein-onlinesymposium-auf-dem-verfassungsblog-2/#.Uen2_hbkVUT>) featured comments by M. Hailbronner, D. Halberstam, D. Kochenov, M. Kumm, P. Lindseth, A.K. Mangold, D. Thym, W. Sadurski, P. Sonnevend, R. Uitz and A. Wiener.

from the recent practice of the European Court of Justice, especially the *Ruiz Zambrano* judgment, which stated the following: any measures by a member state

> [w]hich have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union violate Article 20 of the Treaty on the Functioning of the European Union (TFEU), which creates Union citizenship and its component rights.[217]

If, therefore, a member state violates the substance of any fundamental right enjoyed by a Union citizen – even in the course of purely domestic regulation that does not contain elements with cross-border effects, such as the above-mentioned media law – the court of the given state, with reference to a violation of Union law, must ensure the protection of the Union citizen's rights against the impugned act undertaken by the member state. Union law, however, must be restricted to providing a safety net ('Rettungsschirm') underlying the fundamental rights protection activities of member states' courts and constitutional courts and only kicks in in exceptional cases, namely, based on the principle formulated by the German Constitutional Court in the decision known as *'Solange II'*.[218] Pursuant to the 'reverse Solange' doctrine, one may not invoke Article 2 of the TEU in support of a Union fundamental right as long as the given member state generally provides for an adequate level of protection concerning the substance of fundamental rights. If there are systemic deficiencies in a member state's fundamental rights protection (if, for instance, the media regulations in a member state obviously disregard the substantive content of crucial fundamental rights enshrined in the Charter of Fundamental Rights, such as the freedoms of speech and press), however, then invoking a breach of the core of his/her rights is an avenue open to any Union citizen. As is apparent, the whole concept starts from the notion that there is a presumption pursuant that the human rights enshrined in TEU Article 2 tend to be enforced in member states, and only if that presumption proves untenable may a judge in a member state proceed based on Union law.[219]

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217 C-34/09, *Ruiz Zambrano*, para. 42.

218 According to the second, revised 'Solange' formula of 1983, "for as long as the case-law of the European Communities, and especially of the European Court of Justice, ensures a generally efficient level of fundamental rights protections – which is substantially equivalent to the protection extended by the Basic Laws – against the powers of the Communities, and in so far as respect for the substance of fundamental rights is ensured, the Federal Constitutional Court will not exercise its powers to rule on the applicability of secondary community law […], and will not review secondary community law on the basis of the fundamental rights standards laid down in the Basic Laws," BVerfGE 73, 339.

219 If the international law character of Union law was recognized, then the procedure of the member state judge could be discussed in Part II of this work as well, which deals with the assertion of international human rights in national courts. However, in contrast to the early jurisprudence of the European Court of Justice, which conceived of the community's legal order as part of international law (*see* the *Van Gend en Loos* judgment), nowadays the Court assumes that Union law has a 'new', 'hybrid' character.

The authors of the proposal anticipated three potential objections and sought to counter them in their work. One of these objections states that the proposal would expand – without corresponding authority – the terrain where Union law is applicable, and hence violates the prohibition of *ultra vires* by running afoul of the Fundamental Charter's Article 51, which states that the addressees of its provisions are the institutions and bodies of the Union, as well as member states in the context of their implementation of Union law. The authors 'rebut' the objection by arguing that, essentially, their proposal rests on the application of the TEU's Article 2 and hence creates no new powers, neither for member states nor for the Union. The second potential challenge suggests that there is no EU legal instrument for enforcing the rights in Article 2 apart from those laid down in the TEU's Article 7. The author's counterargument is that the TEU has a provision stating that the "Court of Justice of the European Union [...] shall ensure that [...] the law is observed", which is precisely the function their proposal wishes to discharge. Concerning the third criticism, which argues that the proposal might undermine the Strasbourg system of protecting fundamental rights, the authors believe that in light of the fact that pursuant to the Lisbon Treaty the Union accedes to the European Convention on Human Rights, the protection of Union rights will actually end up bolstering the Convention's enforcement.

The criticisms advanced in commentaries may be of a political or jurisprudential nature, or they may concern the application of the law. The most important political counterargument is that political processes in member states require political rather than legal answers at the Union level.[220] The jurisprudential criticism rests on two grounds. For one, it is based on the tension between the *Ruiz Zambrano* judgment – which gave Union citizenship new meaning – on the one hand, and the principles of transferred powers and subsidiarity on the other. Second, some critics argue that the reverse Solange concept disregards Article 52 of the Charter, pursuant to which Union law member states only have to consider the substance of fundamental rights in the context of implementing Union law.[221]

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220 Lindseth (<www.verfassungsblog.de/de/rescue-package-for-fundamental-rights-comments-by-peter-lindseth/#.Uen4NhbkVUQ>), Mangold (<www.verfassungsblog.de/en/rescue-package-for-fundamental-rights-comments-by-anna-katharina-mangold/#.Uen5TBbkVUQ>), and Thym (thym/#.Uen5EBbkVUQ) refer to arguments that are based on connecting Union citizenship and fundamental rights as 'creative lawyering.' Renáta Uitz (<www.verfassungsblog.de/de/rescue-package-for-fundamental-rights-comments-by-renata-uitz/#.Uen6OxbkVUQ>) uses precisely the Union proceedings initiated against Hungary in reaction to the Media Act to argue that at most the EU's intervention will yield the amendment of some details in the regulation, but cannot result in remedying the systemic democratic deficit. Sadurski (<www.verfassungsblog.de/en/rescue-package-for-fundamental-rights-comments-by-wojciech-sadurski/#.Uen4mhbkVUQ>) also believes that the pre-emptive warning procedure laid down in Article 7 (1) of the EU treaty is more suitable to such situations. (Just a week before Sadurski's contribution, on 16 February 2012, the European Parliament adopted its "Resolution on the Recent Political Developments in Hungary", pursuant to which it initiated a procedure based on Art. 7(1).

221 The first critique was formulated by Anna Katharina Mangold (<www.verfassungsblog.de/en/rescue-package-for-fundamental-rights-comments-by-anna-katharina-mangold/#.Uen5TBbkVUQ>), while the latter was advanced by Pál Sonnevend (<www.verfassungsblog.de/de/rescue-package-for-fundamental-rights-comments-by-pal-sonnevend/#.Uen6oxbkVUQ>).

Those who invoke concerns regarding the practical application of the proposal – or rather argue that it cannot be applied in practice – note that if politically partial courts that fail to exercise their role in protecting fundamental rights refuse to recognize the European Court of Justice's prior decisions,[222] then that could undermine the Court's authority and legitimacy.[223] The proposal's real test will come, of course, when a member state court makes a genuine attempt to apply it.

1.5.2 The ECHR and National Constitutional Courts

Just as in the context of European Union law, with regard to the European Convention of Human Rights (ECHR), too, the following theoretical and practical dilemma arises: in case of conflicts, which body is the ultimate interpreter of the Convention, the European Court of Human Rights (ECHR) or national constitutional courts?[224]

The 1950 European Convention on Human Rights, which numbers 47 contracting states today, is undoubtedly a peculiar international agreement. It creates a human rights – or in other words constitutional and fundamental rights – obligation for member states and yet has no immediate effect on their legal order; it does not affect any of the legal norms or specific instances of the application of the law in a condemned state. The ECHR has no direct power to effect commitments it has determined to apply pursuant to the Convention, in contrast to, say, the institutions of the European Union with regard to commitments derived from Union law. A given member state's legal order autonomously regulates compliance with these commitments, with the inevitable result that different states employ differing methods of compliance.

The nature of the aforementioned member state regulations will also depend on the status of the Convention in the given member state's legal order. Member states can be grouped into several categories in this latter respect.[225] States in which the Convention is on or nearly on a par with the national Constitution in terms of its legal rank constitute one extreme. Some states give the Convention constitutional rank (*e.g.*, Albania, Austria, Slovenia); and in the Netherlands, the ECHR enjoys supra-constitutional status. In Belgium, the Constitutional

222 The fact that the restrictions on the substance of fundamental rights went hand in hand with the curtailment of judicial independence is well illustrated by the transformation that the constitutional order experienced in 2011, whose details I elaborate on further below.

223 *Cf.* the commentary of Kochenov (<www.verfassungsblog.de/en/rescue-package-for-fundamental-rights-comments-by-dimitry-kochenov/#.Uen5uBbkVUQ>), Halberstam (<www.verfassungsblog.de/de/rescue-package-for-fundamental-rights-comments-by-daniel-halberstam/#.Uen7kxbkVUQ>) and Thym (<www.verfassungsblog.de/en/rescue-package-for-fundamental-rights-comments-by-daniel-thym/#.Uen5EBbkVUQ>).

224 This is the question that András Bragyova seeks to address both in general and in the Hungarian context. *See* A. Bragyova, 'Az értelmezés hatalma' ['The Power of Interpretation'], *Alkotmánybírósági Szemle*, 2011, p. 1.

225 For the categorization, *see* András Bragyova's study cited above.

Court has determined that the ECHR possesses supra-legislative but infra-constitutional rank, while the Supreme Court holds that the ECHR possesses supra-constitutional status, thereby enhancing its autonomy *vis-á-vis* the Constitutional Court: "*gue la Convention de sauvegarde des droit de l'homme et des libertes foundamentales prime la Constitution*".[226] Also, Article 2(2) of the Constitution of Bosnia and Herzegovina of 1995 specifically provides that those standards set in the ECHR shall have priority over all other laws, including constitutional amendments. In the case of Austria, the text of the Convention (in other words, not the Convention itself) is part of the Federal Constitution, supplementing its incomplete bill of rights. Consequently, it is indisputable that in Austria the Constitutional Court is the ultimate arbiter of the constitutionally integrated Convention text. The Human Rights Act adopted in the United Kingdom in 1998 also incorporated the text of the Convention, thereby remedying the lack of formal constitutional fundamental rights guarantees, which were lacking in the absence of a written Constitution. In the 1990s, Finland, Norway and Sweden too enacted new Bills of Rights, closely modelled on (and invoking) the ECHR, to fill gaps in their own Constitutions. Here the courts must give primacy to the ECHR when in conflict with legislation. Article 94 of the Netherlands' Constitution grants a status to international agreements – including the Rome Convention – that is superior to the Constitution. Some member states, including France, place the Convention below the national Constitution but above the other norms in the legal order. Another group of countries treat the Convention as other directly applicable laws in their own legal orders.

Finally, the last class of countries – and, along with Germany, Greece, Ireland, Italy, Turkey, Portugal, Spain, Hungary too falls into this category – also accords the Convention the status of a law, but without deeming it directly applicable. The *Spanish Constitutional Tribunal*, for example, enforces the ECHR as quasi-constitutional norms.[227] The *Tribunal* will strike down statutes that violate the Constitution as *per se* unconstitutional, and it interprets Spanish constitutional rights in light of the ECHR, wherever possible. Nonetheless, the *Tribunal* insists that in the event of an irreconcilable conflict between ECHR and the Spanish Constitution, the latter will prevail. In 2004, the Supreme Court of Italy (Corte Cassazione) began treating the Convention as directly applicable, while in 2007, the Italian Constitutional Court struck down a statute (concerning expropriation) as unconstitutional on the grounds that it violated property rights under the Convention.[228] According to the German Federal Constitutional Court's view, which was reaffirmed on several occasions, the Convention (though not necessarily its interpretation by the ECHR) may play an important role in the Constitutional Court's interpretations – indeed, the judges of the

226 Belgian Cour de cassation, Dutch Section, 2nd Chamber, Vlaamse Concentratie, Decision of 9 November 2004, para. 14.1.

227 *See* M.C. Soriano, 'The Reception Process in Spain and Italy', *in* H. Keller & A. Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems,* Oxford University Press, Oxford, 2008, pp. 393-450.

228 *Id.*, pp. 405-406.

Court strive to formulate interpretations that are 'open to public international law' – but they are not bound by it.[229] In its *Görgülü* decision (2005), the German Federal Constitutional Court repudiated the 'traditional theory', according to which the Strasbourg Court's judgments did not bind the domestic organs of government, including the courts. The ruling expanded the constitutional complaint procedure: individuals can now challenge (as a violation of their constitutional rights) judicial rulings that ignore or fail to properly take into account the ECHR's case law. While Görgülü significantly bolstered the status of the ECHR within the domestic order, the GFCC also noted that it would settle any conflict between the Basic Law and the ECHR in terms of the former. In the Prevention Detention ruling (2011),[230] the GFCC acknowledged a dialogic relationship with the Strasbourg Court, without abandoning its position on the primacy of the Basic Law. In practice this means that in Hungary and Germany, actions and motions directly invoking the Convention may not be filed in ordinary courts or the constitutional court.

Pursuant to the Hungarian Constitutional Court's standing practice, it follows from the dualist model of constitutionalism that the codification through Act XXXI of 1993 was a precondition of the Convention's applicability in the Hungarian legal order as an international law obligation. This follows from Article 7(1) of the constitutional text that was comprehensively amended in 1989. Incidentally, the latter constitutional provision evinces greater openness to international law and its relation to national law than Article 2(A), which is tilted considerably towards national sovereignty – even if this tendency does not necessarily manifest itself in its text, but rather at the level of statutory regulations and the Constitutional Court's jurisprudence.[231] The Constitutional Court's practice has made clear that domestic law is void if it contravenes international *ius cogens*.[232]

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229 For the relevant practice, *see* BVerfGE 74, 102, and more recently BVerfGE 111, 307 (*Görgülü* case).

230 Prevention Detention, No. 2 BvR 2365/09 (4 May 2011).

231 The Fundamental Laws of 25 April 2011 also express a commitment to the international community and to international law. Unlike the respective provision of the previous Constitution, however, Art. Q(1), which addresses this issue, does not contain the principles of rejecting war – which is part of international *ius cogens* – and of the prohibition on violence – based on the UN Charter Art. 2(4). Instead, it unites the aforementioned prohibitions and posits peace, security and sustainable development, in international cooperation with the people and countries of the world, as objectives. Art. Q(2) and (3) makes provisions regarding the relationship between international and Hungarian law; it does so respecting the requirement of compatibility and upholding the monist-adoptional system in the context of the recognized rules of international law, and the dualist-transformational system in the case of other sources of international law (international agreements and decisions rendered by certain international judicial forums). The dualist-transformational system becomes unequivocal – as compared with the effective Constitution – through the requirement of promulgation in law. In effect, therefore, the interpretive frameworks developed through the Constitutional Court's jurisprudence do not change. *See*: Chronowski, 2011, p. 2.

232 *Cf.* for example Constitutional Court Decision No. 53/1993. (X. 13.). Some construe this decision as saying that the Constitutional Court believes international *ius cogens* to enjoy primacy over the Constitution. On this, *see* P. Sonnevend, 'Verjährung und völkerrechtliche Verbrechen in der Rechtsprechung des ungarischen Verfassungsgerichts', *ZaöRV*, Vol. 57, 1997, p. 211. In his cited study A. Bragyova argues that it is conceptually impossible for an international obligation to supersede the Constitution that regulates its relations to the domestic legal order.

As to the role the Convention plays in Hungarian judicial practice, it is undeniable that whenever Hungarian legal regulations clash with the Convention, ordinary courts invariably apply Hungarian law. Thus, for example, in the case of *Bukta v. Hungary*[233] the Strasbourg Court held that the requirement to register spontaneous and instant assemblies three days in advance violates the Convention's Article 11. This has not stopped Hungarian ordinary courts, however, from continuing to insist on the registration required by law, and to deem the dissolution of assemblies lawful in its absence. Nevertheless, following the Strasbourg judgment, the Hungarian Constitutional Court, in response to a corresponding petition, quashed the legal provisions mandating the obligatory dissolution of an unregistered assembly, though while doing so, it did not oblige the legislator to legally regulate spontaneous and instant assemblies despite making out an omission.[234]

Since in the Hungarian legal order the Constitutional Court is also not required to adhere to Strasbourg jurisprudence, however, it is naturally possible to find examples in which the Hungarian judges arrived at a completely antithetical or at least different assessment of the same case. In discussing such contradictions, however, we must naturally keep in mind that while – at least until the entry into effect of the Fundamental Laws on 1 January 2012 – the Hungarian Constitutional Court fundamentally performed the abstract review of norms, the ECHR (not being a Constitutional Court) only decides on specific cases and never on the abstract constitutionality of the underlying legal norm, or even whether the latter contravenes the Convention. This is the prism through which we must assess the *Vajnai v. Hungary case*, for example, in which the Strasbourg judges ruled that by holding the Workers Party's (the communist party in Hungary) leader criminally accountable for wearing a red star, Hungary had in the given context violated Article 10 of the Convention.[235] What the Strasbourg judges did not say, however, and in fact could not say, is that the criminal law sanctioning of the display of all totalitarian symbols, whatever the context or conditions may be, violates the Convention. All we can state for certain, therefore, is that the Strasbourg judges agreed with Decision 4/2013 (II. 21.) of the Hungarian Constitutional Court, which declared unconstitutional the law banning the display of extremist symbols on the grounds that it violated the free expression clause. This recent decision was a reversal of its earlier decision on extremist symbols, bringing it much more into line with the rest of its own jurisprudence over the last twenty years. The

233 *Bukta et al. v. Hungary* (Appl. No. 25691/04), 17 July 2007.

234 Constitutional Court Decision No. 75/2008. (V. 29.). This decision also supports an earlier statement made by the Constitutional Court's former president, László Sólyom, in the context of the Court's practice concerning the freedom of expression, saying that the Court seeks to consider Strasbourg case law in rendering its own decisions. L. Sólyom, 'The Interaction between the Case-Law of the European Court of Human Rights and the Protection of Freedom of Speech in Hungary', *in* P. Mahoney, F. Matscher, H. Petzold & L. Wildhaber (Eds.), *Protection des droit de l'homme: la perspective européenne/Protecting Human Rights: The European Perspective. Mélanges à la mémoire de/Studies in Memory of Rov Ryssdal*, Carl Heymanns, Köln, 2000, p. 1317.

235 *Vajnai v. Hungary* (Appl. No. 33629/06), 8 July 2008.

new decision was also clearly influenced by the mentioned similar rulings at the ECHR in regard to Hungarian law. But the Strasbourg judges most probably disagree with the new provision of the Criminal Code titled 'the criminal sanctioning of the use of totalitarian signs', enacted in April 2013, after the Constitutional Court decision that amends the criminal code to allow for prosecuting the distribution of the signs of various totalitarian regimes. This includes the swastika, the SS sign, the arrow cross, the hammer and sickle and the red star. The law bans the use of these signs when the distribution or public display is meant to disturb the public order.

The two cases wherein the ECHR decided on petitions in which the underlying statute was a Hungarian constitutional provision do not allow us to assess what position the judges of the Hungarian Constitutional Court would have espoused in the given context, for – as we discussed above – thus far the Court has not been willing to engage in the constitutional review of constitutional provisions. One such case was *Rekvényi v. Hungary*, in which the petitioner complained – ultimately unsuccessfully – against the ban on members of the police force joining political parties.[236] In the *Kiss v. Hungary* case, the complainant turned to Strasbourg because of the constitutional block on the suffrage of persons who are under guardianship because of their diminished discretionary ability. The complainant's petition was successful, as the Court held that the automatic deprivation of voting rights in such instances constitutes a violation of the Convention.[237] In this, as in other cases, if the ECHR declared a domestic constitutional provision incompatible with the ECHR, under Article 50 of the ECHR it granted the injured party just reparation, but under Article 53, it was up to the state – in this case Hungary – to amend the domestic law that was declared incompatible with the ECHR. Actually, Hungary did not modify the Constitution and even put the same provision into its new Fundamental Law of 2011.[238] Therefore, one can argue that ECHR judgments do not have any direct effect on the Constitution or validity of the national measure that was found to have breached the Convention.[239]

There were two cases, however, in which the ECHR and the Hungarian Constitutional Court unequivocally took opposite stances. In one of the cases it was not actually a specific decision by the Constitutional Court that clashed with the Strasbourg judges' opinion,

236 *Rekvényi v. Hungary* (Appl. No. 25390/94), 20 May 1999.

237 *Kiss v. Hungary* (Appl. No. 38832/06), 20 May 2010.

238 The same happened in the case *Sejdie and Finci v. Bosnia and Herzegovina*, where the ECHR held that a constitutional provision limiting the right to be elected in parliamentary and presidential elections to people belonging to Bosniak, Croats and Serbs (the 'constituent people' of Bosnia and Herzegovina) is discriminatory, and the disqualification of Jewish and Roma origin candidates constitutes a breach of the ECHR. *Sejdic and Finci v. Bosnia and Herzegovina*, Appl. No. 27996/06, European Convention on Human Rights, Judgment of 22 December 2009. Following that judgment, Bosnian authorities began proceedings to implement the decision, but so far no constitutional amendment regarding the discrimination against minority groups in election has been made.

239 *See* L. Garlicki & Z.A. Galicka, 'External Review of Constitutional Amendments? International Law as a Norm of Reference', *Israel Law Review*, Vol. 4, 2011, p. 363.

but its consistently applied practice that it only publishes the petitions it receives if the petitioner expressly provides his or her consent, even in cases in which it undertook an abstract review of the constitutionality of norms based on a so-called popular action (an institution that allows for anyone to request an abstract review of constitutionality). Moreover, a Member of Parliament who sought to protest against the liberalization of drug regulations had initially filed the underlying petition whose publication the Court denied. The Civil Liberties Union, human rights organizations, sought to achieve the publication of the petition by going through the ordinary court system, arguing that the contents of the petition qualify as public interest data and should therefore be published. Hungarian courts rejected this request at two different levels, which led to the Strasbourg complaint. The ECHR determined that Article 10, which also encompasses freedom of information, had been violated.[240] The fact that the legislator saw no need to amend the existing regulations in light of the judgment, and, moreover, that the Constitutional Court itself failed to adjust its existing practice, is a powerful illustration of the lacking direct effect of Strasbourg decisions. This is especially so since the Constitutional Court could have easily implemented the requirement arising from the judgment without any statutory amendments, simply by construing the petition as public interest data.

An example of Budapest and Strasbourg decisions being really diametrically opposed was the case of *Korbély v. Hungary*. There the Strasbourg judges held that the complainant, who had been convicted in the so-called 1956 fusillade trial, had suffered a breach of his rights enshrined in Article 7 of the Convention when his deed was classified as an imprescriptible act.[241] This assessment by the court was made possible by a Constitutional Court decision holding that the events of the 1956 Revolution fall under the Common Article 3 of the Geneva Conventions.[242]

1.6 The Constitution-Making of the Hungarian Transition and External Impacts

In the course of designing the new constitutional order through the comprehensive constitutional amendment adopted during the 1989/1990 regime transition, the 'constitutional fathers' drew vastly from both various global and European international conventions as well as individual constitutional solutions used in other – mainly European – countries. The bill of rights, for instance, leaned in part on the International Covenant on Civil and Political Rights and in part on the European Convention on Human

240 *Társaság a Szabadságjogokért v. Hungary* (Appl. No. 37374/05), 14 April 2009.

241 *Korbély v. Hungary* (Appl. No. 9174/02), 19 September 2008.

242 Constitutional Court Decision No. 53/1993. (X. 13.). For a critique *see*: A. Bragyova, 'Igazságtétel és nemzetközi jog' ['Efforts at Providing Justice and International Law'], *Állam- és Jogtudomány*, Vol. 35, 1994, p. 213.

Rights, while the powers of the Constitutional Court were delineated to reflect those of its German counterpart. The Fundamental Laws adopted in 2011, however, strove to rely to the greatest possible degree on Hungarian historical traditions and to actually eliminate the main safeguards of global constitutionalism, even as they retained the framework of the 1989 parliamentary system.

1.6.1 Transition and Democratization

Before discussing the special features of the Hungarian Constitution making in 1989-1990, and especially the democratic values expressed in it, we have to clarify our understanding of the transition to and the consolidation of democracy in general and in the case of Hungary.

Martin Seymour Lipset, using Max Weber's research, discusses two major preconditions of democracy, the institutional and the societal. The institutional or procedural one requires a Constitution, a political elite in power, which makes the most important decisions, and a legitimate alternative group, aiming at running for power. Concerning the societal or substantive preconditions for the stability of democracy, Lipset differentiates between two dimensions: the economic situation and the legitimacy of the political system. In the Weberian approach by Lipset "legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society".[243]

In his famous article Transitions to Democracy, which later became one of the emblematic works of transitology, Dankwart Rustow differentiates between three phases of the emergence of democracies: the rise of the new elite being the preparatory, the second in which the decision on the new political system is being made, and the stabilization of the new institutions as the third one.[244] Following Rustow, Robert Dahl investigated the preconditions of the emergence of democracy, and, similarly to Lipset, separated the institutional and the societal dimensions. The aims of the institutions are, first, to enable the citizens to work out their preferences, like freedom of assembly and speech and information; second, to make them possible to express these preferences, like free elections, and third, guaranteeing that the preferences influence the political decisions.[245] Among the societal dimensions there are some that are preferable, like a plural economic system, and that are disadvantages for democracy, like a centralized economy.[246]

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243 S.M. Lipset, *Political Man,* Anchor, New York, 1963, p. 64.

244 D.A. Rustow, 'Transitions to Democracy: Toward a Dynamic Model', *Comparative Politics*, Vol. 2, No. 3, 1970, pp. 337-363.

245 *See* R.A. Dahl, *Polyarchy,* Yale University Press, New Haven, 1971, p. 3.

246 *Id.*, p. 203.

The study of Guillermo O'Donnell and Philippe Schmitter uses the more sophisticated terminology of transition, liberalization and democratization. Transition means the change of the political system, while liberalization means the broadening of human rights, which does not necessarily influence the political decision-making process. Another theory for post-conflict societies suggests a more gradual process, where liberalization is being delayed rather than rapidly implemented. To do this, certain political and economic freedoms should be limited in the short run.[247] Democratization is defined from the perspective of the citizen's rights and duties. According to the authors, the democratic character of a system means not only the citizens' equal rights in the decision-making process of the community, but also their readiness to obey these decisions.[248] The novelty provided by O'Donnell and Schmitter is that they try to define the decisive elements that influence the emergence of the new political system not only at the very beginning but also during the transition. One of these elements is the way of dealing with the past. Another important aspect of democratization was emphasized by Adam Przeworski, who investigated the division of the elites, differentiating between hardliners and reformers within the old elite and between moderates and radicals within the new one.[249]

In their comprehensive book[250] Juan Linz and Alfred Stepan introduce the term consolidated democracy, which is based on the procedural, institutional and substantive, behavioural elements. According to Linz and Stepan, the criteria of consolidated democracy are not only the democratic institutions, but also the absence of political actors that aim to overthrow these democratic institutions, and the democratic decisions are generally accepted by the public opinion. Similarly to Lipset, Linz and Stepan's structural view conceptualizes the process of democratic consolidation as taking place on two levels, the first one being procedural/structural and the second more substantive.

On the first, institutional level, those political institutions that have been created during the transitions must be strengthened. Linz and Stepan single out three such institutions. First, without what they call a 'usable bureaucracy' a democratic state cannot effectively exercise its claim to a monopoly of the legitimate use of force in its territory.[251] Second, democratic consolidation must involve the strengthening of the core institutions of a

247 R. Paris, *At War's End: Building Peace after Civil Conflict*, Cambridge University Press, New York, 2004.

248 G. O'Donnel & P. Schmitter, 'Tentative Conclusions about Uncertain Democracies', *in* G. O'Donnel, P. Schmitter & L. Whitehead (Eds.), *Transitions from Authoritarian Rule: Prospects for Democracy,* The Johns Hopkins University Press, Baltimore, 1986.

249 A. Przeworski, *Democracy and the Market. Political and Economic Reforms in Eastern Europe and Latin America,* Cambridge University Press, Cambridge, 1991.

250 J.J. Linz & A. Stepan, *Problems of Democratic Transition and Consolidation, Southern Europe, South America, and Post-Communist Europe,* The Johns Hopkins University Press, Baltimore, 1996a.

251 J.J. Linz & A. Stepan, 'Toward Consolidated Democracies', *in* L. Diamond, M. Plattner, Y. Chu & H. Tien (Eds.), *Consolidating the Third Wave Democracies: Themes and Perspectives*, John Hopkins University Press, Baltimore, 1997, p. 20.

democratic 'political society': political parties, elections, political leadership and inter-party alliances.[252] Third, the structures that ensure horizontal accountability, constitutionalism, and the rule of law must be strengthened. A particularly vital element for the consolidation of democracy is therefore a state governed by the rule of law. Besides these political institutions, a strong civil society and an institutionalized economic society need to be present for democracies to consolidate.

The second level concerns the normative commitment to democracy on a behavioural and attitudinal level. The two levels are interrelated because the legitimation of democracy that is necessary among political actors and the citizenry at large (the second level) cannot be achieved without some degree of effective governance by the new democratic institutions (the first level). This is the basis of the definition given by Larry Diamond, who construes consolidation as

> the process of achieving broad and deep legitimation, such that all significant political actors, at both the elite and mass levels, believe that the democratic regime is the most right and appropriate for their society, better than any other realistic alternative they can imagine.[253]

In a consolidated democracy, the rules, institutions and constraints of democracy come to constitute 'the only game in town'[254] for political competitors, the only viable framework for governing the society and advancing their own interests. Linz and Stepan stress that legitimation must be more than a commitment to democracy in the abstract. By positing overlapping behavioural (*i.e.*, when no significant political group threatens to overthrow the democratic regime), attitudinal (when the citizens prove a strong degree of commitment to democracy) and constitutional dimensions of consolidation, they claim that legitimation must also involve a shared normative and behavioural commitment to the specific rules and procedures of the country's constitutional system.[255]

All these elements reveal the extended nature of the consolidation process: it is related not only to the development, strengthening and good functioning of democratic institutions, but also to the entrenchment and deepening of democratic attitudes, both by the elites and by the masses. Consolidation of democracy thus implies, and indeed requires, the emergence of a democratic political culture, which Larry Diamond posits as a central factor in the consolidation of democracy.[256] Political culture – both among the masses and

252 *Id.*, p. 17.

253 L. Diamond, *Developing Democracy: Toward Consolidation*, Johns Hopkins University Press, Baltimore, 1999.

254 J.J. Linz & A. Stepan, 'Toward Consolidated Democracies', *Journal of Democracy*, Vol. 7, 1996b, pp. 14-33.

255 Linz & Stepan, 1997, pp. 15-16.

256 L. Diamond, 'Introduction: Political Culture and Democracy', *in* L. Diamond (Ed.), *Political Culture and Democracy in Developing Countries*, Lynne Rienner, Boulder, 1994.

especially among the elites – is a crucial issue in post-communist East Central Europe. Indeed, if there is no doubt that the countries in East Central Europe are consolidated on the procedural level, full consolidation on the substantive level leaves much to be desired mainly because the political culture in these countries is not strong enough.

On the other hand, Linz and Stepan – similar to O'Donnell and Schmitter – take both the situations, before and during the transition, into consideration. The most important pre-transitional elements influencing democratization are the national and state unity of power, the original political system and the economic situation, while during the transition the decisive factors are as follows: the behaviour of the old elite, the strategy of the new one, the external influences, the change of legitimacy of the political system and the way of the Constitution-making.[257]

Owing to the efforts in the international relations first formulated by Woodrow Wilson in World War I to spread democracy in the whole world, besides these more or less descriptive definitions of democracy, more and more value-based definitions were used. One of them is the concept of liberal democracy, which sets the following requirements: protection of the rights of minorities, the independent judiciary and the rule of law, as well as the respect for basic human rights and the civil society. The political organization of a liberal democratic state must be 'republican', which means a form of government in which executive and legislative powers are separated, 'equality among citizens' secured and tyranny avoided.[258]

Similarly, Francis Fukuyama defines liberal democracy as a combination of two sets of institutions: first, democratic institutions that ensure that governments are accountable to popular choice, and second, liberal institutions that provide for a rule of law, which means the government's acceptance of the sovereignty of a pre-existing body of law representing a social consensus on rules of justice.[259] In contrast to this, the illiberal democracy is characterized by the use of violence by the state power and the ignorance of fundamental rights.[260]

The question whether in a given time it satisfies the notion of a liberal democracy is valid even in democracies of several hundred years, like the United States. This is what Ronald Dworkin said in 2006 in his book *Is Democracy Possible Here?* when George W. Bush was running for his second presidency.[261] He argued that recognizing shared key principles of personal and political morality can make substantial political argument possible, but democracy could become inoperable if contempt is not replaced with mutual respect. Not

257 Linz & Stepan, 1996b.

258 *See* this Kantian definition of republicanism in A. Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe', *Journal of Global Constitutionalism*, Vol. 1, 2012, p. 56.

259 *See* F. Fukuyama, 'Transitions to the Rule of Law', *Journal of Democracy*, Vol. 21, No. 1, 2010, p. 33.

260 *See* the concept of liberal and illiberal democracy *in* Diamond, 1999 and F. Zakaria, *The Future of Freedom. Illiberal Democracy at Home and Abroad*, W.W. Norton & Company, New York, 2003.

261 R. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate*, Princeton University Press, Princeton, 2006.

recognizing such shared principles can make substantial political argument impossible and raises questions whether the promise of liberal democracy can be realized, as is argued by Dworkin to be the case towards the end of the presidency of George W. Bush, endangering the legitimacy of American democracy. By following the "majoritarian" principle, the President ignores the interests of other groups that are in a minority and with that the realization of the "partnership" concept of democracy becomes impossible. As a remedy, Dworkin, among others, recommends limiting campaign financing; establishing school courses in political philosophy as well as public broadcasting stations.[262]

Six years later, at the end of President Obama's first term, after the 2011 federal debt limit crisis, two congressional scholars, Thomas Mann and Norman Ornstein, published their book *It's Even Worse Than It Looks*, analysing the dysfunctionality of the American democracy and the constitutional system.[263] The authors identified two major sources of this dysfunction. The first is the fact that the parties are so polarized and "vehemently adversarial" as to resemble European parliamentary parties. In a parliamentary system the majority is not inhibited from enacting its agenda, even if there are stridently adversarial voices. In contrast to this, in the presidential constitutional system of the United States, with its strict separation of powers, the majority is limited. This implies that effective government rests on negotiation and compromise, which does not work in the current American situation, owing to the asymmetric nature of the polarization, which is the second source of dysfunction. Asymmetry means that the Republican Party is "an insurgent outlier – ideologically extreme, contemptuous of the inherited and social and economic policy regime; scornful of compromise, unpersuaded by conventional understanding of facts, evidence and science; and dismissive of the legitimacy of its political opposition". This analysis was proven in the fall of 2013, when Republicans wanted and had the power to shut down the government.[264]

Francis Fukuyama's value-based democracy concept is based on the universality of democratic values. Although he argues that national and religious ideologies, strong social tensions and the lack of civil society can hinder the emergence of democracy, democracy can strike roots all over the world.[265] In a more recent writing, Fukuyama refers to some

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262 Especially critical towards the latter proposal P. Starr, *see* 'Liberalism for Now' (2009), *The New York Review of Books,* Vol. 56, No. 12, 16 July 2009.

263 Th.E. Mann & N.J. Ornstein, *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*, Basic Books, New York, 2012.

264 Actually it was only 80 radical Tea Party members who forced House Republicans. These 80 members represent just 18% of the House and just a third of the 233 House Republicans. They were elected with 14.5 million of the 118 million votes cast in House elections last November, or 12% of the total. In all, they represent 58 million constituents, just 18% of the population. This means that a small minority in Congress could hold up not only their own party but the whole government as well, because they do not like 'Obamacare', The Affordable Care Act, a policy passed by Congress, signed by the president and affirmed by the Supreme Court. *See* Th.L. Friedman, 'Our Democracy Is at Stake', *The New York Times,* 3 October 2013.

265 F. Fukuyama, *The End of History and the Last Man,* Penguin Books, London, 1992.

successful democracies such as Israel and India deviating from modern liberal practice by accommodating traditional religious-based rules. He argues that while Western liberals should certainly ensure that law should act as a check on arbitrary power, they should not promote that law should match Western cultural values if its effect is to weaken respect for the law as such.[266] In contrast to this, Samuel Huntington thinks that the definition of democracy is bound to the Christian-Western civilization.[267]

In their more recent paper, Kalypso Nicolaidis and Rachel Kleinfeld use the term liberal democracy as a holistic picture of the separate but interwoven elements of the rule of law, formal democracy and human rights.[268] Formal democracy in this sense is a prerequisite for the rule of law, while human rights mean guaranteed equal human dignity and protection of minorities. In this concept, rule of law contains a living list of the following principles from the point of view of citizens: (a) Citizens are free from the arbitrary use of power, (b) Citizens benefit from legal certainty, (c) All citizens are treated as equal before the law, (d) All citizens are granted accessible and effective justice, (e) All citizens can claim their rights, including a substantial degree of "law and order".[269] Political arrangements, where free and fair elections are not granted, are not democracies. One needs to note that Hannah Arendt, in *The Origins of Totalitarianism* (1951), has pointed out that totalitarian regimes can be rooted in liberalism when aiming to answer issues unanswered by liberalism.[270] It is known that the answers given by Nazism and Communism were the wrong answers, but not seeing the challenges of liberalism in relation to totalitarianism leads to wrong conclusions. Such is the case of Francis Fukuyama, who after the Central-Eastern-European revolutions could not envision illiberal backsliding and saw the advent of Western liberal democracy as a signal to the end point of humanity's sociocultural evolution and the final form of human government, and pictured the global victory of liberalism and the 'end of history'.

A system is illiberal where besides formal democracy, both or either of the other two elements are missing. Theories similar to this talk about 'electoral' and 'delegative' democracy in cases where the principle of democracy is present only in the elections and the liberal and republican dimension of government accountability is not present.[271] There are

266 *See* Fukuyama, 2010, p. 42. Here Fukuyama also refers with approval to Noah Feldman's book, *The Fall and Rise of the Islamic State* (Princeton University Press, Princeton, 2008, pp. 111-117), claiming that the rise of Islam in the early 21st century and the widespread demand for Sharia throughout the Arab world reflects a nostalgia for a time when executive power was supposedly limited by a genuine respect for law.

267 S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Touchstone Books, London, 1997.

268 K. Nicolaidis & R. Kleinfeld, 'Rethinking Europe's "Rule of Law" and Enlargement Agenda: The Fundamental Dilemma', *Sigma Paper,* No. 49, 2012, pp. 10-11.

269 *Id.,* pp. 54-58.

270 *See* J. Schell, 'Introduction', *in* H. Arendt, *On Revolution,* Penguin, London, 2006, XIX.

271 *See* G. O'Donnell, 'Delegative Democracy', *Journal of Democracy*, Vol. 5, 1994, p. 55.

authors who distinguished between two forms of illiberal Constitutions.[272] Ran Hirschl summarizes theocratic Constitutions by outlining four main elements: (1) adherence to some or all core elements of modern constitutionalism, including the formal distinction between political authority and religious authority, the existence of a constitutional catalogue of rights, and the establishment of some form of active judicial review; (2) the presence of a single religion or religious denomination that is formally endorsed by the state as the "state religion"; (3) the constitutional enshrining of the religion, its texts, directives, and interpretations as a or the main source of legislation and judicial interpretation of laws – essentially, laws may not infringe upon injunctions of the state-endorsed religion; and (4) a nexus of religious bodies and tribunals that not only carry symbolic weight, but that are also granted official jurisdictional status and operate in lieu of, or in an uneasy tandem with, a civil court system.[273] In the communitarian Constitutions, such as the ones in South Korea, Singapore and Taiwan, the well-being of the nation, the community and society receives utilitarian priority rather than the individual freedom principle of liberalism.

At the same time illiberal Constitutions that embrace a minimum level of constitutionalism are not the same as dictatorships. Even when there is a formal written Constitution, a dictatorship is not a constitutional system. Therefore, China, Vietnam, Cuba, Belorussia, the former Soviet Union and former communist countries cannot be considered to be constitutional systems,[274] even though formal written Constitutions are found as often in autocracies as in democracies. But as William J. Dobson argues in his book *The Dictator's Learning Curve*, "today's dictators and authoritarians are far more sophisticated, savvy, and nimble than they once were".[275] They understand that in a globalized world the more brutal forms of intimidation are best replaced with more subtle forms of coercion, and it is better to appear to win a contested election than to openly steal it. Therefore they work in a more ambiguous spectrum that exists between democracy and authoritarianism, and

272 *See* L.-A., Thio, 'Constitutionalism in Illiberal Polities', *in* M. Rosenfeld & A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, pp. 133-152. Some political scientists are inclined to believe that Constitutions themselves and their institutional structures are much less important in the distortion of liberal constitutionalism than political culture. Such is the argument that says that the reasons for the ungovernability of the United States lie deeper than the institutional structure of the country. *See*: Th.L. Friedman & M. Mendelbaum, *That Used to Be Us: How America Fell behind in the World It Invented and How We Can Come Back*, Farrar, Straus and Giroux, New York, 2011, p. 33. This view is contradicted by S. Levinson's excellent monography. *See* S. Levinson, *Framed. America's 51 Constitutions and the Crisis of Governance*, Oxford University Press, Oxford, 2012, p. 6.

273 *See* R. Hirschl, *Constitutional Theocracy,* Harvard University Press, Cambridge, 2010, p. 3.

274 In contrast to this, there are opinions, according to which these latter, anti-constitutionalist regimes can be considered to be manifestations of illiberal constitutionalism. *See* K.L. Scheppele, 'The Agendas of Comparative Constitutionalism', *Law and Courts*, Vol. 13, 2003, pp. 5-22.

275 W.J. Dobson, *The Dictator's Learning Curve. Inside the Global Battle for Democracy,* Doubleday, New York, 2012, p. 4.

from a distance, many of them look almost democratic. Their Constitutions often provide for a division of powers among the executive, the legislature and the judiciary – at least on paper. They are also not particularly fearful of international organizations. Even a threat of foreign or international intervention and criticism can be a useful foil for stirring up nationalist passions and encouraging people to rally around the regime. Therefore, comparison of authoritarian and democratic Constitutions shows that although authoritarian Constitutions tend to be less specific, protect fewer rights and provide for less judicial independence, they do not contain higher levels of executive power in their texts and do not necessarily differ from their democratic counterparts with respect to rights provision.[276]

As many scholars have noted, there is an incredible range of non-democratic, non-authoritarian regimes, and their relationship with each other and democracy is often imperfect and unclear.[277] The problem of countries in this "grey zone"[278] inspired a lot of concepts that were created to capture the mixed or "hybrid"[279] nature of "these regimes". Steven Levitsky and Lucas A. Way introduced the term "competitive authoritarianism" for a distinctive type of 'hybrid' civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage *vis-á-vis* their opponents.[280] This theory does not try to solve the problems of all hybrid cases,[281] but categorizes only regimes meeting special criteria such as 'competitive authoritarianism', and indicates 35 regimes, which were or became competitive authoritarian during 1990 and 1995. These 35 constituted around one-sixth of all countries in the world at that time. For the authors, a way of describing regime change and stability is the interplay of domestic and external factors, the latter being more important and divided into two parts. They define three possible outcomes: democratization, unstable authoritarianism and stable authoritarianism. The 'high linkage to the West' tends to cause democratization, high organizational power

276 Z. Elkins, T. Ginsburg & J. Melton, 'The Content of Authoritarian Constitutions', *in* T. Ginsburg & A. Simpser (Eds.), *Constitutions in Authoritarian Regimes,* Cambridge University Press, Cambridge, 2014 (Forthcoming), p. 162.

277 *See* L. Diamond, J. Linz & S.M. Lipset, *Democracy in Developing Countries,* Lynne Rienner, Boulder, 1988.

278 The term 'grey zone' is used by Georg Sørensen. *See* G. Sørensen, 'Democracy and Democratization', *in* K.T. Leicht & J.C. Jenkins (Eds.), *Handbook of Politics: State and Society in Global Perspective*, Springer Science and Business Media, London, 2010.

279 The term 'hybrid regime' was introduced by Terry Linn Karl in the mid-1990s. *See* T.L. Karl, 'The Hybrid Regimes of Central America', *Journal of Democracy,* Vol. 6, No. 3, 1995, pp. 72-96.

280 *See* S. Levitsky & L.A. Way, *Competetive Authoritarianism. Hybrid Regimes after the Cold War,* Cambridge University Press, New York, 2010, p. 5.

281 The authors acknowledge the fact that there are hybrid regimes that do not fall under either of the authoritarian categories. These are, first, 'tutelary regimes', where elected governments are constrained by non-elected religious, military or monarchic authorities; second, 'semi-competitive' (or restricted) democracies, where a major party is excluded from elections; and, third, 'constitutional oligarchies' (or 'exclusive republics'), where a major segment of the adult pupulation is denied suffrage. As opposed to Huntington, who talked about the (third) wave of democratization, Levitsky and Way are talking about the 'wave of hybridization'. *Id.* p. 20.

brings authoritarian stabilization and in the case of contradictory powers at play, the result will often be unstable authoritarianism.[282]

As opposed to Levitsky and Way, other scholars argue that all non-democratic, non-authoritarian regimes can be called 'hybrids' rather than democracy or authoritarianism with adjectives.[283] This approach tries to redefine the overarching concept of electoral and non-electoral regimes and revive a multidimensional conceptualization of regimes based on competitiveness, tutelary interference and civil liberties.[284]

The terms illiberal and non-consolidated democracy are antithetical to liberal and consolidated democracy. Similar terms are used also for describing hybrid regimes, which are neither democratic nor authoritarian.[285] Certainly a significant part of countries that jettisoned authoritarian regimes between 1974 and 1999 (the 'third wave' of transitions) did not develop into stable democracies by the turn of the century.[286] One of these terms is 'managed democracy', used for Putinism, which is, among other things, characterized by rigged, engineered, phony elections, simulated management.[287] The other term is 'democradura,' used in the 1970s and 1980s for some Latin American systems by Guillermo O'Donnell and Philippe Schmitter.[288] But also the term 'post-democracy', first used by Colin Cruch, refers to democracies of countries in crisis.[289]

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282 According to critics, the Western linkage is the only casual factor theorized by Levitsky and Way to explain the democratization of competitive authoritarian regimes in the post-Cold War era. *See* D. Slater, 'Competitive Authoritarianism: Hybrid Regimes after the Cold War. By Steven Levitsky and Lucan A. Way. Critical Dialogue', *Perspectives on Politics*, Vol. 9, No. 2, 2011, pp. 385-388, at 387. Another crtitic mentions Russia, which is probably never going to evidence even medium Western linkage or Western leverage; therefore, it is a country with a regime trajectory, which is only vaguely describable by the variables proposed by Levitsky and Way. *See* A. Raun, 'Book Review: How to Survive the Western Democratizing Pressure?', *Studies of Transition and Societies,* Vol. 5, No. 1, 2013, p. 87.

283 *See* L. Gilbert & P. Mohseni, 'Beyond Authoritarianism: The Conceptualization of Hybrid Regimes', *Studies in Comparative Interntional Development,* Vol. 46, No. 3, 2011, pp. 270-297.

284 *Cf. id*. pp. 293-294.

285 The study of the Transatlantic Academy on the democratic disconnect published in May 2013 discusses the 'hybrid' nature of the post-Soviet transformations. *See* S. Benhabib, D. Cameron & A. Dolidze *et al.*, 2013. Also, Paul Lendvai in his most recent book on Hungary puts the country between democracy and authoritarianism. *See* P. Lendvai, *Hungary. Between Democracy and Authoritarianism*, Columbia University Press, New York, 2012.

286 Barbara Geddes even argues that only a minority of those countries became consolidated democracies. *See* B. Geddes, 'What Do We Know about Democratization after 20 Years?', *Annual Review of Political Science,* Vol. 2, 1999, pp. 115-144. Valerie Bunce also relayed the same opinion about post-communist countries, when she communicated at the POMEPS Conference in May 2011 that more than 20 years after the fall of the Berlin Wall, the vast majority of countries that had brought down communism were still not democracies, but they are, at best, 'hybrid regimes'. Quoted by E. Bellin, 'Reconsidering the Robustness of Authoritarianism in the Middle East. Lessons from the Arab Spring', *Comparative Politics,* Vol. 44, No. 2, 2012, pp. 127-149, at 143.

287 *See* I. Krastev & S. Holmes, 'An Autopsy of Managed Democracy', *Journal of Democracy*, Vol. 23, No 3, 2012, pp. 33-45.

288 The term is recently used by Andrew Arato, 'Is There a Dictatorship in the E.U.?', <www.booksandideas.net>, 11 May 2012.

289 *See* J.-W. Müller, 'Postdemokratie? Karriere und Gehalt eines problematischen Schlagwortes', *Neue Zürcher Zeitung*, 10 November 2012.

Nicolaidis and Kleinfeld, in their study cited earlier, characterize illiberal democracies as systems that lack one or two of the three interwoven elements. For instance, the historical German legal positivistic term *Rechtsstaat* in the first half of the 20th century was reduced to mere 'legality', fundamentally concerned with limiting the arbitrary power of the State, not being necessarily democratic and willing to create a sphere of human rights. In constitutional monarchies, rights and laws can be respected, but these are non-democratic. Also, in many transitioning formal democracies, which are ruled by laws, minority rights are not upheld. Also, traditional rights respecting societies, *i.e.* tribal chieftaincies with concept of rights, do not respect formal legal rules or democracy. Finally, there are formal democracies without rule by law and lacking fundamental rights as well, like Iran.[290]

In most of the illiberal democracies, formally competitive elections are held with competing parties, but owing to the rigged, engineered characteristic of these phony elections their outcome is not really uncertain, as was the case in the recent presidential election in Russia.

In many illiberal democracies, fundamental rights are listed in the Constitution, but the institutional guarantees of these rights are endangered through the lack of an independent judiciary. This happened in Hungary after 2010, when the ordinary judges were forced to retire and new judges loyal to the government were appointed, and the Constitutional Court was packed with the governmental majority, and its competences were curtailed. The democratic backsliding of Hungary has been demonstrated by many independent ratings. According to Freedom House's *Nations in Transit* ratings, Hungary has weakened more since EU accession than any other member state, with the largest declines in 2010 and 2011. In 2012, Hungary was downgraded both for its electoral process and for losing its 'free' status with regard to media freedom, the only country to do so. With downgrades in civil society and local democratic governance in 2012, Hungary's overall democracy score is edging closer to the barrier between consolidated democracies and those classified as "semiconsolidated", a category that includes Bulgaria, Romania and the better-performing Balkan states.[291] Also, Demos concluded that Hungary was a significant 'backslider' on dimensions of electoral and procedural democracy, rule of law and fundamental rights and freedoms and, worryingly, it scored poorly with respect to citizens' attitudes towards democracy. It was also the poorest performer among EU member states on the measure of active citizenship. Overall, Greece and Hungary emerge as the most worrying backsliders on measures of healthy democracy.[292]

Besides these more means-based, institution-focused definitions of the rule of law, Nicolaidis and Kleinfeld also discuss the end-based sociopolitical elements of the term,

290 Nicolaidis & Kleinfeld, 2012, pp. 10-11.

291 S. Habdank-Kołaczkowska, *Authoritarian Aggression and the Pressures of Austerity, Nations in Transit*, Freedom House, 2013.

292 J. Birdwell, S. Feve, Ch. Tryborn & N. Vibla, *Measuring Democracy in the EU,* Demos, 2013, pp. 20-21.

investigating the cultural patterns as reflected in both general and specific behaviour.[293] This question relates to the normative commitment to democracy on a behavioural and attitudinal level, whether a broad and deep legitimation of liberal democracy has been achieved. In other words, whether or not all significant political actors, at both the elite and the mass levels, are convinced that the democratic regime is the right and appropriate one for the society, better than any other realistic alternative they can imagine.

In this chapter, I have tried to describe the very elements and possible reasons for the change of the liberal democratic system to an illiberal one, and to answer the question of both the uniqueness and the typical features of the events, and through the latter the lessons to be learned from. To achieve this aim I would like to discuss the characteristics of the Hungarian transition to constitutional democracy and the constitutional backsliding since 2010.

1.6.2 Post-Sovereign Constitution-Making in 1989-1990

The common characteristic of the system change in Hungary was that the country had to achieve an independent nation-state, a civil society with a private economy and a democratic structure at the same time. In other words, the constitutionalization in Hungary was part of a transition to both a Western model of democracy and a market economy. This 'dual transition'[294] scenario characteristic of the post-communist states of East Central Europe in the early 1990s is significantly different from the scenario of 'single transition', where the only goal was a transition from a quasi-democratic or authoritarian regime to democracy, as had happened in the middle of the 1970s in Southern Europe (Greece in 1975, Portugal in 1976 and Spain in 1978), or in South Africa with the making of the interim Constitution in 1993 and the final one in 1996, and even more different from constitutional reforms that have been neither accompanied by nor resulted from any apparent fundamental changes in political or economic regimes, as in the case of Israel.

The very first question to be investigated is how the different categorizations of some political scientists fit into the transitions in Hungary; how we can, for instance, put the countries, representing unique solutions of transition, into one of the categories (replacement, transformation, transplacement) used by Samuel Huntington when studying 35 so-called third wave transitions that had occurred or that had appeared to be underway by the end of the 1980s. He calls the overthrow replacement, while the two less radical types of transition, between which the line is fuzzy, are transformation and transplacement.[295] The

293 *Id.*, pp. 23-24.

294 These terms 'single' and 'dual' transitions are used by Przeworski, 1991. Later, Claus Offe broadened the scope of this debate by arguing that post-communist societies actually faced a triple transition, since many post-communist states were new or renewed nation-states. *See* C. Offe, *Varieties of Transition: The East European and East German Experience*, MIT Press, Cambridge, 1997.

295 *See* S.P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century,* University of Oklahoma Press, Norman, 1991.

problem with this kind of categorization begins when we try to put the different countries, representing unique solutions of transition, into one of the categories. Evaluating the East Central European transitions, for instance, Huntington puts Hungary into the category of transformation, while the events in Poland and Czechoslovakia are characterized as transplacements. Comparing the East Central European countries, Timothy Garton Ash, in his book *The Magic Lantern*, keeping alive 'the revolution of '89' that he witnessed in Warsaw, Budapest, Berlin and Prague, has coined the term 'refolution' for the events of Warsaw and Budapest, because they were, in essence, reforms from above in response to the pressure for revolution from below, though he uses the word 'revolution' freely for what happened in Prague, Berlin and Bucharest.[296] The changes in Hungary and Poland were not triggered by mass demonstrations such as those in Romania, in the former GDR or in Czechoslovakia, and reforms of revolutionary importance interrupted the continuity of the previous regime's legitimacy without any impact on the continuity of legality. Ralf Dahrendorf, another Western observer, argues that

> the changes brought about by the events of 1989 were both extremely rapid and very radical (which is one definition of revolutions), at the end of the day, they led to the delegitimation of the entire ruling class and the replacement of most of its key members, as well as a constitutional transformation with far-reaching consequences.[297]

But the forces that, for instance, in Poland helped liberate the society, the church and the labour unions were not present in Hungary, so instead of civil society organization only a reformist elite contributed to the changes. But if we take into account Hannah Arendt's definition of revolution, we can argue that the very results of the events in Hungary were actually revolutionary, in the sense that their aim was to create a *constitutio libertatis,* an attempt to establish a political space of public freedom in which people, as free and equal citizens, would take their common concerns into their own hands.[298]

If we compare the Constitution-making processes of the East Central European countries, they were all closed in the 1990s with the exception of Hungary. These processes represent three different types of Constitution-making.

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296 *See* T.G. Ash, *The Magic Lantern: The Revolution of '89 Witnessed in Warsaw, Budapest, Berlin and Prague,* Random House, New York, 1990. In principle, the same terminology is used by János Kis regarding the Hungarian system change. Kis reasons that in the case of a reform, legality and legitimacy is unchanged; in the case of a revolution, they both fracture; while in the case of a system change, legality continues to exist, while legitimacy ceases to exist. *See* J. Kis, 'Between Reform and Revolution: Three Hypotheses about the Nature of System Change', *Constellations,* Vol. I, No. 3, 1995.

297 R. Dahrendorf, *Reflections on the Revolution in Europe,* Random House, New York, 1990, p. 8.

298 H. Arendt, 1963b. Of course, the 1989 transition had no 'absolute', no sovereignty, in the way that Arendt thought the French Revolution had gone wrong.

1. The earliest, even too early closure with significant legitimation problems happened in Bulgaria and Romania, where the first freely elected parliaments have been elected as a sovereign constituent assembly, like the French one in 1789-1791 and in 1945 or the Weimar Assembly in 1918.
2. In the Czech and the Slovak Republics, the democratically elected normal legislature closed the process in 1992 after the collapse of the federal state.[299]
3. In Poland, the Constitution-making process was closed in 1997 by a final Constitution

In Hungary, formally the normal but the illegitimate legislature enacted the comprehensive modifications of the old Constitution, but after the peaceful negotiations between the representatives of the authoritarian regime and their democratic opposition. A similar "post-sovereign"[300] or "pacted constitution-making"[301] process happened in Spain at the end of the 1970s, and in South Africa from the beginning through the middle of the 1990s. In Hungary, concepts of transforming the 1949, Stalin-inspired Rákosi-Constitution into a rule of law document were delineated in 1989 in the National Roundtable Talks by the participants in the Opposition Roundtable (OR), and the representatives of the state-party.

299 A. Arato, 'Dilemmas Arising out of the Power to Create Constitutions in Eastern Europe', *in* M. Rosenfeld (Ed.), *Constitutionalism, Identity and Difference*, Duke University Press, Durham, 1994.

300 Andrew Arató recognizes three models of Constitution-making in post-communist countries. The earliest, possibly too early, Constitution-making took place in Bulgaria and Romania, where the Parliaments, which were created as a result of democratic elections, were given the rights of a constituent assembly, as had been the case in France (the National Contituent Assembly between 1789 and 1791) and in Weimar (in 1918). Meanwhile in the Czech Republic and Slovakia, after the dissolution of Czechoslovakia in 1992, Constitution-making was carried out by democratically elected legislative bodies, but without the classification of a constituent assembly. The cases of Hungary and Poland represent a third type of Constitution-making, where the process was started by a conventional legislature that was an illegitimate body whose job was to approve a text that had been agreed upon by the state-party and the new democratic movements before the democratic elections. This third type, in which Spain, South Africa and Iraq also belong, is called post-sovereign Constitution-making by Arató. *See*: A. Arato, 'Forms of Constitution Making and Theories of Democracy', *in Civil társadalom, forradalom és alkotmány. Civil Society, Revolution and Constitution,* Új Mandátum Könyvkiadó, 1999, pp. 299-332, later A. Arato, 'Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?', *South African Journal of Human Rights*, Vol. 26, 2010a, p. 19. First published in Hungarian: A. Arató, 'Sikeres kezdet után részleges kudarc – merre tovább? Posztszuverén alkotmányozás Magyarországon', *Fundamentum*, Vol. 13, No. 4, 2009, pp. 5-30. The extensive database of Jennifer Widner, which describes 195 Constitution-making processes taking place between 1975 and 2002, cannot make such distinctions regarding Constitution-making processes. Romania and Bulgaria fall into one category in her work, because the GDP was low during negotiations; and again, for reasons related to GDP, the Czech Republic, Hungary, Poland and Slovakia fall into another group. Within this group, Hungary is placed into a different category than the other Visegrád countries, because the rights restriction was harsher at the time of the constitutional preparatory work, in 1989 in Hungary, then in the Czech Republic and Slovakia in 1992, and in Poland in 1997 when the final Constituion was enacted. Because of this categorization, Widner's conclusion that the preparatory procedures are not of utmost importance in Constitution-making, does not come as a surprise. *See*: J. Widner, 'Constitution Writing in Post-Conflict Settings: An Overview', *William and Mary Law Review*, Vol. 49, 2008, pp. 1513, 1532.

301 The term is used by Rosenfeld, 2009b.

Afterwards, the illegitimate Parliament only sealed the comprehensive amendment to the Constitution, which entered into force on the anniversary of the Revolution and which has been since then – with smaller-bigger changes – the basic document of the 'constitutional revolution'. The minutes of the OR and the National Roundtable Talks[302] give us a better idea what the intention of the 'founding fathers' was, and then we can examine how these ideas have been implemented and altered.

As the immediate antecedent of the establishment of the OR in March 1989, the concept of the new Constitution written by the Hungarian Socialist Worker's Party (Magyar Szocialista Munkáspárt – MSZMP) had been submitted to the Parliament. Thus, the opposition was afraid that those being in power would create the 'new' constitutional framework themselves. During the National Roundtable talks, which started in mid-June, the OR initially tried to prevent this, and considered the adoption of the new constitutional order to be the task of the new Parliament set up after the parliamentary elections. For example, they did not want to negotiate about creating the institution of the president of the republic at all; instead they recommended that the speaker of the Parliament should be vested temporarily with the powers of the president. Moreover, the participants in the OR had agreed on establishing the Constitutional Court prior to the new Constitution only 3 days before the negotiations were closed.

Giving up the idea of adopting a new Constitution by the democratically elected new Parliament was influenced by various factors. One of them was definitely the fact that the opposition could not be sure that the MSZMP would not win by absolute majority against its rivals who were far less known among the voters. But several signs indicate that they could not exclude, even in case of a relative win, the MSZMP's ability to form a government. Of course, the MSZMP could not be sure of its success either; thus they were unable to ignore the possibility of the 'advance Constitution-making', certainly in exchange for promises to guarantee some of their positions. Such a promise could be on the part of the parties at the end signing the agreement to directly elect the president before the parliamentary elections, which held forth the win of the communist reformer Imre Pozsgay. This was prevented by the success of the referendum initiated by the Alliance of Free Democrats (Szabad Demokraták Szövetsége – SZDSZ) and the Federation of Young Democrats (Fiatal Demokraták Szövetsége – Fidesz). As a result of this, the president was elected by the new Parliament only after the first democratic elections. The published minutes prove that the split between the signatories of the agreement and those who initiated the referendum

302 A. Bozóki (Ed.), *A rendszerváltás forgatókönyve. Kerekasztal-tárgyalások 1989-ben. I-IV.* [*The Screenplay of the System-Change. Round-Talks in 1989*], Magvető, Budapest, 1999. On the Constitution-making procedure, *see* details at: G. Halmai, 'Az 1949-es alkotmány jogállamosítása' ['Transforming the 1949 Constitution into a Rule of Law Document'], *in* A. Bozóki (Ed.), *A rendszerváltás forgatókönyve. Kerekasztal-tárgyalások 1989-ben*. [*The Screenplay of the System-Change. Round-Talks in 1989*], Vol. VII., Új Mandátum Kiadó, Budapest, 2000, pp. 180-199.

was caused by the fact that one of the parties pursued a consistent plan to change the regime, while on the other side – allegedly – Antall and Pozsgay agreed on an MSZMP and MDF (Hungarian Democratic Forum, Magyar Demokrata Fórum – MDF) pact. Antall was obviously motivated by the fear that the MSZMP could win, and that is why he wanted an assurance of a share in power, so they could win even if they actually lost on the first democratic elections. From the point of view of the transition, the happy end of this is that the referendum freed the MDF from the pact with the communists, and this made it possible to come to an agreement with the SZDSZ, which initiated the referendum.

This shows that both the state-party and the opposition were motivated not to leave the establishment of the transition's constitutional framework to a new Constitution by the fear that they could lose the democratic elections. Thus, the 1989 constitutional amendment inserted new content into the 1949 framework, which can be considered as a rule of law document, even if the Rákosist-Kádárist skeleton is still visible sometimes, especially concerning the unchanged structure of the chapters, starting with the state organization, followed by the fundamental rights parts.[303] Apparently, the negotiations-based drafting explains that the old-new Constitution principally follows the model of a consensual democracy widely accepted in the continental European systems. The system of government, which assumes the presence of more than two parties in the Parliament and a coalition-governance, at the same time meant that the parties knowingly rejected both the semi- or full presidential regime that was preferred by the MSZMP and is applied in many post-communist countries even today, and also the English Westminster-type of two-party parliamentarism. Compared with the Western European solutions, the decision-making process set up in 1989-1990 has another distinctive characteristic that could obviously be explained by the legacy of the 40-year-long totalitarian regime: not only is it based on the consensus among the coalition parties, but in some cases it requires the involvement of the opposition, and it significantly strengthens the checks on the governmental powers.

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

303 Surprisingly, a contrary approach is reflected in the reasoning of the Decision 3/2004. (II. 17.) on the possibility of interpellation of the Attorney General, where the justices, 15 years after the transition resulting in a practically new Constitution, perceived Hungarian constitutional development as a continuum starting in 1949. This is supported by the fact that the Court established periods in the following way: its first stage is the Rákosist. Constitution, the Act no. XX of 1949 (marked as Constitution 1 by the Court, even though in this partition only one exists), its amendment during Kádár by Act I of 1972 (the marking of the Court for this is Amendment 1); the second stage is the Constitution of the transition, elaborated upon by the Roundtable talks, the Act No. XXXI. of 1989 (this is called Amendment 2).

the constructive vote of confidence, the SZDSZ received the right to nominate a 'moderately weak' president of the republic. In 1989 the OR was able to prevent the institution of a 'moderately strong' president – a position designed for Imre Pozsgay – and with this a semi-presidential system in the Constitution, but the presidential powers of Árpád Göncz were undeniably stronger than those set out in the Act no. I of 1946 with its representative president serving as an example. The rather 'neutral' powers of the president mean that he belongs neither to the executive nor to the legislative branch, but rather has an equilibrating role between the two. The extremely broad powers of the Constitutional Court compared with other European solutions and the complicated system of parliamentary commissioners can also be traced back to the idea of limiting the executive.

The parties of the OR accepted the MSZMP's plan to set up the Constitutional Court as an institution counterbalancing the executive, as is prevalent in the consensual democracies of Europe, even for the temporary period prior to the elections. However, instead of a body for preserving the state-party's power, the opposition insisted on a Court, which radically limits the Parliament and the government and the decisions of which cannot be overturned by the Parliament – as initially proposed by the MSZMP, and where anyone is entitled to submit a petition to review the constitutionality of a piece of legislation.

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

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

While the pact of 1990 represented probably the last institutional sign of a consensus between the governing parties (or at least the bigger party) and their opposition (or at least

one of them), the constitutional amendment following from the pact itself also narrowed the checks on the executive.

In the second democratic term (1994-1998), the two new governing parties (the Hungarian Socialist Party (MSZP), successor of MSZMP with an absolute majority of the seats alone, together with its liberal coalition partner (SZDSZ)) had more than two-thirds of the parliamentary seats, reviving the threat that the governing parties could monopolize the making of the Constitution. This danger, however, was warded off by the governing coalition itself with their self-restraining gesture: they decided that the parliamentary committee set up to draft the Constitution could adopt a resolution only if it were supported by five out of the six parties, and in place of the proposed passages rejected by the committee, the provisions of the existing Constitution would be left to prevail. In principle this policy could have guaranteed the consensual drafting of a new, up-to-date basic law. But in the summer of 1996 the new draft of the Constitution did not get a two- thirds majority of the votes in the Parliament, because a part of the MSZP did not support it. The leftist wing of the Government's stronger party prevented the approval of the draft because it did not include the declaration of the social character of the state and mechanisms for the reconciliation of interests.

In the coming parliamentary period of 1998-2002 it seemed that the government would have gladly restricted the constitutional institutions of the consensus-based exercise of governmental powers, first of all the Parliament's means to control the executive. For instance, the first Fidesz-led government decreased the frequency of the plenary sessions to every third week and prevented the establishment of every ad hoc investigating committee of the Parliament. However, they did not have either the courage or the necessary support to carry out the required constitutional amendments.

The Hungarian Constitution making of 1989 was criticized by many authors. The American law professor Bruce A. Ackerman states in his book published in 1992: the constitutional guarantees of a liberal rule of law state can be established only if a new Constitution is adopted, and the possibility to adopt a new basic law fades as time passes.[304] According to him, there would have been a possibility, and indeed a need, for the adoption of a new Constitution in Hungary at the beginning of the political transition, which would have

304 B. Ackerman, *The Future of Liberal Revolution*, Yale University Press, New Haven, 1992b. Although criticizing Ackerman's thorough misunderstanding of the Hungarian and Polish cases, Arato also claims that in Hungary the Constitution-making process was incomplete. *Cf.* A. Arato, 'What I Have Learned: Concluding Remarks', *South African Journal of Human Rights*, Vol. 26, 2010b, pp. 134-138. In the beginning of the 1990s at the Legal Institute of the Hungarian Academy of Science, András Sajó prepared the draft of a new Constitution, which apart from the reaction by experts, did not have any political impact. A. Sajó, 'Egy lehetséges alkotmány' ['A Possible Constitution'], Bence György, Halmai Gábor, Pokol Béla és Sós Vilmos bíráló megjegyzéseivel. [With comments of Gy. Bence, G. Halmai, B. Pokol, V. Sós], *A Társadalomtudományi Társaság Füzetei*, Budapest, 1991.

solved the legitimacy deficit of the 'system change', similarly to what was done with respect to the German Basic Law (Grundgesetz) of 1949. In an interview given a decade later he not only repeats this opinion, but talks about the disadvantages too:

> Hungary did not grab the opportunity to pass a constitution. The roundtable of 1989 did not adopt a new constitution. The Constitutional Court by elaborating on fundamental principles in its decision, tried to substitute the new constitution. But it is to be feared that this had been finished when the mandate of László Sólyom expired. Because the appearance of constitutionalism is not supported by a modern, new constitutional text, but is based on the interpretation of the current Constitutional Court, the Hungarian constitutional achievements are too fragile and uncertain.[305]

Some opinions also argue, however, that a consensus between the parties involved concerning the basic constitutional framework had in fact been lacking from the very beginning.[306] Attila Gábor Tóth espouses a seemingly similar, though somewhat contradictory, view on this question, as he argues that there was no consensus among the participants in the roundtable talks, except on the point that no other basic constitutional structure enjoys extensive support.[307] As far as the consensus parliamentary regime is concerned, the semi-presidential model agreed upon by the signatories of the roundtable deal was actually an alternative type of governmental model – except that it was scrapped by the referendum. The signatories to the agreement – the 'state party' MSZMP (Magyar Szocialista Munkáspárt – Hungarian Socialist Workers' Party) on one side, and chiefly the MDF (Magyar Demokrata Fórum – Hungarian Democratic Forum, the leading centre-right opposition movement) on the other side – preferred a direct presidential election to be held before the parliamentary election. This would not only have resulted in the election of MSZMP politician Imre Pozsgay as president in light of his prominence, but would also have inevitably led to a presidency with greater powers in the area of foreign and military policy.

Ferenc Horkay Hörcher strikes a substantially more critical tone towards the roundtable Constitution. His view is that the constitutional process came too early, which is why it

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305 G. Halmai, '"A magyar alkotmányos vívmányok túlságosan sérülékenyek". Interjú Bruce A. Ackermannal.' ['"The Hungarian Constitutional Achievements Are Fragile". Interview with Bruce A. Ackerman'], *Fundamentum*, Vol. 7, No. 2, 2003, p. 52.

306 *See* A. Körösényi, 'Mozgékony patthelyzet. Reform és változatlanság között: a politikai és az alkotmányos alapszerkezet változásai 1990–2005' ['Mobile Stalemate. Between Reforms and Immutability: Changes in the Basic Structure of the Political and Constitutional System, 1990–2005'], *in* Cs. Gombár (Ed.), *Túlterhelt demokrácia. Alkotmányos és kormányzati alapszerkezetünk* [*Overburdened Democracy. The Basic Structure of Our Constitutional and Governmental System*], Századvég Kiadó, Budapest, 2006.

307 *Cf.* G.A. Tóth, *Túl a szövegen. Értekezés a magyar alkotmányról* [*Beyond the Text. Treatise on the Hungarian Constitution*], Osiris, Budapest, 2009, p. 15.

inevitably had to result in a formal constitutionalism.[308] While I disagree with his main conclusion regarding the purely formal nature of the resultant Constitution, I believe that Horkay's observation on the premature timing of the process merits further consideration. There is, undeniably, truth in the notion that the patched up version of the Constitution inherited from the previous regime was unsuitable to exemplify the onset of a new era, even if some posit that precisely such an old/new document best symbolizes Hungarian constitutional evolution.[309] As the second disadvantage, Horkay notes that the document's creation was not embedded in a rule of law framework, with the result that it reflects 'lowest common denominators,' thereby giving rise to a formal constitutionalism devoid of values. The difficulties of democratic transition stemmed not so much from an absence of constitutional values in the process of Constitution-making as from the lack of respect for and acceptance of these values. Nevertheless, as with pacted constitutional processes in general, the Hungarian process too undeniably bears the burden of what András Sajó has labelled the 'paradox of restoration constitutions', which exerts an ill effect on the consistency of constitutional values. Sajó argues that there are two distinct reasons that can underlie this type of Constitution-making – which reaches back to the past to some extent, while it simultaneously seeks to ensure that it does not repeat itself – and both played a role in Hungary in 1989.[310] One is that a key source of the intellectual opposition to communism was nationalism with its fixation on the 'glorious past'.[311] As an illustration for this phenomenon, Sajó points out that when the parties of the opposition roundtable argued against the efforts by the ruling regime party to create a strong presidential office, they invoked the presidential status and powers as laid out in Act I of 1946, arguing that it was part of national tradition. (In Poland the reference to Pilsudski's Constitution played a similar role.) The other reason behind a constitutional thinking that looks back to the

308 *See*: F. Horkay Hörcher, 'Az értékhiányos rendszerváltás. Jogelméleti és politikai filozófiai megfontolások' ['A Regime Transition Devoid of Values. Legal Theory and Political Philosophy Considerations'], *Fundamentum*, Vol. 7, No. 1, 2003, pp. 62-72. Later, Horkay saw these neglected values and principles manifested in the 2011 Fundamental Laws and especially their chapter entitled National Creed. *Cf.* F. Horkay Hörcher, 'A Nemzeti hitvallásról' ['On the National Creed'], *in* A. Jakab & A. Körösényi (Eds.), *Alkotmányozás Magyarországon és máshol* [*Constitution-Making in Hungary and Elsewhere*], MTA TKPTI, Új Mandátum Kiadó, 2012, pp. 286-309.

309 *Cf.* L. Majtényi, 'Kié az alkotmány? Szükség van-e Magyarországon új alkotmányra?' ['Whose Constitution? Does Hungary Need a New Constitution?'], *Kritika*, No. 3, 1994.

310 *See*: A. Sajó, 'Preferred Generations: A Paradox of Restoration Constitutions', *in* M Rosenfeld (Ed.), *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives,* Duke University Press, Durham, 1994.

311 Several studies have shown to what degree Hungarian public opinion is capable of embellishing and exaggerating the 'glorious past'. Citing Mária Vásárhelyi's research studies, Paul Lendvai notes that more than half of those who demand the return of the territories lost pursuant to the Trianon Treaty estimate the Hungarian population of these territories to be three times as high as it really is, and 70% see no problem at all in the way Hungarian governments have handled minorities. Lendvai views this sense of Hungarian exceptionalism as one of the underlying reasons of irredentism. *See* P. Lendvai, *Mein verspieltes Land. Ungarn im Umbruch,* Ecowin Verlag, Salzburg, 2011, Chapter 8.

past, argues Sajó – and this is of course not specific to Eastern and Central European Constitution-making in the early 1990s – is the semi-modernized state of these societies and their fear of modernization, which simply renders a straight-out adoption or even adaptation of Western constitutional solutions unacceptable.[312]

What is most difficult to agree with among Horkay's arguments regarding the prematurely undertaken Constitution-making is his notion that since the new Constitution was already effective during the time of transition, this made the process excessively lengthy. My opinion is that Hungarian constitutional development has only benefited from the fact that the Constitutional Court, which began its work on 1 January 1990, had the opportunity to assert the rules and principles enshrined in the Constitution even before the democratic elections. This was fortuitous precisely because it did so against an illegitimate parliament and government. In reality, Horkay's main problem is that the Constitutional Court interdicted the implementation of the Antall government's first plans for retroactive justice concerning the previous regime, arguing that "legal security based on objective and formal principles enjoys primacy over a sense of substantive justice that is always partial and subjective" (Constitutional Court decision No. 11/1992. (III. 5.)). By refusing to stray from a strict notion of legal continuity, thus Horkay, the Constitutional Court produced the regime transition's justice deficiency, foregoing the possibility of satisfying popular perceptions and needs of truth and justice from the very start, thereby alienating large masses from the ideal of constitutionalism.[313]

In the foregoing I have sought to show that the institutional aspects of the basic Hungarian constitutional structure emerged in reflection of the will of the 1989-1990 roundtable participants, though they underwent some modifications as a result of the so-called 'Négyigenes' [Four times yes] referendum of November 1989 and the subsequent 1990 MDF–SZDSZ pact. The consensus surrounding this structure has gradually eroded, however, as a result of the fact that the requisite political culture, which would have rendered compliance with the Constitution's rules and principles unquestionable, was never able to take shape in either the political elite or the masses of their supporters.

The first serious political crisis emerged in the first year of the 'pact', with the taxi drivers' blockade. The cause that triggered the blockade – the government lying – bears an uncanny resemblance to the events leading up to the 2006 riots. Following a promise by the Minister of Industry to leave petrol prices unchanged, the government nevertheless raised the consumer price of petrol, which is a cardinal issue for taxi drivers. Still, there were two key differences between the taxi drivers' blockade and the 2006-2007 public

312 Still, legal imports do occur in the case of Hungary as well, but not on account of the Constitution-maker, but resulting from the practice of the Constitutional Court. For more details *see*: C. Dupré, *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity*, Hart Publishing, Oxford, 2003.

313 *See*: Horkay Hörcher, 2003, p. 64.

manifestations of discontent wrought by the publication of Prime Minister Ferenc Gyurcsány's 'confession'.[314] The taxi drivers initiated and organized the entire operation as ordinary citizens, though the president of the republic, as well as the leading opposition party at the time, SZDSZ (Szabad Demokraták Szövetsége – Alliance of Free Democrats), made public gestures that expressed their sympathy for the taxi drivers. The series of demonstrations in 2006-2007, in contrast, were initiated by two opposition parties. The other significant difference is that although the taxi drivers unlawfully closed off traffic on bridges and roads in the capital, there were neither violent actions such as the storming of the public television headquarters in Budapest's Szabadság Square nor extraconstitutional demands – such as the ones in Kossuth Square, in front of the Parliament building, where demonstrators called for the convocation of a constituent assembly – nor irredentist, neo-Nazi and anti-Semitic expressions, nor threats levelled at judges and prosecutors. Incidentally, this assessment of the 2006 events was shared even by the president of the republic at the time – by no means an impartial voice in this matter – when he qualified the events in Szabadság Square as plain criminal acts, noting that only Parliament had the authority to resolve the moral crisis.

Despite the differences, what is common to both series of events is that neither realizes the circumstances of civil disobedience specified in Article 2(3) of the 1989 Constitution – originally enshrined in the Constitution as part of the constitutional amendments enacted during regime transition, though it also found its way into the Fundamental Laws – pursuant to which citizens react to the activities of a social organization, state organs or citizens who aim to violently obtain or exercise power, or seek to control political power exclusively. In neither case can the governments' failures to keep their promises, their morally reproachable lies be assessed as endeavours that would constitutionally authorize, much less oblige, everyone to take action against it by all lawful means. Nevertheless, in the case of the peaceful participants in the taxi drivers' blockade, who had refrained from violence, it was possible to exempt them from legal accountability by exercising clemency; this solution was obviously not available for those who had committed violent crimes in Szabadság Square or elsewhere during the 2007-2007 demonstrations.

Both the taxi drivers' blockade and the anti-government demonstrations of 2006-2007 can be qualified as attacks on the parliamentary democracy-based constitutional order, just as the referendum initiative introduced by Fidesz-KDNP concurrently with the street demonstrations. The latter opened up a new chapter in the relationship between direct and representative democracy in the post-transition period of Hungarian constitutional

314 At a meeting of his own party's parliamentary caucus, then Prime Minister Ferenc Gyurcsány admitted that during the election campaign his government had lied to voters about the state of the economy in order to win the elections. Although the purpose of the speech was to persuade his fellow MPs to honestly confront the situation, in politics the acknowledgment of a lie is fraught with consequences if the admission is not aimed at the general public.

history.[315] It was no secret that these initiatives were intended to politically incapacitate the government by extra-parliamentary means. All the referenda debates in the post-transition period have demonstrated the generally accepted fact that this legal institution of popular sovereignty can serve as an effective instrument for realizing political objectives. This has been the case on several occasions since regime transition, for the very first time in the context of the 1989 'Four-Yes' ('Négyigenes') referendum, whose outcome had a substantial impact on the course of the transition process.[316] But its use as a means of seeking to bring down the government in 2006 was a first. The politicization of referenda was of course greatly helped by the failure to clarify their place in the new constitutional order – a dereliction of the constitutional process – as well as the fact that the legal regulation of referenda, beginning with the first statutory arrangement in 1989 all the way to the pertinent constitutional amendment adopted in July 1997, had never ranked among the more successful legislative products.

The most recent and simultaneously most dangerous stage in this process questioning the constitutional values of the regime transition has been the success at the June 2009 EP elections of a party that has, in both its fundamental program and election manifesto, formulated objectives that are openly antithetical to the rules and principles of the Constitution, and has, with the endorsement received from its voters, also successfully implemented these objectives. With Jobbik pulling in 15% of the votes and sending three representatives to the European Parliament and improving on that result with 17% at the parliamentary election in the spring of 2010, which made it the third strongest party in Parliament, a party that espouses an ill-concealed Nazi ideology is now ensconced within the framework of the constitutional system.

These developments raised the following question even before the 2010 parliamentary elections and the subsequent illiberal turn: were the constitutional values widely recognized and could Hungarian constitutional democracy be characterized as consolidated

315 For more details *see*: G. Halmai, 'Referendum and Representative Democracy', *Fundamentum*, English edn., 5/2008, pp. 5-21.

316 Those who did not sign the agreement that resulted from the roundtable talks – primarily SZDSZ and Fidesz (Fiatal Demokraták Szövetsége – Alliance of Young Democrats) – initiated a referendum that put four questions to the voters. Of these, the first two – the abolition of the communist paramilitary organization called Workers' Guards, and the regime party MSZMP's accounting with its assets – had already been resolved through other laws before the referendum even took place. Hence the really important question was whether the president of the republic ought to be elected directly by citizens before the parliamentary elections or after the parliamentary elections by Parliament itself. The first was the proposal of MSZMP and MDF, which more than likely would have resulted in the election to the presidency of Imre Pozsgay. The second was the option preferred by those who had initiated the referendum. As the reader may be aware, the electorate ended up opting for the second choice by a margin of a few thousand votes, and resulted in the new Parliament – pursuant to a pact concluded by MDF and SZDSZ – that elected the previously little known Árpád Göncz, a politician in the largest opposition party.

two decades after regime transition?[317] The previously described loss of a constitutional consensus among the political players had the effect that a large segment of these political actors, or their successors, no longer subscribe to the constitutional values that were accepted at the time of regime transition and, partly owing to this development, their supporters and a significant portion of society also no longer hold the principles underlying constitutional democracy in high regard. In other words, it appears that the Constitutional Court's vision, expressed early in the transition process, never materialized:

> It is not only legal statutes and the operations of state organs that need to be in strict compliance with the Constitution, but the Constitution's conceptual culture and values need to fully suffuse society.[318]

Jürgen Habermas, who argues for an ideal of 'constitutional patriotism,' adds here that constitutional values inevitably differ from state to state, depending on the historic traditions of the country in question: the expression 'constitutional patriotism' (*Verfassungspatriotismus*) refers to the notion that citizens share not only the abstract understanding of constitutional principles, but also make its prevailing specific meaning – which emerges from the context of their own national history – their own.[319]
In several of his writings, Shlomo Avineri also emphasized the key significance of this international history in the context of the Central and Eastern European transformation. In this context he considers Poland, Hungary and the Czech Republic to be in the best position, precisely because of the relatively democratic nature of their pre-1939 history, though not forgetting the crucial differences between authoritarian Polish and Hungarian politics on the one hand and the genuinely democratic Czech traditions before 1948 on the other.[320]
Indeed, the Constitutional Court, led by László Sólyom, expressly followed an activist approach in the interpretation of the Constitution, which was laid down in the concept of the 'invisible Constitution' elaborated in his concurring opinion on the decision on the death penalty:

> The Constitutional Court must continue its effort to explain the theoretical bases of the Constitution and of the rights included in it and to form a

317 For a more detailed discussion of these questions *see*: G. Halmai, 'Alkotmányos értékek és demokratikus konszolidáció' ['Constitutional Values and Democratic Consolidation'], *Fundamentum*, Vol. 13, No. 3, 2009b; G. Halmai, 'Elfogadottak-e az alkotmányos értékek Magyarországon? Helyzetjelentés 20 év után' ['Are the Constitutional Values Accepted in Hungary? A Situation Report after 20 Years'], *in* M. Kocsis & J. Zeller Judit (Eds.), *A köztársasági alkotmány 20 éve* [*20 Years of Republican Constitution*], Pécs, PAMA Könyvek, 2009c, pp. 147-163.

318 Constitutional Court decision 11/1992. (III. 5.) ABH 1992, p. 80.

319 *See*: J. Habermas & J. Ratzinger, *The Dialectics of Secularization,* Ignatius Press, San Francisco, 2005. The book is a transcript of a debate between Jürgen Habermas and Joseph Ratzinger on the pre-political moral foundations of a free-state on 19 January 2004 at the Catholic University in Munich.

320 *See* S. Avineri, 'Two Decades after the Fall: Between Utopian Hopes and the Burdens of History', *Dissent,* 30 September 2009.

> coherent system with its decisions, which as an 'invisible Constitution' provides for a reliable standard of constitutionality beyond the Constitution, which nowadays is often amended out of current political interest; therefore this coherent system will probably not conflict with the new Constitution to be adopted or with future Constitutions.[321]

Therefore, Sólyom and many academics argued that the text of the 1989 Constitution and the jurisprudence of the Constitutional Court make a new Constitution unnecessary.

This constitutional system without the second step of a post-sovereign Constitution-making process, namely a final Constitution, seemed to work for more than twenty years, until FIDESZ's overwhelming electoral victory in 2010. How was the stage set for FIDESZ to win such a high percentage of the votes and change the entire constitutional setting without much resistance from the citizens?

As far as Fidesz' populism is concerned, its two key characteristics are anti-elitism and anti-liberalism. Fidesz' anti-elitism – which is of course odd coming from a key representative of the transition elite – rests on the assumption that society's wise majority is behind the 2010 electoral victory and that through the "revolution at the voting booths" this majority has delegated its power to the government representing it. Consequently, no other mediating institution – banks, multinational corporations, political parties or civic organizations – can be authentic expressions of the popular will. The latter is manifested by the 'National System of Cooperation' rather than elite bargains. This populist version of conservative politics is at the same time anti-liberal, which is rather surprising considering that it comes from a party that used to consider itself liberal. In many respects, this anti-liberalism is reminiscent of the Anglo-Saxon New Right ideology. At the same time, in contrast to the aforementioned, it puts great faith in the state's central organizing role in the economy, education and culture.[322]

The disappointment with regime transition was obviously exacerbated by the perfunctory nature of confronting the past, specifically the fact that even as for the most part the new regime failed to hold the leaders of the party state accountable or to screen for persons who had cooperated with the clandestine services of the old regime, many of those falling into these categories managed to convert their previous political influence into economic clout under the new regime, while the restitution provided to the victims of the former regime, be it in material or informational terms, was largely symbolic. (This is what Ferenc Horkay Hörcher, in his cited study, referred to as the justice deficit of regime transition). Even with the approval of the Constitutional Court,[323] the Hungarian

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321 Decision 23/1990. (XII. 31.) AB

322 *See* Fidesz' populist conservatism in more detail: U. Korkut, *Liberalization Challenges in Hungary. Elitism, Progressivism, and Populism*, Palgrave and Macmillan, New York, 2012, pp. 162-176.

323 *Cf.* Constitutional Court decision No. 37/2005. (X. 5.).

legislature was incapable of ensuring what the Czech, Slovak and Polish parliaments had provided for in the early 2000s, namely to offer access to the documents of the former secret services – thereby recognizing everyone's right to learn about public interest documents stored in archives – so that society can learn about its own history.[324]

Populism, nationalism, anti-Europeanism and anti-secularism spread more easily among those who were disillusioned with regime transition, as did racism, anti-Semitism and homophobia, especially since, in order to maximize votes, certain political forces failed to reject the support of those who held such views.[325]

There are of course no infallible prescriptions on the length of time that needs to pass after a transition to the rule of law for members of a society to achieve a reconciliation with their past, to reach the point where a constitutional democracy may be considered consolidated. As we may recall, it took a generation or two to conclude this process in several European states after World War II. After Franco's death, for instance, the old and new elite in Spain entered into a "pact of silence" (*pacto se silencio*) mediated by the King, in which they recognized the unlawful acts of the Franco regime, while they also granted immunity to its leaders in 1977 – after the King had granted amnesty to the regime's political prisoners in 1976. These moves facilitated the negotiated Constitution-making process in 1978 – which resembled the later Hungarian process – as well as the consolidation of constitutional democracy beginning in the 1980s.[326] Citing the need for social reconciliation, the Zapatero government initiated the Historical Memory Law in 2004, and it was ultimately adopted in 2007. This was followed by the debates on reviewing the amnesties previously granted to Francoists, and the subsequent ban in 2008 on public commemorations of the

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324 For a critical analysis, *see*: G. Halmai, 'Mi fán terem az információs kárpótlás? Az információszabadság és adatvédelem konfliktusa az Alkotmánybíróság gyakorlatában' ['What Informational Restitution Means? The Conflict between Freedom of Information and Data Protection in the Constitutional Court's Practice'], *Fundamentum,* Vol. 9, No. 4, 2005.

325 According to a survey conducted in 2008, 27.5% of respondents agreed that "the injustice of Trianon can only be redressed by returning to Hungary the territories that it had to forfeit", while 36% agreed that "the most important goal for Hungarian politics should be to reclaim and preserve our previously held leading role in the Carpathian Basin". 69% of those who responded to this survey also held that "the Roma only abuse benefits and state support", while 50% rejected the notion that "a large portion of Roma are in poverty through no fault of their own", 31% agreed that "the culture of the Jews is very peculiar and difficult to reconcile with that of the majority", and 41% considered that "Jews have too great an influence on Hungarian public discourse and public life". *See* P. Tamás, 'Radikális újközép' ['Radical New Center'], *Népszabadság*, 13 September 2008. Mária Vásárhelyi's studies, which revealed similar results for youth. While in 2002 only 18% believed that we can never reconcile ourselves to the consequences of the Trianon Treaty, by 2007 it was 43%; *see*: M. Vásárhelyi: 'A huszonévesek és Trianon' ['The 20-Somethings and Trianon'], *Élet és Irodalom*, 3 June 2011. 69% of youth – in contrast to 79% of the elderly – believed that the Roma must be forced to live like Hungarians, while 57% believed that Jews have excessive influence, and 27% held that for Jews Israel's interests take priority over Hungary's; *see*: M. Vásárhelyi, 'Cigányellenesség és antiszemitizmus a húszévesek körében' ['Anti-Roma Sentiments and Anti-Semitism among 20-Year-Olds'], *Élet és Irodalom,* 6 November 2009.

326 *See* J.E. Mendez, 'In Defense of Transitional Justice', *in* J.A. MacAdams (Ed.), *Transitional Justice and the Rule of Law in New Democracies*, University of Notre Dame Press, Notre Dame-London, 1997, p. 9.

dictator's death.[327] The Spanish example seems to illustrate the notion that genuinely confronting the past – and the resultant social reconciliation – is most likely to succeed under the circumstances of a consolidated democracy.[328] This was also underlined by the former GDR's efforts at coming to terms with its past (*Vergangenheitsbewältigung*, *Geschichtsverarbeitung*), which took place in the framework of the Federal Republic of Germany, by then a four-decade-old, consolidated democracy. In Hungary – just as in the other post-communist countries – this process was hindered by the process of consolidation getting bogged down.

The fact that, as in other Central European regime transitions, the establishment of the constitutional system in Hungary was also concluded rapidly held out the hope that the process of consolidation would be considerably quicker here. In the light of the current situation in Hungary, however, one might well conclude that the current political and social consensus regarding democratic values is considerably more fragile than that two decades ago, in the early stages of regimes transition. The state of democratic and human rights culture and the lack of trust in democratic institutions[329] – especially Parliament and the political parties – make it harder to avoid the road that leads back to the totalitarian regime.

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327 *See* A. Mihr, 'The Impact of Acts of Reconciliation on Democratic Processes – Case Studies in Europe: Germany, Spain, Turkey', 21st World Congress of Political Science, 16 July 2009, Santiago de Chile.

328 This was the conclusion drawn by German political scientist Claus Offe, in a debate on Anja Mihr's study in Santiago.

329 According to a 2009 survey by Eurobarometer, in addition to low levels of trust vested in democratic institutions, especially in Parliament and political parties, the majority of respondents (51%) in Hungary did not agree that life improved since the fall of the Iron Curtain, while a mere 30% felt that an improvement had occurred. In light of the widespread negative attitude that prevails *vis-à-vis* regime transition, it is hardly surprising that views pressing for a 'new regime transition' have become exceedingly popular. While in 2002 only a third of the adult population agreed with this view, by 2007 almost two-thirds believed that no real regime transition had taken place in the 1990s, and hence the challenge is still ahead for Hungary. *See* M. Vásárhelyi, *Szabadnak születtek. Huszonévesek a rendszerváltásról* [*Born Free. Twenty-Somethings about Regime Transition*], Pallas Páholy Kiadó, 2011, p. 88. The ratio of those who felt that the situation had deteriorated since their respective countries' transitions was only 14% in Poland and 23% in the Czech Republic, while 75% and 70%, respectively, considered that the state of things had improved. According to the same survey, Hungary had the highest ratio of respondents (27%) who disagreed with the statement that the eastern enlargement of the European Union contributed to the spread of democratic values and the protection of human rights in the region; the ratio of those who agreed with the statement was the second lowest in the EU, at 61%. The average for the Union was 17% disagreeing and 73% agreeing, and even regionally it was 15% and 72%, respectively. *See*: Flash Eurobarometer No. 257. Views on European Union Enlargement, 2009. This is also underlined by the TÁRKI Institute's research on Hungary's position on the value map: it suggests that our place on the map is one that our history and cultural legacy has preordained for us. At the same time, even within this cultural sphere we tend towards the margin, as a closed-minded, inward-looking society, far from the core of Western culture and close to Orthodox or (in some cases) to Latin-American culture. In terms of her position on a map of basic cultural attitudes, Hungary is closer to Bulgaria, Moldova, the Ukraine and Russia than to Slovenia or the Western European countries. *See*: I. Gy. Tóth, *Bizalomhiány, normazavarok, igazságtalanságérzet és paternalizmus a magyar társadalom értékszerkezetében. A gazdasági felemelkedés társadalmi-kulturális feltételei című kutatás zárójelentése* [*Lack of Trust, Norm Anomalies, Feelings of Injustice, and Paternalism in Hungarian Society's Value System. A Final Report on the Sociocultural Preconditions of Economic Emergence*], TÁRKI, Budapest, 2009, pp. 10-11. Incidentally, these results mesh with the data from Christian Welzel's 2006 study, where he argued that within

In part, the underlying reason is that the Hungarian institutions created at the beginning of regime transition, including the Constitutional Court, no longer constitute substantial guarantees for asserting constitutionalism – as we will see in more detail below – but also because – as I will show in the context of the 2011 European reception of the media law and the new Fundamental Laws[330] – the international, and above all the European, environment no longer appear fully willing and capable of enforcing international democratic standards.[331] Still, more realistic than a return to a totalitarian system is the looming threat of some version of Putinism, *i.e.*, a mutant variety of the presidential system that is customary in Latin America, where democratic institutions are at home in the letters of the Constitution, but actual power arrangements develop independently of and differently from the text.[332] In fact, the Putin system itself, with its seemingly free elections that are in reality manipulated by the elite, is, even formally speaking, at the borderline of the concept of democracy.[333]

1.6.3 The 'Constitutional Counter-Revolution' of 2010-2013

FIDESZ's first term in power between 1998 and 2002 was followed by eight years of the socialist-liberal coalition government of MSZP and SZDSZ. This period can be characterized with corruption, economic and moral failures of the governing parties. The symbolic event of this was Prime Minister Ferenc Gyurcsány's speech to his Socialist Party faction members, in May 2006, weeks after his governing coalition won the Parliamentary

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the former socialist bloc, Hungary belongs to the eastern group, including Bosnia, Serbia, and Russia, rather than the western category including the Visegrad 4 countries and the Baltic states. *See*: Ch. Welzel, 'A Human Development View on Value Change Trends (1981-2006)', 2006, <http://margaux.grandvinum.se>. Cited *in* T. Keller, *Magyarország helye a világ értéktérképén* [*Hungary's Position on the World Value Map*], TÁRKI, Budapest, 2009, p. 26. In 2013 TÁRKI repeated the survey with almost the same results. *See Bizalom, normakövetés, az állam szerepéről és a demokráciáról alkotott vélemények alakulása Magyarországon* [*Trust, Norm Tracking, Opinions about the Role of the State and Democracy in Hungary*], TÁRKI, Budapest, 2013. Literary Nobel laureate Imre Kertész suggested a notion that was essentially very similar when he argued that Hungary's ill-fate stemmed from her inability to choose between Asia and Western Europe: 'La Hongrie est une fatalité', *Le Monde,* 10 February 2012. Paradoxically, it appears as if Viktor Orbán himself reaffirmed this assessment in a speech on 26 July 2012: "Joining forces is not a matter of intentions, but of sheer force. With a half-Asian lot such as ours, there is no other way" [GH: than compulsion or force]. *See* B. Szabó, 'Félázsiai származékoknál, mint mi, csak így megy' ['With a Half-Asian Lot Such as Ours, There Is No Other Way'], *Népszabadság*, 27 July 2012.

330 On 25 April 2011 the National Assembly adopted Hungary's new Constitution, entitled *Alaptörvény* (Fundamental Laws), which came into effect on 1 January 2012. 'Magyarország Alaptörvénye,' *Magyar Közlöny*, No. 43.

331 András Nyerges takes a similarly sceptical position, *see* A. Nyerges, 'Európa úgyse hagyná' ['Europe Would Certainly Not Let It Happen'], *Mozgó Világ,* No. 7, 2009.

332 Adam Michnik, one of the leaders of the elite that undertook the transition in Poland, viewed this as one of the main threats to the post-communist countries based on the experiences with the Law and Justice Party's (PiS) 2 years in government. A. Michnik, 'A mi szabadságunkért és a ti szabadságotokért' ['For Our Freedom, and for Yours'], *Magyar Lettre Internationale*, Fall, 2009, p. 74.

333 This is the basis for referring to Putinism as a 'managed democracy'. *See* Krastev & Holmes, 2012.

elections, and broadcast from a tape by the Hungarian Public Radio on 17 September 2006. In the speech he admitted that his party had made a mess of Hungary's economy and that "We lied morning, noon and night". There were immediate protests, organized by the main opposition party, FIDESZ, who lost the elections in April. Thanks to the situation, the governing coalition suffered large setbacks in the October nationwide municipal elections, after which the Prime Minister – also upon the request of the President of the Republic – had requested the vote of confidence to reinforce political support for his austerity package and the transformation of the inefficient public sector. Even as Parliament voted, however, tens of thousands of people gathered on Kossuth Square just outside the legislature and demanded Gyurcsany's dismissal. But lawmakers from Hungary's two coalition parties signalled their near unanimous support for the Prime Minister in the confidence vote. After the opposition failed to dismiss the government both in the Parliament and on the streets, they initiated national referendums on issues related to the budget and the government's programme on certain reforms concerning the health care and higher education system. According to the Constitution, these questions cannot be the subject of a referendum, but the majority of the Constitutional Court approved them. With its more than 80% success, the referendum held in 2008 finally destroyed the popularity of the governing parties, and even though in 2009 they decided to replace Gyurcsány with Gordon Bajnai, another Socialist politician, by another vote of confidence, it was too late.

Before the 2010 elections, the majority of the voters were already dissatisfied not only with the government, but also with the transition itself, more than in any other East Central European country.[334] FIDESZ strengthened these feelings by claiming that there were no real transitions in 1989-1990, the previous nomenclature just converted its lost political power to an economic one, exemplifying with the two last prime ministers of the Socialist Party, who both became rich after the transition due to the privatization process.

This populism of FIDESZ was directed against all elites, including the one that designed the 1989 constitutional system (of which FIDESZ was part too), claiming that it is time for a new revolution. That is why he characterized the results of the 2010 elections as a "revolution of the ballot boxes". Orbán's intention with this revolution was to eliminate any kind of checks and balances and even the parliamentary rotation of governing parties. In a September 2009 speech, Viktor Orbán predicted that there was a real chance that politics in Hungary will no longer be defined by a dualist power space. Instead, a large governing party will emerge in the center of the political stage [that] will be able to formulate national policy, not through constant debates, but through a natural representation of interests. Orbán's vision for a new constitutional order – one in which his political party occupies the centre stage of Hungarian political life and puts an end to debates over

334 In 2009, 51% of Hungarians disagreed with the statement that they are better off since the transition, and only 30% claimed improvements. (In Poland 14% and 23% in the Czech Republic detected worsening, and 70% and 75%, respectively, perceived improvement.) Eurobarometer, 2009.

values – has now been entrenched in a new Constitution, enacted in April 2011. The new constitutional order was built with the votes of his political bloc alone, and it aims to keep the opposition at bay for a long time. The new constitutional order of the Fundamental Law and the cardinal laws perfectly fulfils this plan: it does not realize separation of powers and does not guarantee fundamental rights. Therefore, the new Hungary (not even a Republic in its name anymore) cannot be deemed as a state governed by the rule of law. The new constitutional system also does not comply with standards of democratic constitutionalism and the basic principles set forth in Article 2 of the TEU.

The center-right government of FIDESZ, the Alliance of Young Democrats, with its tiny Christian democratic coalition partner, received more than 50% of two actual votes, and due to the disproportional election system with this two-thirds of the seats in the 2010 Parliamentary elections. With this overwhelming majority they were able to enact a new Constitution without the votes of the weak opposition parties. But this constitutionalist exercise aimed at an illiberal constitutional sort.[335]

This new Constitution, entitled the Fundamental Law of Hungary, was passed by the Parliament on 18 April 2011.[336] The Fundamental Law, which entered into force on 1 January 2012, supersedes the previous Constitution (hereinafter 1989 Constitution), which, in keeping with the requirements of democratic constitutionalism during the 1989-1990 regime change, comprehensively amended the first written Constitution of Hungary (Act XX of 1949). The Fundamental Law was drafted without following any of the elementary political, professional, scientific and social debates. These requirements stem from the applicable constitutional norms and those rules of the House of Parliament that one would expect to be met in a debate concerning a document that will define the life of the country over the long term. The debate – effectively – took place with the sole and exclusive participation of representatives of the governing political parties. In its opinion approved

335 In an interview on Hungarian public radio on 5 July 2013, Prime Minister Viktor Orbán responded to European Parliament critics regarding the new constitutional order by admiting that his party did not aim at producing a liberal Constitution. He said: "In Europe the trend is for every constitution to be liberal, this is not one. Liberal constitutions are based on the freedom of the individual and subdue welfare and the interest of the community to this goal. When we created the constitution, we posed questions to the people. The first question was the following: what would you like; should the constitution regulate the rights of the individual and create other rules in accordance with this principle or should it create a balance between the rights and duties of the individual. According to my recollection, more than 80% of the people responded by saying that they wanted to live in a world, where freedom existed, but where welfare and the interest of the community could not be neglected and that these need to be balanced in the constitution. I received an order and mandate for this. For this reason, the Hungarian constitution is a constitution of balance, and not a side-leaning constitution, which is the fashion in Europe, as there are plenty of problems there." *See* 'A Tavares jelentés egy baloldali akció' ['The Tavares Report Is a Leftist Action'], Interview with PM Viktor Orbán, 5 July 2013. Kossuth Rádió, <www.kormany.hu/hu/miniszterelnokseg/miniszterelnok/beszedek-publikaciok-interjuk/a-tavares-jelentes-egy-baloldali-akcio>.

336 For the 'official' English translation of the Fundamental Law, *see* <www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>.

at its plenary session of 17-18 June 2011, the Council of Europe's Venice Commission also expressed its concerns about the document, which was drawn up in a process that excluded the political opposition and professional and other civil organizations.[337] The document – according to the declaration set forth in Article B – seeks to maintain that Hungary is an independent, democratic state governed by the rule of law, and furthermore – according to Article E – that Hungary contributes to the creation of European unity; however, in many respects it does not comply with standards of democratic constitutionalism and the basic principles set forth in Article 2 of the TEU.

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

1.6.3.1 Government without Checks[338]

The new Constitution *appears* to still contain the key features of constitutional constraint imposed by checked and balanced powers. But those constraints are largely illusory, because key veto points have been abolished or seriously weakened. Appointments to key offices, such as Constitutional Court judgeships, ombudsmen, the head of the State Audit Office and the public prosecutor, no longer require minority party inputs. Independent boards regulating crucial institutions necessary for democracy, like the election commission and the media board, no longer ensure multiparty representation. The Constitutional Court itself has been packed and weakened because its jurisdiction has been limited.

The constitutional reforms have seriously undermined the independence of the ordinary judiciary by changing the appointment process of judges. The Head of the National Judicial Office can select any judge from among the top three candidates recommended by the judicial council of the court where the appointment would be made. The retirement ages for judges on ordinary courts has been reduced from 70 to 62 years, starting on the day the new Constitution came into effect. This change forced around 274 judges into early retirement. Those judges include 6 of the 20 court presidents at the county level, four of the five appeals court presidents and 20 of the 80 Supreme Court judges. The head of the National Judicial Office, who is a close personal friend of the Prime Minister and also married to

337 *See* <www.venice.coe.int/docs/2011/CDL-AD(2011)016-E.pdf>. Fidesz's counterargument was that the other parliamentary parties excluded themselves from the decision-making process with their boycott, except Jobbik, which voted against the document.

338 *See* a more detailed analysis on the lack of checks and balances in M. Bánkuti, G. Halmai & K.L. Scheppele, 'From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions', *in* G.A. Tóth (Ed.), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law*, CEU Press, Budapest, 2012.

the chief author of the new Constitution, and the public prosecutor, also a FIDESZ loyalist, can assign specific cases to specific courts according to their assessment of the relative workloads of the country's courts.

The old ombudsman system has also been seriously weakened. In place of four separate ombudsmen with separate staffs and independent jurisdictions, the new system has only one general "parliamentary commissioner for human rights" with two deputies operating under his direction and a much-reduced staff. The old data protection ombudsman's office has been eliminated, and its functions have been transferred to a new office that is part of the government and no longer an independent body.

The state audit office, once a bastion of independent expertise, has been given additional powers in the new constitutional order to launch serious investigations into misuse of public funds. But the new head of the state audit office, elected for twelve years by a two-thirds vote of the Parliament, has no professional auditing experience. Instead, he was a former Fidesz MP.

The new Constitution creates a new Budget Council with the power to veto any budget that the Parliament may produce that adds even a single forint to the national debt. The Budget Council consists of three officials, two elected by a two-thirds vote of the Parliament and one appointed by the President of the Republic. The Constitution says that if the Parliament fails to agree on a budget by March 31 of each year, then the President may dissolve the Parliament and call new elections. Obviously, if the Budget Council, dominated by Fidesz loyalists, vetoes the budget on the eve of the deadline, the constitutional trigger may be pulled for new elections. If another party can come to power in a future election, this provision hangs like the Sword of Damocles over its continued term in office.

The Constitution also created the possibility of increasing the government's influence over monetary policy, by increasing the number of vice-presidents from two to three, and gave the Prime Minister the authority to select individuals to these positions.

The constraints on power that appear in the new Constitution are also illusory because the specific people who occupy crucial positions can be appointed for extraordinarily long terms, thus maintaining the current government's control over any foreseeable future government. Loyalists of the current government can stay in power through multiple election cycles, thereby making it almost impossible for a future government dominated by different political parties to carry out new policy initiatives. Offices like the public prosecutor (9 years), the president of the Supreme Court of Justice (named the "Kúria", 9 years), the president of the National Judicial Office (9 years), the head of the Budget Council (6 years), the head of the State Audit Office (12 years), constitutional judges (12 years), the commissioner for fundamental rights (6 years) and the president of the National Media and Communications Authority (9 years) are being filled by the current government, but the people in those powerful offices – all party loyalists of the Fidesz government – will remain through multiple election cycles.

1.6.3.2 Identity of the Political Community

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

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

The elevation of the "single Hungarian nation" to the status of constitutional subject suggests that the scope of the Fundamental Law somehow extends to the whole of historical, pre-Trianon Hungary, and certainly to those places where Hungarians are still living today. This suggestion is not without its constitutional consequences: the Fundamental Law makes the right to vote accessible to those members of the "united Hungarian nation" who live outside the territory of Hungary. It gives a say in who should make up the Hungarian legislature to people who are not subject to the laws of Hungary.

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

(c) The preamble of the Fundamental Law also claims that the "continuity" of Hungarian statehood lasted from the country's beginnings until the German occupation of the country on 19 March 1944, but was then interrupted only to be restored on 2 May 1990, the day of the first session of the freely elected Parliament. Thus, it rejects not only the communist dictatorship, but also the Temporary National Assembly convened at the end of 1944, which split with the fallen regime. It rejects the national assembly election of December 1945. Today's democracy watchers would classify the parliamentary election of December 1945 as 'partly free', adding that it was the freest in Hungary's entire history until that time. It also rejects the progressive legislation of the National Assembly: the "little constitution" of the Republic approved at the beginning of 1946, which the Round Table was able to draw on in 1989; as well as the abolition of noble titles and the Upper House of Parliament.

With the historical dividing lines drawn by the preamble of the Fundamental Law, it does not take care of acknowledging that war crimes and crimes against humanity were committed not only by foreign occupying forces and their agents, but also, between 1920 and 1944, by extreme

right-wing "free troops" and the security forces of the independent Hungarian state, and not only against "the Hungarian nation and its citizens", but also against other people. Neither does it acknowledge that the continuity of Hungary's statehood was not interrupted on 19 March 1944. Restrictions were placed on the government agencies' freedom to act, but they were not shut down. The Regent remained in his office, and the parliament sat and regularly passed those bills that were introduced by the government. The Hungarian state leadership did not declare the termination of legal continuity, but cooperated with the occupying powers.

The Fundamental Law only recognizes the (pre-1944) glorious pages of Hungarian history, but does not acknowledge the acts and failures that give cause for self-criticism. It only holds to account the – reputed or genuine – injuries caused to the Hungarian people by foreign powers, and does not wish to acknowledge the wrongs committed by the Hungarian state against its own citizens and other peoples.

Paul Shapiro, of the U.S. Holocaust Memorial Museum, in his testimony at 'The Trajectory of Democracy – Why Hungary Matters' hearing before the Commission on Security & Cooperation in Europe: U.S. Helsinki Commission, held on 19 March 2013 in Washington, D.C., said the following about the continuity of Hungary's statehood, and the shared responsibility of the Hungarian government in the Hungarian Holocaust:

> Under Regent and Head of State Miklós Horthy, foreign Jews resident in Hungary were deported to their deaths. Jewish men were forced into labour battalions, where tens of thousands died. And over 400,000 Hungarian Jews and at least 28,000 Romani citizens of the country were deported from Hungary to Auschwitz. During the months that followed the removal of Horthy from power in October 1944, the Arrow Cross Party of Ferenc Szálasi committed additional atrocities. The record is one of immense tragedy: 600,000 Hungarian Jews murdered out of a total Jewish population of over 800,000, at least 28,000 Romani victims and significant participation and complicity in the crime by Hungarian authorities from the head of state down to local gendarmes, police and tax collectors in tiny villages.[339]

As Gary Jeffrey Jacobsohn observes, the Constitution's language and especially the preambles to Constitutions are exceptionally informative in conveying the underlying meaning of the authors, and may indicate a commitment on their part to establish a constitutional identity, but until confirmed in the accumulated practice of the constitutional community, the goal will remain unfulfilled.[340] The establishment of

339 *See* the transcript of the hearing at <www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewTranscript&ContentRecord_id=539&ContentType=H,B&ContentRecordType=H&CFID=24497186&CFTOKEN=18666051>.

340 G.J. Jacobsohn, 'The Formation of Constitutional Identity', *in* T. Ginsburg & R. Dixon (Eds.), *Comparative Constitutional Law*, Edward Elgar, Cheltenham, 2011, p. 131.

a constitutional identity seems to have failed after the transition in 1989-1990, but it also remains to be seen whether this new attempt will be successful.

1.6.3.3 Intervention into the Right to Privacy

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

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

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

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

(a) According to Article L of the Fundamental Law:

> (1) Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation's survival.
> (2) Hungary shall encourage the commitment to have children.
> (3) The protection of families shall be regulated by a cardinal Act.

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

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

While a complete neutrality of the constitutional text is almost impossible, these provisions very much challenge the autonomy of individuals who do not accept the normative life models defined on the basis of the Fundamental Law's ideological values – as the preamble words it: "the form in which we want to live" – and they are capable of ostracizing them from the political community.

1.6.3.4 Weakening of the Protection of Fundamental Rights

The decline in the level of protection for fundamental rights is significantly influenced not only by the substantive provisions of the Fundamental Law pertaining to fundamental rights, but also by the weakening of institutional and procedural guarantees that would otherwise be capable of upholding those rights that remain under the Fundamental Law. The most important of these is a change to the review power of the Constitutional Court,

making it far less capable than before of performing its tasks related to the protection of fundamental rights. Added to this is the change in the composition of the Constitutional Court, taking place prior to the entry into force of the Fundamental Law, which will further impede it in fulfilling its function as protector of fundamental rights.

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

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

Abstract ex-post norm control, under point e) paragraph (2) of Section 24 of the Fundamental Law, may in future only be initiated by the government, a quarter of the votes of members of parliament, or the Commissioner for Fundamental Rights. Given the balance of power in the current parliament, this makes any such petitions much more difficult, since the government is hardly about to make use of this opportunity against their own bills, while a quarter of MPs' votes would assume a coalition between the two

democratic opposition parties and the extremist right-wing party, which supports the government.[341]

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

(b) Private individuals or organizations may only turn to the Constitutional Court in future if they themselves are the victims of a concrete breach of law and this has already been established in a civil-administration or a final court decision. In this case, the legal remedy offered by the Constitutional Court will naturally only affect them. In other words, the extension of opportunities to submit constitutional complaints is no substitute whatsoever for the widely available right of private individuals and organizations to file petitions.

(c) There is no doubt that the widely available opportunity to submit complaints could be beneficial to the judging of cases involving fundamental rights, and this has been the case in Germany, Spain and the Czech Republic. A prerequisite for this, however, is a Constitutional Court that is committed to fundamental rights and is independent from the government. The present government, on the other hand, has done all it can to prevent this since taking office in May 2010. This process began with the alteration of the system for nominating Constitutional Court judges, giving the governing parties the exclusive opportunity to nominate and subsequently replace judges. The Fundamental Law, in a further weakening of the guarantees of independence, increased the number of Constitutional Court judges from 11 to 15, which makes it possible to select 5 more new judges, after the 2 judges selected in May 2010, with their appointments lasting for a term of twelve years rather than the previous 9; in other words, for three parliamentary cycles. In future, the president of the Constitutional Court, who has until now been elected for a term of three years by the judges, will be selected by Parliament for the duration of his/her time in office. These changes could not wait until the entry into force of the Fundamental Law on 1 January 2012; rather, the president and the new members were selected at the end of July on the basis of an amendment to the existing Constitution, passed on 6 July 2011.[342]

341 Indeed, in 2012 it was only the ombudsman who filed such petitions in 35 cases (12 petition files were still pending earlier, and there were 23 new ones). The Constitutional Court decided on 11 of these cases, 6 cases in favour of the petitions and 5 rejections. There are still 24 petitions pending. *See* 'Ombudsmani indítványok az Alkotmánybíróság előtt' ['Petitions of the Ombudsman before the Constitutional Court'], <www.jogiforum.hu/hirek/28922>.

1.6.3.5 Constitutional Entrenchment of Political Preferences

At the time of the Hungarian regime change, the Constitution-makers have preserved the amendment rule of the original 1949 Constitution used to produce a substantively new Constitution. Whatever the original reason, this rule, requiring only two-thirds of the absolute majority of parliament to make any and all changes to the Constitution, has long been considered insufficient for a protection of fundamental rights, adequate constitutional review and of the stability of the basic structure of the Constitution. Observers, including the author of this article, considered this deficiency the main one requiring the making of a new Constitution.[343] The FIDESZ government, in its initial plans, proposed a new amendment rule that would require two-thirds votes in two parliamentary sessions with an election in between to approve constitutional amendments. Unlike its Spanish prototype, not distinguishing between fundamental revision and minor changes, this rule promised to entrench to too high a degree a Constitution that was not produced with sufficient consensus. It was because of such legitimation problems that the government backed away from the idea of replacing the purely parliamentary amendment rule. But it chose to compensate for this failure by lifting a large number of ordinary policy issues into the realm of entrenched laws, thereby removing the power of future parliaments to alter policy choices made by the present one.

The new Fundamental Law regulates some issues that would have to be decided by the governing majority, while it assigns others to laws requiring a two-thirds majority. This makes it possible for the current government enjoying a two-thirds majority support to write in stone its views on economic and social policy. A subsequent government possessing only a simple majority will not be able to alter these even if it receives a clear mandate from the electorate to do so. In addition, the prescriptions of the Fundamental Law render fiscal policy especially rigid since significant shares of state revenues and expenditures will be impossible to modify in the absence of pertaining two-third statutes. This hinders good governance since it will make it more difficult for subsequent governments to respond to changes in the economy. This can make efficient crisis management impossible. These risks are present irrespective of whether in writing two-third statutes the governing majority will exercise self-restraint (contrary to past experience). The very possibility created by the Fundamental Law to regulate such issues of economic and social policies by means of two-third statutes is incompatible with parliamentarism and the principle of the temporal division of powers.[344]

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342 *See* <www.parlament.hu/irom39/03199/03199.pdf>.

343 *See* G. Halmai, 'Grundstrukturen staatlichen Verfassungsrechts: Ungarn', *in* A. von Bogdandy, P.C. Villalón & P.M. Huber (Eds.), *Ius Publicum Euroepaeum,* Vol. I, C.F. Müller Verlag, Heidelberg, 2007, pp. 687–727.

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

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

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

344 One can argue that the economic crisis created such exceptional measures, like the debt brakes proposed by the German Chancellor, Angela Merkel.

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

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

1.6.3.6 New Cardinal Laws and Amendments to the Fundamental Law

Before 1 January 2012, when the new Constitution became law, the Hungarian parliament had been preparing a blizzard of so-called cardinal – or super-majority –laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure. These cardinal laws included the laws on freedom of information, the Constitutional Court, the prosecution, the nationalities, the family protection, the independence of the judiciary, the status of churches and elections to Parliament.

In the last days of 2011, the parliament has also enacted the so-called Transitory Provision to the Fundamental Law with a claimed constitutional status, which partly supplemented the new Constitution even before it came into effect.

These new laws have been uniformly bad for the political independence of state institutions, for the transparency of lawmaking and for the future of human rights in Hungary. Ignoring serious warnings from the European Commission President José Barroso,[345] the Fidesz government just pushed through two cardinal laws on financial matters. The new law[346] on the central bank (the Magyar Nemzeti Bank or MNB) gives the prime minister the right to appoint all vice presidents of the bank, while previously, the president of the central bank initiated the nominations process himself. The law creates a new third vice president for the bank, and one of these vice presidents can be named by Prime Minister Viktor Orbán immediately. The new law also expands the number of members on the monetary council. The monetary council, which – as the name suggests – sets monetary policy and interest rates, will grow to nine members, of which six have already been or soon will be put into office by the Fidesz government.

On the same day it passed this law, the parliament passed a constitutional amendment that also affects the status of the central bank. According to the amendment, the parliament may merge the central bank with the existing Financial Supervisory Authority to create a new agency, within which the central bank would be just one division. The government would then be able to name the head of this new agency who would effectively become the boss of the president of the central bank, reducing the bank president to a mere vice president in the new agency. The constitutional amendment does not actually complete the merger – it just lays the constitutional groundwork for the later disappearance of the free-standing bank. The new Economic Stability Law – also a target of EU criticism – creates a permanent flat tax, requiring all personal wage income to be taxed at the same rate, starting in January 2013.

The independence of the judiciary was dealt a blow with the constitutional amendment that was also passed on 30 December, the last day of the parliamentary session. According to it, both the head of the National Judicial Office and the public prosecutor, both people very close to the governing party and elected by the Fidesz parliamentary supermajority, can choose which judge hears each case. A prior decision of the Constitutional Court had found unconstitutional a law that permitted political officials to assign cases like this. To avoid constitutional questions, the government simply put the new powers to assign cases directly into the Constitution itself.

345 On Barroso's letter to Orban: <www.bloomberg.com/news/2011-12-20/barroso-calls-on-hungary-s-orban-to-withdraw-laws-origo-says.html>.

346 Contents of the new national bank law: <www.nytimes.com/2011/12/31/business/global/hungary-passes-central-bank-rules-despite-risk-to-bailout.html?_r=2>.

The constitutional reforms have also seriously undermined the independence of the ordinary judiciary by changing the appointment and reassignment process for judges. According to the Cardinal Acts on the Structure of the Judiciary and the Legal Status of Judges,[347] the head of the National Judicial Office can select either any judge from among the top three candidates recommended by the judicial council of the court where the appointment would be made or none of them at all. If she decides against the top candidate, or against any of the candidates listed, she only has to report the reasons to the National Judicial Council, a new body that has a merely advisory role in this matter. While formally the President of the Republic must sign off all new judicial appointments, the decision of the head of the National Judicial Office alone is necessary to promote or demote a judge presently sitting anywhere in the judiciary. The new law contains no procedures through which a sitting judge can contest such a reassignment. The nomination process for new judges became quite salient because the Transitory Provisions to the Fundamental Law, an omnibus constitutional addendum passed also at the very end of 2011, reduced the retirement ages for judges on ordinary courts from 70 to 62, starting on the day the new Constitution came into effect. This change forced somewhere between 274 judges into early retirement. Those judges include 6 of the 20 court presidents at the county level, 4 of the 5 appeals court presidents and 20 of the 80 Supreme Court judges. In July 2012, the Constitutional Court declared that the suddenly lowered retirement age for judges was unconstitutional.[348] But by the time the Court ruled, the 274 judges had already been fired. President Áder said he would not withdraw the orders firing the judges, and the head of the National Judicial Office said that the newly hired and promoted judges would not be displaced even if the unconstitutionally fired judges were reinstated by order of the labour courts. The European Commission requested the European Court of Justice to expedite its decision in the infringement proceeding launched on this issue, and the Court in November 2012 ruled that Hungary's reduced retirement age for judges is discriminatory.[349] Despite these decisions the fired judges were not reinstated.

The same constitutional amendment also listed the crimes committed by communist party officials during the Soviet period, extended the statute of limitations for these crimes, branded the former communist party a criminal organization, and designated the current Socialist party (Fidesz's primary opposition) as the legal successor to the communist party, responsible for all of its crimes.

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347 Act CLXI of 2011 on the Organization and Administration of the Judiciary and Act CLXII of 2011 on the Legal Status and Remuneration of Judges.

348 Decision 33/2012 (VII.17).

349 *C-286/12*. Judgment of the Court (First Chamber), 6 November 2012.

Many other cardinal laws were passed in the last 2 weeks as well. According to the cardinal law on the status of the churches, as well as a separate law on the Transitional Provisions of the Fundamental Law – both enacted with the two-thirds majority at the end of 2011 – the power to designate legally recognized churches is vested in the Parliament itself. The law has listed 14 legally recognized churches and required all other previously registered churches (some 330 religious organizations in total) to either re-register under considerably more demanding new criteria or continue to operate as religious associations without the legal benefits offered to the recognized churches (such as tax exemptions and the ability to operate state-subsidized religious schools). As a result, only 18 have been able to re-register, so the vast majority of previously registered churches have been deprived of their status as legal entities. Because registration requires an internal democratic decision-making structure, the majority of previously registered churches were not able to continue to operate with any legal recognition under the new regime. As a result, non-traditional and non-mainstream religious communities – which had not faced legal obstacles between 1989 and 2011 – are now facing increasing hardships and discrimination.

On 23 December 2011 the parliament also was set to vote on the controversial election law with its gerrymandered electoral districts, making the electoral system even more disproportional, which favours the current governing party in the elections to come. The main changes in the system are as follows: shift to the majoritarian principle, by increasing the proportion of single-member constituency mandates, eliminating the second round, introducing relative majority system instead of the absolute majority and introducing "winner compensation".

At the end of 2012 the Parliament amended the Fundamental law, and also passed a new cardinal law on Election Procedures, introducing a new system of voters' registration. The most important change is the abolition of the system of automatic voter registration. Hungarian citizens are no longer automatically entitled to vote but must register every four years to be allowed to vote. This is extremely unusual in European comparison, but even the very few countries that require registration strive to make it easier on their citizens. While the original bill contained a provision giving citizens in Hungary proper a brief window of 2 weeks to register by mail, the version finally adopted scrapped this option. Registering by mail will only be open to citizens abroad. The new law is also limiting both the time for campaigning as well as spaces where advertisements may be displayed, thus placing even greater restrictions on the opposition's already limited communication channels to the public. Even what was anticipated to be slight progress, *i.e.* the number of signatures necessary for placing candidates on the ballot, ultimately turned out to be far less generous than originally suggested.

On 11 March the Hungarian Parliament added the Fourth Amendment[350] to the country's 2011 Constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court, and rebuffing requests by the European Union, the Council of Europe and the U.S. government that urged the government to seek the opinion of the Venice Commission before bringing the amendment into force. The Fourth Amendment also added new restrictions on the Constitutional Court, inserted provisions that limit the application of constitutional rights and raises questions about whether concessions that Hungary made to European bodies last year in order to comply with European law are themselves now unconstitutional. These moves reopened serious doubts about the state of liberal constitutionalism in Hungary and Hungary's compliance with its international commitments under the Treaties of the European Union and under the European Convention on Human Rights.

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

The government has said that this 15-page comprehensive amendment to the still new Constitution was necessary because of previous decisions by the Hungarian Constitutional Court, in particular, a ruling issued at the very end of 2012. This decision held that those parts of the Transitional Provisions of the Fundamental Law that are not transitional in nature could not be deemed part of the Constitution, and were therefore invalid.[351] (Some elements of the Transitional Provisions were previously reviewed and criticized by the Venice Commission.[352]) In his letter to Mr. Thorbjørn Jagland, Secretary General of the Council of Europe, dated 7 March 2013, Mr. Tibor Navracsis, the Hungarian Minister of Public Administration and Justice, argued that the main aim of the Fourth Amendment was to formally incorporate into the text of the Fundamental Law itself the provisions that were annulled for formal procedural

350 *See* the 'official' English text of the amendment provided by the government here: <www.venice.coe.int/webforms/documents/?pdf=CDL-REF%282013%29014-e>.

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

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

reasons.[353] He argued that the amendment is, therefore, "to a great extent, merely a technical amendment to the Fundamental Law, and most of its provisions do not differ from the former text of the Transitional Provisions or they are directly linked thereto. Accordingly, the significance and novelty of this Proposal should not be overestimated". Mr. József Szájer, the Fidesz member of the European Parliament who served as the official representative of the Hungarian government at the hearing before the Commission on Security and Cooperation in Europe (U.S. Helsinki Commission) on 19 March 2013 went even further, claiming that the amendment was "basically a copy-paste exercise of a purely technical nature" done at the request of the Court itself.[354]

These statements are misleading. In its decision of 28 December 2012, the Constitutional Court did not review the substance of the Transitional Provisions,[355] since the petition of the ombudsman had not requested such a review. Instead of requesting that the nullified provisions be reinserted into the Constitution as an amendment, the Court only said that if the Parliament wanted a provision to be part of the Constitution, it was not enough to declare that the Transitional Provisions had constitutional status. Instead, the Parliament had to use the formal procedure laid out in the Constitution to make a constitutional amendment. The Court did not tell the government to put the annulled provisions back into the Constitution.

In fact, the ruling on the Transitional Provisions made it possible for the Constitutional Court to review the substance of some of the cardinal laws that said the same thing as the corresponding parts of the Transitional Provisions.[356] Most of the provisions struck down

353 The letter can be found at <www.kormany.hu/download/c/ee/c0000/Letter%20from%20DPM%20Navracsics%2007-03-2013.pdf>.

354 Mr. Szájer's testimony can be found at <www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewTranscript&ContentRecord_id=539&ContentType=H,B&ContentRecordType=H&CFID=22872555&CFTOKEN=58422914>.

355 *See* the English translation: <http://lapa.princeton.edu/hosteddocs/hungary/The%20Act%20on%20the%20Transitional%20Provisions%20of%20the%20Fundamental%20Law.pdf>.

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

by the Constitutional Court when it reviewed the Transitional Provisions were also embedded in cardinal laws that the Parliament had passed earlier, and with these provisions now "demoted" from constitutional status by the Court's ruling, the Court then undertook to review the almost identical provisions in the cardinal laws. Among these reviewed and annulled laws was one on voter registration, which the Court found unconstitutional on substantive grounds because it constituted an unnecessary barrier to voting.[357]

At the time that the Fourth Amendment was submitted to the Parliament, a decision on the constitutionality of the cardinal law on the status of churches was expected and the Court did in fact issue its ruling on 26 February 2013,[358] declaring unconstitutional parts of the law regulating the parliamentary registration of churches. These provisions had been first enacted as a law in 12 July 2011, were struck down by the Constitutional Court on procedural grounds in December 2011,[359] and then reinserted into the Transitional Provisions 1 week after the Constitutional Court struck down the law. This section of the Transitional Provisions was then struck by the Court again in December 2012 because the provision failed to guarantee procedural fairness in the parliamentary process through which churches were certified. Within a week, the annulled provisions were again added to a constitutional amendment, the Fourth Amendment, and this time it was insulated from Constitutional Court review by the section of the Fourth Amendment that prohibits the Court from substantively evaluating constitutional amendments.

The fact that the government was defeated in the voter registration and church registration cases shows that, even though the Fidesz government by that time had elected 7 of the 15 judges with the votes of their own parliamentary bloc, these judges were still not in a reliable majority within the Court.[360] That may have provided a reason for the government to want to limit the Court's influence even further.

In response to these decisions, the Fourth Amendment elevated the annulled permanent provisions of the Transitional Provisions into the main text of the Fundamental Law, with the intention of excluding further constitutional review, while the amendment also prohibited the Constitutional Court from reviewing the substantive constitutionality of constitutional amendments. The Fourth Amendment therefore contained all of the annulled sections of the Transitional Provisions except the section on voter registration.

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

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

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

360 When it came to power in 2010, the Fidesz government changed the rules for nominating judges to the Court so that all of the recently elected judges were elected by the Fidesz two-thirds majority in the parliament without needing (and generally without getting) the support of any opposition parties. The government expanded the number of judges on the Court from 11 to 15 to give themselves even more seats to fill. When the Transitional Provisions and the Law on the Status of Churches were struck down by the Court in December 2012 and February 2013, respectively, 7 of the 15 judges had been named by Fidesz since 2010. In February 2013, an eighth judge was added, and in April 2013 a ninth Fidesz judge joined the bench.

Even though the Constitutional Court argued that the registration of churches by the Parliament does not provide a fair procedure for the applicants, this procedure will be constitutional in the future as the Fourth Amendment puts this procedure, previously declared unconstitutional, directly into the Constitution itself and beyond the reach of the Constitutional Court. That effectively means a very serious restriction on the freedom to establish new churches in Hungary.

The Fourth Amendment also put into the Constitution and beyond the reach of the Constitutional Court the power of the President of the National Judicial Office (NJO) to move cases from the court to which a case is assigned by law to a different court anywhere in the country that is less crowded. While the Constitutional Court did not have the opportunity to review the substance of this provision for constitutionality, the Court had previously struck down a similar provision giving that power to the Prosecutor General.[361] The Venice Commission had criticized the power of the president of the National Judicial Office to move cases,[362] and the Hungarian government had added some restrictions on this power through amendments to the relevant cardinal law in summer 2012.

A number of statutory provisions that were previously annulled by the Constitutional Court have also become part of the Fourth Amendment. One of them authorizes the legislature to set conditions for state support in higher education, such as requiring graduates of state universities to remain in the country for a certain period of time after graduation if the state has paid for their education. The Constitutional Court had declared this unconstitutional in December 2012 because it violates both the right to free movement and the free exercise of occupation. The European Commission has expressed its concern over this restriction on the movement of Hungarian students in an "EU Pilot" letter to the government of Hungary in November 2012.[363]

Another reversal of a declaration of unconstitutionality is the authorization for both the national legislature and local governments to declare homelessness unlawful in order to protect "public order, public security, public health and cultural values".[364] The Constitutional Court had declared the prohibition of homelessness as a status unconstitutional because it violated the human dignity of people who could not afford a place to live.[365] But the power to make homelessness unlawful has now been placed into the Constitution and beyond the reach of the Constitutional Court so it cannot be reviewed again.

361 Decision 166/2011 (XII. 20.).

362 *See* Opinion 663/2012 on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts.

363 <www.freehungary.hu/component/content/article/1-friss-hirek/1510-another-infringement-procedure-against-hungary.html>.

364 Fourth Amendment, Art. 8.

365 Decision 38/2012. (XI. 14.).

At the end of 2012, the Court had annulled the definition of the family in the law on the protection of families because it was too narrow, excluding all families other than very traditional ones consisting of opposite-sex married parents with children.[366] Now the Fundamental Law will define marriage as taking place only between men and women. It will also establish the parent–child relationship as the basis of the family, excluding not only same-sex marriage, but also all non-marital partnerships. The Fourth Amendment therefore overrules yet another Constitutional Court decision.

Under the old Constitutional Court jurisprudence, group libel laws were found to be an unconstitutional restriction on free speech.[367] The Fourth Amendment now entrenches in the Constitution those parts of the new Civil Code that permit private actions to remedy group libel, not only in the case of the protection of racial, religious and other minorities, but also where there are offences "against the dignity of the Hungarian nation". Since the Fourth Amendment annuls all of the case law of the Constitutional Court from 1990-2011, the addition of this provision to the Constitution is not a direct contradiction of a recent case, but a jarring reversal of something that had been taken for granted in Hungarian constitutional law.

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

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

> The Proposal contains that constitutionality of the Fundamental Law itself and any amendments thereto may be examined by the Constitutional Court from a procedural point of view, in order to check their compliance with procedural law requirements regulated in the Fundamental Law. This is a new competence for the Constitutional Court, because under the Fundamental Law so far it had no legal possibility at all for any review of the amendments to the Fundamental Law. The provision is in accordance with the case-law of Constitutional Court based on the former Constitution under which, for the last time in decision 61/2011, the Constitutional Court explicitly reinforced that it had no power to review in merits the amendments to the Constitution. Neither did the decision of 45/2012 on the Transitional Provisions overrule this former practice.

366 Decision 43/2012. (XII. 20.).
367 Decision 96/2008. (VII. 3.).

Unfortunately none of these arguments are correct.

As discussed earlier, a great number of petitions reached the Constitutional Court concerning the November 2010 constitutional amendments that sought to curtail the Court's powers in fiscal and budget matters.[368] The restriction of the Court's jurisdiction was instituted in retaliation for a decision that the Court made, declaring unconstitutional a 98% retroactive tax on "exit bonuses"[369] given to state employees in the preceding five years. In their decision 61/2011. (VII. 13.), the justices of the Constitutional Court refused to perform a review of the substance of these amendments. At the same time, however – and this was the first time in the Court's judicial practice – they undertook an investigation, despite the lack of explicit competence to do so, into the constitutional validity of these amendments by examining the procedure that led to their adoption, even though the justices did not find the petition well grounded in this regard. The three dissenting justices, however, believed that an examination of the substance of the amendments was also necessary, and two of them would have nullified the impugned constitutional amendments, which they deemed – albeit to differing degrees – unconstitutional on substantive grounds.

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

In the last days of 2011, the Hungarian Parliament enacted the so-called Act on the Transitional Provisions to the Fundamental Law, which the government claimed had constitutional status. These Transitional Provisions supplemented the new Constitution even before it came into effect. At the very end of 2012, the Constitutional Court in its decision

368 Act CXIX of 2010.

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

45/2012. (XII. 29.) ruled that those parts of the Transitional Provisions of the Fundamental Law that were not transitional in nature could not be deemed part of the Constitution, and were therefore invalid. This decision did not review the substantive constitutionality of the Transitional Provisions, since the petition of the ombudsman asked for an exclusively formal review, and therefore the substantive question was not referred to the Court. But the majority of the justices this time emphasized in the reasoning that it is the constitutional responsibility of the Court to protect the unity of the Constitution, and to ensure that the text of the Constitution can be clearly identified. The justices added that an amendment of the Constitution cannot create an irresolvable inconsistency in the text of the Constitution. Therefore, they argued, "In certain cases, the Constitutional Court can examine the continuous realization of the substantial constitutional requirements, guarantees and values of the democratic state governed by rule of law, and their incorporation into the constitution." In this decision, therefore, the Court concluded that it had the theoretical power to review constitutional amendments for their substantive constitutionality.

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

The most alarming change concerning the Constitutional Court annuls all Court decisions prior to when the Fundamental Law entered into force. At one level, this makes sense: old Constitution, old decisions/new Constitution, new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new Constitutions was substantially the same, the opinions of the prior Court would still be valid and could still be applied. Otherwise, where the new Constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are

key provisions that are the same in the old and new Constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonized domestic rights protection with European human rights law. Without those cases as touchstones, the government has undermined legal security when it comes to the protection of constitutional rights in Hungary.

Upon the request of the Secretary General of the Council of Europe, Mr. Thorbjørn Jagland, and the Minister for Foreign Affairs of Hungary, Mr. János Martonyi, the Venice Commission at its plenary session on 14-15 June adopted opinion 720/2013 on the Fourth Amendment to the Fundamental Law of Hungary.[370] According to the Commission's opinion, the main concerns relate to the role of the Constitutional Court and to the ordinary judiciary. In the field of human rights in general, several issues are regulated in a manner disregarding earlier decisions by the Constitutional Court. The Commission assesses these constitutional amendments problematic not only because constitutional control is blocked in a systematic way, but also in substance because these provisions contradict principles of the Fundamental Law and European standards. In particular: the provisions on the communist past attribute responsibility in general terms, without any individual assessment; the absence of precise criteria for the recognition of churches and of an effective legal remedy against the decision not to recognize; the limitations on advertising have a disproportionate effect on opposition parties; and the provisions on the dignity of communities are too vague and the specific protection of the "dignity of the Hungarian nation" creates the risk that freedom of speech in Hungary could, in the future, be curtailed to protect Hungarian institutions and office holders.

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

(a) A series of provisions of the Fourth Amendment raise issues to the constitutional level as a reaction to earlier decisions of the Constitutional Court. Reacting to Constitutional Court decisions by 'constitutionalizing' provisions declared unconstitutional is a systematic approach, which was applied already to the old Constitution, then to the Transitional Provisions and now to the Fundamental Law itself. It threatens to deprive the Constitutional Court of its main function as the guardian of constitutionality and as a control organ in the democratic system of checks and balances.

(b) The removal of the possibility to base itself on its earlier case law unnecessarily interrupts the continuity of the Court's case law on a body of principles, which transcend the Constitution itself and directly relate to the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law.

(c) Instead of removing the limitations on the competence of the Constitutional Court to review potentially unconstitutional legislation, which has a budgetary incidence, the

370 <www.venice.coe.int/WebForms/documents/?pdf=CDL-AD(2013)012-e>.

> Fourth Amendment perpetuates this system, which shields potentially unconstitutional laws from constitutional review even when budgetary problems have subsided.

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

Upon the request of the European Parliament, also its Committee on Civil Liberties, Justice and Home Affairs (LIBE) prepared a report on the Hungarian constitutional situation, including the impacts of the Fourth Amendment to the Fundamental Law of Hungary.[371] The report is named after Rui Tavares, the Portuguese MEP who was the rapporteur on this detailed study of the Hungarian constitutional developments since 2010. On 3 July 2013 the report passed with a surprisingly lopsided vote: 370 in favour, 248 against and 82 abstentions. In a Parliament with a slight majority of the right, this tally gave the lie to the Hungarian government's claim that the report was merely a conspiracy of the left.[372]

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

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371 <www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN>.

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

to institutionalize a new system of monitoring and assessment in place. The most important four elements of ways of actions are these:

(a) An "Article 2 Alarm Agenda", which requires the European Commission in all of its dealings with Hungary to raise only Article 2 issues until such time as Hungary comes into compliance with the report. This Alarm Agenda effectively blocks all other dealings between the Commission and Hungary until Hungary addresses the issues raised in the report.

(b) A "Trilogue" (a three-way communication) in which the Commission, the European Council and the European Parliament will each delegate members to a new committee that will engage in a close review of all activities of the Hungarian government relevant to the report. This committee is charged with assessing the progress that Hungary is making in complying with the list of specific objections that the report identifies. The Trilogue sets up a system of intrusive monitoring, much more intrusive than the Excessive Deficit Procedure (EDP) from which Hungary just escaped. Under the EDP, European bodies only looked at the budget's bottom line to determine whether Hungary's deficit was within acceptable bounds. Under the Trilogue, the committee can examine anything that is on the long list of particulars that the report identifies as being within its scope.

(c) A "Copenhagen Commission" or high-level expert body through which a panel of distinguished and independent experts will be assigned the power to review continued compliance with the Copenhagen criteria used for admission to the EU on the part of any member state. The idea behind this body, elaborated by Jan-Werner Müller, in a report of the Transatlantic Academy research project on the future of the liberal democracy, which I also had the privilege to take part in, is that non-political experts should be given the task of judging whether member states are still acting on the basis of values of Article 2.[373]

(d) And in the background, there is still Article 7 of the Treaty of the European Union. Article 7, which identifies a procedure through which an EU member state can be deprived of its vote in the European Council and therefore would lose representation in the decision-making processes of the EU, is considered the "nuclear option" – unusable because extreme. But the Tavares Report holds out the possibility of invoking Article 7 if the Hungarian government does not comply with the monitoring programme and reform its ways.

But perhaps the most important part of the report is the list of what these various monitoring bodies can examine. Here is the list of items that the Hungarian government must address, taken from the report, where the Parliament "urges the Hungarian authorities to

373 <www.transatlanticacademy.org/publications/safeguarding-democracy-inside-eu-brussels-and-future-liberal-order>.

implement as swiftly as possible all the measures the European Commission as the guardian of the treaties deems necessary in order to fully comply with EU law, fully comply with the decisions of the Hungarian Constitutional Court and implement as swiftly as possible the following recommendations, in line with the recommendations of the Venice Commission, the Council of Europe and other international bodies for the protection of the rule of law and fundamental rights, with a view to fully complying with the rule of law and its key requirements on the constitutional setting, the system of checks and balances and the independence of the judiciary, as well as on strong safeguards for fundamental rights, including freedom of expression, the media and religion or belief, protection of minorities, action to combat discrimination and the right to property:

On the Fundamental Law:

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

On checks and balances:

1. to fully restore the prerogatives of the Constitutional Court as the supreme body of constitutional protection, and thus the primacy of the Fundamental Law, by removing from its text the limitations on the Constitutional Court's power to review the constitutionality of any changes to the Fundamental Law, as well as the abolition of two decades of constitutional case law; to restore the right of the Constitutional Court to review all legislation without exception, with a view to counterbalancing parliamentary and executive actions and ensuring full judicial review; such a judicial and constitutional review may be exerted in different ways in different Member States, depending on the specificities of each national constitutional history, but once established, a Constitutional Court – like the Hungarian one, which after the fall of the communist regime has rapidly built a reputation among Supreme Courts in Europe – should not be subject to measures aimed at reducing its competences and thus undermining the rule of law;

2. to restore the possibility for the judicial system to refer to the case law issued before the entry into force of the Fundamental Law, in particular, in the field of fundamental rights;
3. to strive for consensus when electing the members of the Constitutional Court, with meaningful involvement of the opposition, and to ensure that the members of the court are free from political influence;
4. to restore the prerogatives of the parliament in the budgetary field and thus secure the full democratic legitimacy of budgetary decisions by removing the restriction of parliamentary powers by the non-parliamentary Budget Council;
5. to provide clarifications on how the Hungarian authorities intend to remedy the premature termination of the term of office of senior officials with a view to securing the institutional independence of the data protection authority.

On the independence of the judiciary:

1. to fully guarantee the independence of the judiciary by ensuring that the principles of irremovability and guaranteed term of office of judges, the rules governing the structure and composition of the governing bodies of the judiciary and the safeguards on the independence of the Constitutional Court are enshrined in the Fundamental Law;
2. to promptly and correctly implement the abovementioned decisions of the Court of Justice of the European Union of 6 November 2012 and of the Hungarian Constitutional Court, by enabling the dismissed judges who so wish to be reinstated in their previous positions, including those presiding judges whose original executive posts are no longer vacant;
3. to establish objective selection criteria, or to mandate the National Judicial Council to establish such criteria, with a view to ensuring that the rules on the transfer of cases respect the right to a fair trial and the principle of a lawful judge;
4. to implement the remaining recommendations laid down in the Venice Commission's Opinion No. CDL-AD(2012)020 on the cardinal acts on the judiciary that were amended following the adoption of Opinion CDL-AD(2012)001;[374]

On the electoral reform:

1. to invite the Venice Commission and the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) to carry out a joint analysis of the comprehensively changed legal and institutional framework of the elections and to invite the ODIHR for a Needs Assessment Mission and a long- and short-term election observation.
2. to ensure balanced representation within the National Election Committee;

374 Venice Commission reports on Hungary can be found here: <www.venice.coe.int/webforms/documents/by_opinion.aspx>.

On the media and pluralism:

1. to fulfil the commitment to further discuss cooperation activities at expert level on the more long-term perspective of the freedom of the media, building on the most important remaining recommendations of the 2012 legal expertise of the Council of Europe;
2. to ensure timely and close involvement of all relevant stakeholders, including media professionals, opposition parties and civil society, in any further review of this legislation, which regulates such a fundamental aspect of the functioning of a democratic society, and in the process of implementation;
3. to observe the positive obligation arising from European Court of Human Rights jurisprudence under Article 10 ECHR to protect freedom of expression as one of the preconditions for a functioning democracy;
4. to respect, guarantee, protect and promote the fundamental right to freedom of expression and information, as well as media freedom and pluralism, and to refrain from developing or supporting mechanisms that threaten media freedom and journalistic and editorial independence;
5. to make sure that objective, legally binding procedures and mechanisms are in place for the selection and appointment of heads of public media, management boards, media councils and regulatory bodies, in line with the principles of independence, integrity, experience and professionalism, representation of the entire political and social spectrum, legal certainty and continuity;
6. to provide legal guarantees regarding full protection of the confidentiality-of-sources principle and to strictly apply related European Court of Human Rights case law;
7. to ensure that rules relating to political information throughout the audiovisual media sector guarantee fair access to different political competitors, opinions and viewpoints, in particular on the occasion of elections and referendums, allowing citizens to form their own opinions without undue influence from one dominant opinion-forming power;

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

1. to take, and continue with, positive actions and effective measures to ensure that the fundamental rights of all persons, including persons belonging to minorities and homeless persons, are respected and to ensure their implementation by all competent public authorities; when reviewing the definition of 'family', to take into account the legislative trend in Europe to broaden the scope of the definition of family and the negative impact of a restricted definition of family on the fundamental rights of those who will be excluded by the new and more restrictive definition;
2. to take a new approach, finally assuming its responsibilities towards homeless – and therefore vulnerable – people, as set out in the international treaties on human rights to which Hungary is a signatory, such as the European Convention on Human Rights

and the Charter of Fundamental Rights of the European Union, and thus to promote fundamental rights rather than violating them by including in its Fundamental Law provisions that criminalize homeless people;
3. calls on the Hungarian Government to do all in its power to strengthen the mechanism for social dialogue and comprehensive consultation and to guarantee the rights associated with this;
4. calls on the Hungarian Government to increase its efforts to integrate the Roma and to lay down targeted measures to ensure their protection. Racist threats directed at the Roma must be unequivocally and resolutely repelled;

On freedom of religion or belief and recognition of churches:
1. to establish clear, neutral and impartial requirements and institutional procedures for the recognition of religious organisations as churches, which respect the duty of the State to remain neutral and impartial in its relations with the various religions and beliefs and to provide effective means of redress in cases of non-recognition or lack of a decision, in line with the constitutional requirements set out in the abovementioned Decision 6/2013 of the Constitutional Court."[375]

One more item was added to this list by amendment from Rui Tavares during the parliamentary debate:
1. "to cooperate with the European institutions in order to ensure that the provisions of the new National Security Law comply with the fundamental principles of the separation of powers, the independence of the judiciary, respect for private and family life and the right to an effective remedy".

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

The first reaction of the Hungarian government was not a sign of willingness to comply with the recommendations of the report, but rather a harsh rejection. Two days after the European Parliament adopted the report at its plenary session, the Hungarian Parliament adopted Resolution 69/2013 on "the equal treatment due to Hungary". The document is written in first person plural as an anti-European manifesto on behalf of all Hungarians: "We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have

375 Para. 71. of the report.

had enough of dictatorship after 40 years behind the iron curtain." The resolution argues that the European Parliament exceeded its jurisdiction by passing the report, and creating institutions that violate Hungary's sovereignty as guaranteed in the Treaty on the European Union. The text also points out that behind this abuse of power there are business interests, which were violated by the Hungarian government by reducing the costs of energy paid by families, which could undermine the interest of many European companies that for years have gained extra profits from their monopoly in Hungary. As a conclusion, the Parliament called on the Hungarian government "not to cede to the pressure of the European Union, not to let the nation's rights guaranteed in the fundamental treaty be violated, and to continue the politics of easing life for Hungarian families".[376] These words very much reflect the Orbán-government's view of 'national freedom', the liberty of the state (or the nation) to determine its own laws:

> This is why we are writing our own constitution [...] And we don't want any unconsolidated help from strangers who are keen to guide us [...] Hungary must turn on its own axis.[377]

As István Pogány characterizes this 'new constitutionalism,' it is a clear rejection of the notion of the common set of European, let alone global values, which is based on an outdated and largely discredited conception of state sovereignty, which does not take into account that in the present day, international human rights norms concerning self-determination, democratic governance, respect for civil liberties, etc. define the parameters within which 'sovereign' governments may lawfully function,[378] or as Martti Koskenniemi puts it: "the freedom of action left to public officials by a state's international obligations".[379]

Under international pressure the Hungarian government finally made some cosmetic changes to its Fundamental Law, doing little to address concerns set out by the Council of Europe and the European Parliament. The changes leave in place provisions that undermine the rule of law and weaken human rights protection. The Hungarian parliament,

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

377 For the original Hungarian-language text of Orbán's speech entitled 'Nem leszünk gyarmat!' ['We Won't Be a Colony Anymore!'] *see*, *e.g.*, <www.miniszterelnok.hu/beszed/nem_leszunk_gyarmat_>. The English-language translation of excerpts from Orbán's speech was made available by Hungarian officials, *see*, *e.g.*, Financial Times: Brussels Blog, 16 March 2012, <http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFtC>.

378 I. Pogány, 'The Crisis of Democracy in East Central Europe: The "New Constitutionalism" in Hungary', *European Public Law,* Vol. 19, No. 2, 2013.

379 *Cf.* M. Koskenniemi, 'What Use for Sovereignty Today?', *Asian Journal of International Law*, Vol. 1, No. 61, 2011, pp. 61-63.

with a majority of its members from the governing party, adopted the Fifth Amendment on 16 September 2013.[380] Hungary's reasoning states that the amendment aims to "finish the constitutional debates at international forum". A statement from the Prime Minister's Office said: "The government wants to do away with those [...] problems which have served as an excuse for attacks on Hungary." Here are the major elements of the amendment:

(a) Regarding political campaigns on radio and television, commercial media broadcasters are able to air political ads, but they must operate similar to public media channels – *i.e.* distribution of air time for political ads should not be discriminatory and should be provided free of charge. But since commercial media cannot be obliged to air such ads, it is unlikely that commercial outlets would agree to run campaign ads without charge.

(b) Regarding recognition of religious communities (in line with the relevant cardinal law), the amendment emphasizes that all communities are entitled to operate freely, but those who seek further cooperation with the state (the so-called 'established churches') must still be voted upon by Parliament to receive that status. This means that the amendment does not address discrimination against churches the government has not recognized. Parliament, instead of an independent body, confers recognition, which is necessary for a church to apply for government subsidies.

(c) The provision that enabled the government to levy taxes to settle unforeseen financial expenses occurring after a court ruling against the country – such as the European Court of Justice – was also removed, but the reasoning adds that the government is always free to levy new taxes, and this amendment will cost Hungarian taxpayers at least 6 billion Forints in the next five years.

(d) The amendment creates a chance for the merger of the central bank (MNB) and the financial watchdog institution (PSZÁF).

(e) Although the amendment elevates some provisions of a self-governing supervisory body, the National Judicial Council, to the level of the Constitution, and slightly strengthens the Council's powers, it still leaves key tasks of administering the courts with the National Judicial Office.

(f) One positive amendment removed the power of the president of the National Judicial Office to transfer cases between courts – a change already made on the statutory level, but since the head of the Office is already able to appoint new judges loyal to the government all over the country, the transfer power is no longer necessary to find politically reliable judges.

380 Both the foreign and Hungarian Human Rights NGOs said that the 'amendments show the government is not serious about fixing human rights and rule of law problems in the constitution'. *See* the assessment of Human Rights Watch: <www.hrw.org/news/2013/09/17/hungary-constitutional-change-falls-short>, and the joint opinion of three Hungarian NGOs: <http://helsinki.hu/otodik-alaptorveny-modositas-nem-akarasnak-nyoges-a-vege>.

As we could see, in 1989, Fidesz and Viktor Orbán together with SZDSZ played a crucial role to avoid a kind of semi-presidential system with a former communist president by not signing the agreement of the National Roundtable and initiating a successful referendum on the way and time of the election of the President. In 2010, after Fidesz's election victory, many argued that Orbán is willing to introduce a presidential system in order to concentrate power in the hands of the presidency. Others claimed that Orbán does not want a presidential system, since he does not want a system that gives a lot of power to the president but contains checks and balances against the executive.[381] Proponents of Fidesz, such as Béla Pokol, argued that Fidesz's new constitutional system envisages the Westminster type of Parliamentary system, in which the "winner takes all" and where the principle of the unity of power prevails. In my view the Westminster model also works with checks and balances, even if different from that of a presidential system. Therefore one cannot treat Fidesz's new constitutional system as a monistic democracy, which just gives priority to democratic decision-making over fundamental rights.[382] The institutional arrangement of this model is best embodied by the British doctrine of parliamentary sovereignty, which does not entail the usual institutional elements of a dualist democracy, such as strong judicial review. By contrast, the new Hungarian constitutional system has kept these institutional arrangements, such as the Constitutional Court, but deprived of their power. They also kept the mixed electoral system, but made it more majoritarian.

This means that the new Hungarian constitutional system does not fit into either of the models of government, which are all based on a different concept of separation of powers. The more traditional model creations of government forms are based on the relationship between the legislature and the executive. For instance, Arendt Lijphart differentiates between majoritarian (Westminster) and consensual models of democracy, the prototype of the first being the British, while of the second the continental European parliamentary, as well as the U.S. presidential system.[383] Giovanni Sartori speaks about presidentialism and semi-presidentialism, as well as about two forms of parliamentarism, namely the premiership system in the United Kingdom, Kanzlerdemokratie in Germany and the assembly government model in Italy.[384] Besides the Westminster and the U.S. separation

381 *See* the discussion in the Hungarian weekly, *Élet és Irodalom,* initiated and concluded by my articles: G. Halmai, 'Búcsú a jogállamtól' ['Farewell to the Rule of Law'], 23 July 2010, and 'Jogállami ellenforradalom – illiberális demokrácia' ['Rule of Law Counter-Revolution and Illiberal Democracy'], 24 September 2010.

382 Bruce Ackerman distinguishes between three models of democracy: monistic, rights fundamentalism, in which fundamental rights are morally prior to democratic decision-making and there impose limits, and dualist, which finds the middle ground between these two extremes, and subjects majoritarian decision-making to constitutional guarantees. *See* Ackerman, 1992a, pp. 6-16.

383 A. Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries,* Yale University Press, New Haven, 1999.

384 G. Sartori, *Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes,* 2nd edn., New York University Press, New York, 1997.

of powers systems, Bruce Ackerman uses the constrained parliamentarism model as a new form of separation of power, which has emerged against the export of the American system in favour of the model of Germany, Italy, Japan, India, Canada, South Africa and other nations, where both popular referendum and constitutional courts constrain the power of the parliament.[385] Hungary, between 1990 and 2010, belonged to the consensual and constrained parliamentary systems, close to the German Kanzlerdemokratie. But the 2011 Fundamental Law has abolished almost all possibility of institutional consensus and constraints of the parliamentary power, and the system has certainly moved towards an absolute parliamentary sovereignty model without the cultural constraints of the Westminster form of government. Not to mention the fact that in the last decades the traditional British model of constitutionalism has also been changed drastically with the introduction of bill of rights by left-of-centre governments (and opposed by right-of-centre opposition parties in Canada (1982), New Zealand (1990), the United Kingdom (1998), the Australian Capital Territory (2004) and the State of Victoria (2006). As opposed to the traditional Commonwealth model of constitutionalism, these codified bill of rights became limits on the legislation, but as opposed to the judicial supremacy approach of the U.S. separation of powers model, as well as the constrained parliamentary model, the legislature, a politically accountable branch of government enjoys the final word.

The biggest change occurred in the United Kingdom, and some even talk about the "demise of the Westerminster model".[386] The greatest deviation from the system of unlimited Parliamentary sovereignty was the introduction of judicial review. In just over two decades, the number of applications for judicial review nearly quadrupled to over 3,400 in 2000, when the Human Rights Act 1998 came into effect in England and Wales.[387] The Human Rights Act has a general requirement that all legislation should be compatible with the European Convention of Human Rights. This does not allow U.K. courts to strike down, or 'disapply,' legislation, or to make new law. Instead, where legislation is deemed to be incompatible with Convention rights, superior courts may make a declaration of incompatibility (under section 4.2). Then it is up to the government and Parliament to decide how to proceed. In this sense the legislative sovereignty of the U.K. Parliament is preserved. Some academics argue that, although as a matter of constitutional legality, Parliament may well be sovereign, as a matter of constitutional practice it has transferred significant power to the judiciary.[388]

385 B. Ackerman, 'The New Separation of Powers', *Harvard Law Review*, Vol. 113, 2000, pp. 633-727.

386 *Cf.* P. Norton, 'Governing Alone', *Parliamentary Affairs,* October 2003, p. 544.

387 *See* D. Judge, 'Whatever Happened to Parliamentary Democracy in the United Kingdom', *Parliamentary Affairs,* July 2004, p. 691.

388 *Cf.* K.D. Ewing, 'The Human Rights Act and Parliamentary Democracy', *Modern Law Review,* 1999, p. 92.

Others go even further and argue that although the Human Rights Act 1998 is purported to reconcile the protection of human rights with the sovereignty of Parliament, it represents an unprecedented transfer of political power from the executive and legislature to the judiciary.[389]

Besides the mentioned Commonwealth countries, a similar new model has emerged in Israel, where the Basic Law on occupation, re-enacted in 1994, contains a "notwithstanding" provision, similar to the Canadian one. This new model of Commonwealth constitutionalism is based on a dialogue between the judiciary and the parliament.[390] But also comparative constitutional studies conclude that parliamentary sovereignty tends to be restrained either legally or politically more and more, and the last decades have witnessed less and less scope for the exercise of traditional pouvoir constituant conceived as unrestrained, as the 'will of the people,' even in cases of regime change or the establishment of substantially and formally new constitutional arrangements.[391] In contrast to these new trends, in the Hungarian constitutional system the parliamentary majority not only decides every single issue without any dialogue, but practically there is no partner for such a dialogue, as the independence of both the ordinary judiciary and the Constitutional Court has been liquidated.

1.6.4 Lessons to Be Learned from the Hungarian Case

1.6.4.1 Reasons

Since the constitutional order of the new Constitution weakened the checks and balances and the guarantees of fundamental rights, the new Hungary (not even a Republic in its name anymore) cannot be deemed as a liberal democracy.

The main reasons for the turn of constitutionalism are as follows:

(a) Historically, there was no real parliamentary democracy in Hungary; only elements of a representative system existed before World War II during Governor Horthy's regime, with strong nationalism and anti-Semitism, and without any kind of human rights culture.

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389 *See* M. Flinders, 'Shifting the Balance? Parliament, the Executive and the British Constitution', *Political Studies*, Vol. 15, 2002, p. 62.

390 *See* S. Gardbaum, *The Commonwealth Model of Constitutionalism. Theory and Practice,* Cambridge University Press, Cambridge, 2013 about the new model. This model has also come to be known by several other names: (a) 'weak-form of judicial review' (M. Tushnet, 'Alternative Forms of Judicial Review', *Michigan Law Review*, Vol. 101, 2003, p. 2781) or just 'weak judicial review' (J. Waldron, 'The Core of the Case against Judicial Review', *Yale Law Journal*, Vol. 115, 2006, p. 1354), (b) 'the parliamentary bill of rights model' (J. Hiebert, 'Parliamentary Bill of Rights. An Alternative Model?', *Modern Law Review,* Vol. 69, No. 7, 2006, p. 3.) 'the dialogue model', 'the model of democratic dialogue' (A.L. Young, *Parliamentary Sovereignty and the Human Rights Act,* Hart Publishing, Oxford, 2009, Chapter 5), or 'dialogic judicial review' (K. Roach, 'Dialogic Judicial Review and Its Critics', *Supreme Court Law Review*, Vol. 23, 2nd series, 2004, p. 49).

391 *See* C. Fusaro & D. Oliver, 'Towards a Theory of Constitutional Change', *in* D. Oliver & C. Fusaro (Eds.), *How Constitutions Change – A Comparative Study,* Hart Publishing, Oxford, 2011, pp. 417-418.

According to the political theorist, István Bibó, who also acted as the Minister of State in the government of Imre Nagy during the Hungarian revolution of 1956, pre-World War II Hungary was a prime example of a 'deformed political culture', where

> nationhood had to be made, re-fashioned, fought for and constantly protected not only from the predations of imperial powers but also from the indifference and fluctuating sense of national identity as a part of the people themselves.[392]

During the 1920s and 1930s, when Hungary had a far-right government that flirted seriously with fascism, Miklós Horthy governed not only as admiral without a sea, but also as a regent without a king. Horthy relied for some of his authority on his public reverence for the Holy Crown, with which he associated himself whenever possible. He also organized a major national celebration for the Crown in 1937 and took full propaganda advantage of touring the country with the Crown in an open train. While he himself could not claim the title of king, he appeared, nonetheless, in the place of a king governing the country with a toxic mix of nationalism, xenophobia and disrespect for basic legality and constitutionalism. This means that Hungary has never before had a democratic system, similar to the one of the Third Republic between 1990 and 2010.

As surveys on the links between modernization and democracy show, the society's historic and religious heritage leaves a lasting imprint.[393] According to these surveys, the public of formerly agrarian societies, such as Hungary, emphasize religion, national pride, obedience and respect for authority, while the publics of industrial societies emphasize secularism, cosmopolitanism, autonomy and rationality.[394] And even modernization's changes are not irreversible: economic collapse can reverse them, as happened during the early 1990s in most former communist states, including Hungary. These findings were confirmed by another international comparative study conducted by researchers of Jacobs University in Bremen and published by the German Bertelsmann Foundation.[395] According to the study, which examined 34 countries in the EU and the OECD, Hungary has had a low level of social cohesion ever since the post-communist transformation, with which the country was ranked 27th, between Poland and Slovakia. Social cohesion is defined as the special quality with which members of a community live and work together. The survey covering the period between 1989 and 2012 showed that Hungary's position has not

392 *See* I. Bibó, *Kelet-európai kis-népek nyomorúsága* [*The Misery of the Small States of Eastern Europe*], Új Magyarország, Budapest, 1946.

393 *See* R. Inglehart & Ch. Welzel, 'Changing Mass Priorities: The Link between Modernization and Democracy', *Perspectives on Politics*, 2010, Vol. 8, No. 2, pp. 551-567.

394 *Id.*, p. 553.

395 D. Schiefer, J. van der Noll, J. Delhey & K. Boehnke, *Cohesion Radar: Measuring Cohesiveness*, Bertelsmann Foundation, 2013, <www.bertelsmann-stiftung.de/bst/en/media/xcms_bst_dms_36378__2.pdf>.

changed significantly over the years. The country lay in the bottom third of the list except between 1996 and 2003, when it sank to the group of countries with the lowest level of cohesion in the survey. According to the current report, Hungary is in the fourth tier. "It ranks in the bottom tier for perception of fairness as well as for solidarity and helpfulness. Hungary is in the middle tier for acceptance of diversity and respect for social rules, and it ranks as high, in the second tier, for identification with the nation", the report said.

Another study conducted in 2009 within the Pew Global Attitudes Project has shown that dissatisfaction with the state of democracy after twenty years of the transitions is widespread within Eastern and Central Europe.[396] Majorities in many countries are unhappy with the way democracy is working in their countries, amounting to roughly more than three out of four in Hungary.[397] As a consequence of this dissatisfaction in Hungary, only a slight majority (56%) still approves the change to a multiparty system, as opposed to the 18% higher approval rate in 1991.[398] Owing to the existential instability in the countries of Eastern and Central Europe, even though democratic institutions and freedoms may be as important as in Western Europe, prosperity, strong economy and strong leaders are more important than democracy or democratic government. While in West European countries good democracy is more important than strong economy, respondents in Eastern and Central Europe lean towards the latter. In Hungary more than 7 in 10 (73%) say they would prefer a strong economy.[399] Concerning the choice between democratic government and strong leader, the majority in Western Europe and in three Central European countries (Czech Republic, Slovakia, Poland) prefer the first, while Eastern Europe and Hungary the latter. The ratio in Hungary is 49:42.[400] Unfortunately, the results are not better among young Hungarian university students either. Only 39% of them think that democracy is the best way of governance, 28% do not see any difference between democracy and dictatorship and 33% prefer dictatorship to democracy.[401] Actually, the failure of the post-communist threats to democratic development both in Slovakia under the Meciar government 1994-1998 and in Poland under the Kaczynski government 2006-2007

396 'The Decades After the Wall's Fall. End of Communism Cheered But Now with More Reservations', <www.pewglobal.org/files/pdf/267.pdf>.

397 Among the eight countries surveyed, those who are satisfied with democracy are as follows: 53% in Poland, 50% in Slovakia and 49% in the Czech Republic; every other country is in clear minority: 35% in Lithuania, 32% in Russia and 21% in Ukraine, Bulgaria and Hungary. *Id.*, p. 32.

398 *Id.*, pp. 29-30.

399 *Id.*, p. 25. The only exception in Western Europe is Italy, where the ratio is 50:46 for a strong economy.

400 *Id.*, p. 26.

401 *See* the survey conducted by the Aktív Fiatalok Magyarországon Kutatócsoport (Young Active People Research Group) in 2011 among 2,214 Hungarian youngsters, <www.hir24.hu/belfold/2013/07/04/a-hallgatok-koreben-kozelit-a-fidesz-a-jobbikhoz/>.

demonstrates the higher commitment of the Slovaks and the Poles towards democratic values.[402] Another question is, taking into account this dissatisfaction of Hungarians with the democratic and economic transition, can Hungary be considered a failed nation, and if so, what are the main reasons for this failure. Daron Acemoglu and James A. Robinson, in their popular book *Why Nations Fail*,[403] argue that it is not geography, disease or culture that explains why some nations develop and others do not, but rather the intimate connection between political and economic institutions – economic institutions being the most important factor in this respect – and the political institutions determining the character of the economic ones.[404] In this regard we can argue that the political institutions established after the democratic transition in 1989-1990 were unable to develop an appropriate economic institutional setting, which means that the political institutions did not fulfil their task. The reason for this may be what Ralf Dahrendorf said: "It takes six months to replace a political system, six years to transform an economic system, and 60 years to change a society."

(b) Even though the transition to democracy in Hungary too was driven by the fact that a large share of the population gave high priority to freedom itself, one of the legacies of the mild version of socialism with the toleration of private businesses, relative social security, no unemployment in the Kádár-regime ("the happiest barrack in the camp") from the 1960s onwards was that people expected from the new state to produce speedy economic growth, with which the country can reach the living standard of the neighbouring Austria overnight, without painful reforms. In other words, one can argue that the average Hungarian pursued the West in 1989, though not so much the Western economic and political system, which attracted them, but rather the living standard of the West. Claus Offe predicted the possible backsliding effect of the economic changes and decrease in the standard of living, saying that this can undermine the legitimacy of democratic institutions and turn back the process of democratization.[405] The failure of this, and instead the emergence of an economically and politically independent bourgeoisie, the getting rich of some former members of the communist nomenclature, as well as the unsolved problems

402 Surveys regarding democratic principles conducted by Focus Institute during the period 1994-2002 show that the majority of the public in Slovakia moved away from Meciar towards a request for a more open society. FOCUS 1994-2002, in Global Report on the State of Society, Institut pre verejné otázky, Bratislava. Also, the majority of Polish voters "have been shown to dislike sting operations against political rivals" by the Kaczinsky government. *See* Freedom House, Nations in Transit, 2008.

403 D. Acemoglu & J.A. Robinson, *Why Nations Fail? The Origins of Power, Prosperity and Poverty,* Crown Publishers, New York, 2012.

404 One of the weak points of this theory is China, where authoritarian political institutions introduced a successful system of economic institutions.

405 *Cf.* C. Offe, *Designing Institutions for East European Transitions,* Institut für Höhere Studies, 1994, p. 15.

of dealing with the communist past, the lack of retributive justice against perpetrators of grave human rights violations and a mild vetting procedure and the lack of restitution of the confiscated properties were reasons for disappointment.

(c) Without the tradition of a state governed by the rule of law in Hungary, some kind of legalism as maintained a strong presence since the Dual Monarchy with Austria, which helped to build up the institutional framework of a constitutionalism after the transition. But this institutional development did not mean that the other levels of legalism, the state–citizen and the citizen–citizen interactions also have changed. At the state-citizen level, corruption and bribery still show a general problem with rule-of-law values, while the weakness of the citizen–citizen interactions prevent the emergence of a strong civil society.[406] Since this disequilibrium of the different levels of rule of law remained present after the transition, this eroded the constitutionalism.

According to a similar argument, the potential of democracy in Hungary following the transition in 1989-1990 (and also in the other new democracies of Central and Eastern Europe) was diminished by technocratic, judicial control of politics, and the treasure of civic constitutionalism, civil society and participatory democratic government as a necessary counterpoint to the technocratic machinery of legal constitutionalism was lost.[407] This concept argues that the legalistic form of constitutionalism (or legal constitutionalism) while being consistent with the purpose of constitutionalism of creating the structure of the state and setting boundaries between the state and citizens, risks the possibility of creating participatory democracy.[408] In other words, these authors think that legal constitutionalism falls short, reducing the Constitution to an elite instrument, especially in countries with weak civil society and a weak party political system that undermines a robust constitutional democracy based on the idea of civic self-government.[409]

The concept of civic or participatory constitutionalism is based on 'democratic constitutionalism' (James Tully), emphasizing that structural problems in new democracies include the relative absence of institutions of popular participation, which is also related to

406 *See* A. Örkény & K.L. Scheppele, 'Rule of Law: The Complexity of Legality in Hungary', *in* M. Krygier & A. Czarnota (Eds.), *The Rule of Law after Communism. Problems and Prospects in East-Central Europe*, Ashgate, Darthmouth, 2009.

407 *See* this argument *in* P. Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Routledge, London, 2013. Also Wojciech Sadurski argued that legal constitutionalism might have a 'negative effect' in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society. *See* W. Sadurski, 'Transitional Constitutionalism: Simplistic and Fancy Theories', *in* A. Czarnota, M. Krygier & W. Sadurski (Eds.), *Rethinking the Rule of Law after Communism*, CEU Press, Budapest, 2005, pp. 9-24.

408 *See* R. Albert, 'Counterconstitutionalism', *Dalhousie Law Journal,* Vol. 31, No. 1, 2008, p. 4.

409 *Cf.* Sadurski, 2005, p. 23.

'counterdemocracy' (Pierre Rosenvallon), as well as robust institutional linkage of civic associations and citizens with formal politics. Critics of this approach say that it does not sufficiently take into account the rise of populism and the lack of civic interest in constitutional matters, the elite disdain for participatory institutions, and the increasing irrelevance of domestic constitutionalism resulting from the tendencies of Europeanization and globalization, especially the internationalization of domestic constitutional law through the use of foreign and international law in Constitution-making and constitutional interpretation, the very topic of this book.[410]

In discussing the relationship between legal and civic constitutionalism, or constitutional law and constitutional culture, one has to investigate the question of how far (constitutional) courts stand apart from the society in different legal systems. This question is highly relevant in the new democracies of East-Central Europe, including Hungary. The very notion of the "counter-majoritarian difficulty", termed by Alexander Bickel, presupposes that courts stand apart from society, which is called the canonization of courts.[411] This means that judges usually decide cases according to their beliefs and values, using the legalistic form of constitutionalism, and producing constitutional law. Many of these decisions do not match with the constitutional culture of the non-judicial actors, most importantly with the beliefs of the people. Some cases were decided, on a legally correct basis even though the general public opposed the decisions. This happened in 1990 in Hungary when the Constitutional Court abolished capital punishment on the basis of the Constitution's human dignity clause, despite the fact that the majority of Hungarians were in favour of the death penalty. Other decisions were wrongly decided according to the current view of both constitutional lawyers and ordinary citizens. In a decision of the Hungarian Constitutional Court from 2008, the judges declared the institution of registered partnership for heterosexual partners only as unconstitutional. Legal scholarship overwhelmingly identifies this decision, along with some others, as belonging to a constitutional law 'anticanon'. Taking a closer look shows us that this and other anticanonical decisions respect, rather than ignore, the role of popular agency in constructing legal meaning.[412] In other words, the justices in these cases followed the constitutional culture of the time, rather than the constitutional law.

(d) In addition to this, two initial failures of the 1989 constitutional changes also contributed to the possibility that after the 2010 election success, Fidesz was able to change the entire constitutional system. One of them is the disproportional election system, which

410 *See* the reviews on Blokkers book by Jiri Priban and Bogusia Puchalska in ICONnect. <www.iconnectblog.com/2013/09/book-reviewresponse-paul-blokker-jiri-priban-and-bogusia-puchalska-on-civic-constitutionalism>.

411 *See* K. Whittington, *Political Foundation of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*, Princeton University Press, Princeton, 2007.

412 *See* J. Greene, 'The Anticanon', *Harvard Law Review,* Vol. 125, 2011. Greene lists three decisions of the U.S. Supreme Court as anticanonical: *Dred Scott v. Sanford* (chattel slavery from 1857), *P. v. Ferguson* ('separate but equal' from 1896), and *Lochner v. New York* (labor exploitation from 1905).

translated the 53% vote share into 68% of the seats in Parliament, while the other was the unchanged two-thirds rule for making and amending the Constitution.

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

(f) After the 2006 Parliamentary elections, Hungary witnessed the even more spectacular rise of extremist right-wing parties. While an undertow of right-wing extremism operated throughout the 1990s, this new extremism has gained a great deal of public political traction in the last five years. A new political party, *Jobbik*, won 15% of the vote in the European parliamentary election in 2009 and 17% of the vote in the parliamentary elections in April 2010, campaigning on a platform of Euroscepticism, anti-cosmopolitanism and Hungarian nationalism.

About the state of anti-Semitism András Kovács, a sociologist at Budapest's Central European University found that by 2010 the percentage of those who qualified as fervent anti-Semites had risen to as high as 20%, and the percentage who said they held no anti-Jewish feelings had dropped to 50%.[413] An opinion poll of the Anti-Defamation League in February 2012 found that 63% of Hungarians agreed with three out of four anti-Semitic statements about Jews and money, Jewish disloyalty to the state, and Jews and the Holocaust. Of the 10 European countries ADL polled for anti-Semitic sentiments, Hungary was by far the worst. By comparison, on the same scale measuring the prevalence of anti-Semitic attitudes, the Netherlands scored just 10% and France, 24%.[414]

The Fidesz government itself is not anti-Semitic, but it certainly wants to win for its own political purposes the voters of the openly anti-Semitic Jobbik Party, which has got 17% of the popular votes in 2010, and take advantage of the rising percentage of anti-Semitism within the population. This can be demonstrated by their controversial attitude regarding the memory of the Holocaust. Paul Shapiro, of the U.S. Holocaust Memorial Museum, in his already mentioned testimony before the U.S. Helsinki Commission, held on 19 March 2013, said the following about this:

> With the Fidesz government and change of atmosphere in Hungary has come an assault on the memory of the Holocaust. And this has taken four principal

413 *See* L. Abend, 'Ancient Fear Rises Anew', *Time Magazine*, 1 April 2013.

414 <http://archive.adl.org/Anti_semitism/adl_anti-semitism_presentation_february_2012.pdf>.

forms. [. . .] First came an assault on the history displayed at the Holocaust Memorial and Documentation Center. Series of proposals to change the permanent exhibition were made by Dr. András Levente Gál, the then new, Fidesz-appointed state secretary in the Ministry of Public Administration. The first proposal was to eliminate mention on Miklós Horthy's alliance with Adolf Hitler and participation in the dismemberment of three neighbouring states. Mr. Gál claimed that that is irrelevant to the Holocaust. And yet, violation of post-World War I national boundaries brought war in Europe. War provided cover for the mass murder of the Jews. And it was precisely the Jews of the regions that Hitler restored to Admiral Horthy's Hungary who became the first targets of deportation and death. Gál's second proposal was to sanitize the record of Hungarian collaboration in the ghettoization and deportation of the country's Jews. Then came the so-called Nyírő affair, and here I cannot go into detail. But it was the speaker of the Hungarian National Assembly, parliament, founding member of Fidesz, together with Hungarian state secretary for culture, also from Fidesz, who united with the leader of Jobbik to honour posthumously József Nyírő, a Transylvanian-born writer and fascist ideologue, who had been vice chair of the Education Commission in the murderous Arrow Cross regime and had fled the country, together with Szálasi, in the final days of the war. The plan was to rebury Nyirő's ashes in Transylvania, while attempting to whip up nationalist sentiment among the ethnic Hungarian minority there, through an elaborate official funerary procession that would wend its way by train from the Hungarian border to Nyirő's birthplace, some 200 miles inside Romania. How did the Hungarian government deal with this embarrassing incident? Of course, two members of the government planned it. But there was no rebuke, only a claim, again, that the planners were acting in their personal, not their official, capacities. The third root of assault on the Holocaust has been through the inclusion of anti-Semites as positive role models in the national school curriculum, a curriculum that also includes efforts to relativize the significance of the Holocaust. I could explain who the anti-Semitic players are. They are in my – in my extended remarks. The curriculum – so let me address the second point – the curriculum suggests that teachers treat the Holocaust and Hungarian military losses at Stalingrad as equal tragedies. Now, equating the loss of military forces to an enemy army in battle with the systematic, racially inspired murder of civilian men, women and children who were citizens of one's own country, solely because they were of a different religion or ethnicity, of course, makes no sense unless relativization and distortion of the Holocaust is the goal. The final element in the assault on the Holocaust has been the attempted rehabilitation of

> Holocaust perpetrators. The most emblematic case is the attempted rehabilitation of Admiral Horthy himself. Someone has already referred to statues of Horthy, and public places being named after him. When asked to take action to halt the de facto rehabilitation of Miklós Horthy, the Hungarian government has responded evasively. The government is not seeking to rehabilitate Horthy, goes the standard line. But it is important to realize that Horthy is a controversial figure and that there is no consensus on his legacy. This, of course, leaves the door wide open. Meanwhile, the government has played to nationalist sentiment, seeking to purge Horthy's record as Hitler's ally and glorifying the restoration of Hungary's 'lost territories', that Horthy was able to achieve by alliance with Adolf Hitler. The government has not taken serious steps to research and more rigorously evaluate Horthy's record of anti-Semitism and complicity in the Holocaust. In short, the history of the Holocaust is under assault, and the rehabilitation of some of the people responsible for the murder of 600,000 of the country's Jews is well under way. It is understood that anti-Semitic and anti-Romani discourse, and even intimidation and violence, is not likely to elicit effective government action to alter the atmosphere or the situation.[415]

(g) The sound of the losers of the transition could easily cause populism, nationalism, anti-Semitism, anti-secularism, anti-Europeanism, and help to the political actors using these feelings. The populism of the Fidesz government rejects both liberalism and elitism. Of course, they are not against representation, only against representation through the "wrong people", in other words, they reject only specific types of elites. This anti-elitism assumes that the will of the majority is inevitably good and wise, and creates a direct relationship between the government and the will of the people expressed during the 2010 Parliamentary elections, blaming every intermediary institution, such as the political and the intellectual elites, civil society organizations, bankers, multinational and civil society organizations, for frustrating the will of the people. Instead of elite pacts it claims to establish a system of "national cooperation", based on national consultations via letters sent to the households on political and economic issues, with a very low return rate, and with barcodes on the letters that identify the personal data of the respondents. Although this populist variant of conservative politics of the government rejects liberalism, it introduces a new set of policies: austerity and welfare cuts, reminding the ideology of the new rights, but with an active role of the state in economy, and with a flat-tax regime.[416]

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415 *See* the transcript of the hearing at <www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewTranscript&ContentRecord_id=539&ContentType=H,B&ContentRecordType=H&CFID=24497186&CFTOKEN=18666051>.

416 *See* Korkut, 2012, pp. 162-176 about the populist conservatism of the Fidesz government.

These nationalistic, populist ideas brought a lot of emotions into the politics, which also influenced the Constitution-making after 2010. As András Sajó convincingly argues in his book on Constitutional Sentiments, "emotions, through complicated mechanisms, do have an actual impact on constitutional design and law. At the same time, constitutional design is a half-conscious venture of emotion management, and constitutional law and politics have unintended consequences in the emotional culture."[417]

1.6.4.2 External and Internal Challenges

The question for the future is whether constitutionalism can be re-established, or whether the country will slide back even further into an authoritarian system. This section is about possible external and internal agencies of a constitutional reform.

(a) As regards external challenges, the Council of Europe (CoE) and the European Union (EU) can help in the reintroduction of constitutionalism, since according to Article 2 of the TEU, the Union is based on common values, like democracy, rule of law, and fundamental rights, and Article 3 of the Statutes of CoE requires that a country accept the "principles of the rule of law, and the enjoyment by all persons [...] of human rights and fundamental freedoms" as a member. Similarly, Article 2 TEU demands "respect for human dignity, freedom, democracy, equality, rule of law and [...] human rights including the rights of minorities." This article applies to *any* exercise of public authority in the European legal space, be it by the Union or the Member States' constitutional development (amendments, new Constitutions) precondition for a State to accede to the Union (Art. 49 TEU); it is also a standard for Member States, the performance of which can be appraised according to Article 7 TEU. This understanding is confirmed by strong historical evidence: Article 2 TEU constitutionalizes the Copenhagen criteria, laid down in the decision by the European Council of 21 and 22 June 1993 to open up a perspective of accession for the transformation countries that still had to overcome authoritarian traditions. As it was impossible to subject new Members to a different regime than old Members, the standards of Article 2 TEU apply to all.

These two sets of obligations are further merged in the EU's dedication to the ECHR through Article 6 TEU, and its imminent accession to the ECHR itself. By joining the CoE and the EU, all member states have committed to these values.

But how can these foundational European values be defended if Constitutions of certain Member States, like Hungary, do not comply with them?

Article 8 of the Statutes of CoE opens up for the suspension of a country's rights of representation if it has "seriously violated" its values. Similarly, Article 7 TEU in case of "serious and persistent violation" makes it possible to suspend "certain of the rights" deriving from EU membership, including voting rights. But this rather political enforcement mechanism

417 A. Sajó, *Constitutional Sentiments*, Yale University Press, New Haven, 2011, p. 4.

has never been applied in practice. The EU actions taken against Austria in the Haider affair in 2000 were unilateral measures by the Member States, and this experience has left the Member States and the Union institutions extremely reluctant to use similar mechanisms. (As the "report of the three wise men" after the Austrian affair mentions, the measures taken were perceived by the Austrian public as politically motivated sanctions by foreign governments against the Austrian population and therefore fostered nationalist sentiments. The same happened in Hungary after the CoE and the EU criticized the new Hungarian Constitution.)

In the case of Hungary, on 16 February 2012 the European Parliament, instructing the Committee on Civil Liberties, Justice and Home Affairs (LIBE), called on the European Commission to request the opinion of the Venice Commission on the legislative package consisting of the new Constitution, the Transitional Provisions and the cardinal laws as a whole and continue working together on these matters with the Council of Europe.[418] This was a request for investigation of the necessity of using Article 7, according to its paragraph (1), with a very unlikely positive outcome, which would require a qualified majority.

This means that if a country does not comply with the values of the European rule of law, and insists on its own understanding of democracy – one amounting, for instance, to a deeply illiberal democracy, such as Hungary after its new constitutional order was introduced – and does not want to be leaving voluntarily, then so be it, since there is no procedure for ejecting. But at least a mechanism to enforce the Copenhagen criteria also for member states would be advisable.

But let us see, whether there are other, less serious tools in the hands of either the CoE or the EU to enforce the compliance of Member States with European values.

One of the possibilities is the accelerated infringement proceedings over breaches of EU law, which in the case of Hungary were started by the European Commission on 17 January 2012, over three issues jointly regulated by the Constitution and the new cardinal laws: the independence of the central bank, the independence of the data protection authority and some measures affecting the judiciary, particularly the sudden and mandatory lowering of the retirement age from 70 to 62 years.[419] The problem with this procedure is that if the Member State contests the alleged violation of the European law, it can take five steps, and altogether up to four years until the ECJ issues a final decision.

The European Commission also started an over deficit procedure against Hungary over the Stabilization Act with possible financial sanctions, but this proceeding does not exactly aim at enforcing values of the European rule of law.

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418 European Parliament resolution of 16 February 2012 on the recent political developments in Hungary (2012/2511(RSP)).

419 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/24>.

The Venice Commission, the advisory body of the CoE, can be asked both by the CoE and EU institutions to provide expert opinions on constitutional matters of the Member States.

In the case of Hungary, the Venice Commission was asked, on the one hand, by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE), to review the laws on freedom of information, the Constitutional Court, the prosecution, nationalities, and family protection, and, on the other hand, by the Hungarian authorities concerning the laws regulating the independence of the judiciary, the status of churches and elections to Parliament. The request of the Hungarian authorities came as a response to the letter of January 2012 by the Secretary General of the Council of Europe, Thorbjørn Jagland, to the Minister of Foreign Affairs, János Martonyi, inviting Hungarian authorities to request the Venice Commission to provide opinions on these controversial laws. As we could see earlier, in March 2013 the Secretary General of the Council of Europe and the Hungarian Foreign Minister jointly requested the opinion of the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary.

Decisions of the ECHR can also indirectly influence Member States' actions. An astonishing 8,000 individual claims have been filed to the ECHR since December 2011 after the new Hungarian constitutional order came into effect. But these procedures take many years, and the decisions of the Strasbourg Court – even if they state that Hungary violated the European Convention on Human Rights – do not have direct effect on the national legislation and the Constitution.

(b) Among the more decisive, internal challenges, the most powerful institutions to protect the values of rule of law are Constitutional Courts or other bodies entitled to review the constitutionality of legislative acts; in some countries also the amendment of the Constitutions, which violate either explicit "eternal provisions" of the Constitutions, like that of the German Grundgesetz, or in the absence of such an explicit clause the basic principles of the constitutional order. Until the Fourth Amendment to the Fundamental Law explicitly forbade the substantive review of both the Fundamental Law and its amendments, the Hungarian Constitutional Court rejected such requests.

Even if the national Constitutions contain illiberal provisions, Constitutional Courts are always able to use the liberal democratic principles of foreign and international law while interpreting the domestic Constitution. Of course, those judges who are independently elected or appointed are always more likely to stand up against illiberal norms and acts of a government. Therefore, the government's exclusive possibility to nominate both Constitutional Court and ordinary judges – as is the case in the current Hungarian constitutional system – threatens the independent action of the judges.

According to a recent proposal of a group of German legal scholars at the Max-Planck Institute of Foreign and International Public Law in Heidelberg, the citizens of the

European Union are protected even against their own states violating the essence of their fundamental rights.[420] This argument is based on the ECJ's interpretation of Article 20 TFEU, which precludes national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. This substance, the German scholars argue, basically consists of the essence of fundamental rights enshrined in Article 2 TEU. If a violation of the European citizen's right by his own state is to be seen as systematic, as it happened with the right to freedom of expression by the Hungarian media law, individuals can rely on their status as Union citizens to seek redress before national courts. In other words, systemic violations of the essence of fundamental rights by *any* public authority in the European legal space amount to infringements of Article 20 TFEU, which can be considered by national courts in cooperation with the ECJ.

To achieve the goal of re-establishing constitutionality, the role of the citizenry is crucial. For this, however, the values of the constitutional state have to be more deeply embedded into the Hungarian political culture, since despite the curtailment of the liberal democratic institutions, the current governing party is still the most popular one, and the opposition parties and movements have a very slight chance of reaching the two-thirds majority of the mandates, required for changing the Constitution. On 23 October 2012, the 56th anniversary of the 1956 revolution, three civil society organizations announced the establishment of "Együtt 2014" ("Together 2014"), an election alliance of the "middle," which at present does not involve opposition parties at all.[421] The question is whether even a united opposition will be able to win against the current government in the 2014 elections, and if yes, how they can turn back Hungary towards a constitutional state. One of the possibilities is the role of emotions. If the hypothesis of András Sajó is true for the Hungarian constitutional counter-revolution, then, as Sajó also claims, "the same emotions that were instrumental in the making of the constitutionalism may undo it".[422]

1.6.4.3 Concluding Remarks

The "pacted" or "post-sovereign" Constitution-making in Hungary was designed as a two-step process, the first step being an interim Constitution prepared by the National

420 Von Bogdandy *et al.*, 2012.

421 According to opinion polls, within a month Együtt 2014 received 16%, Fidesz 40%, MSZP 19%, Jobbik 18%, LMP and DK 3-3%, and 33% was still undecided. *See* 'Választási preferenciák' ['Election Preferencies'], 2012. November, Medián. But in January 2013 support of Együtt 2014 went back to 7%, Fidesz 43%, MSZP 27%, Jobbik 15%, LMP 6% and DK 2%. *See* 'Ki alkalmasabb? Pártok és politikusok népszerűsége' ['Who Is More Suitable? Popularity of Parties and Politicians'], January 2013.

422 Sajó, 2011, p. 10.

Round Table Talks and enacted by the illegitimate parliament, followed by a final one sometime after the first democratic elections. But the country has failed to make a final constitutionalist Constitution, even though in the second, center-left dominated freely elected parliament the governing coalition of the socialist MSZP and the liberal SZDSZ alone had Constitution-making powers. Unlike South Africa's interim Constitution, or the Polish Little Constitution, the 1989 Hungarian text had no rules or procedures for the final Constitution-making, except an amendment rule giving this power to two-thirds of a unicameral parliament, a rule very much at the mercy of an electoral rule that turned out to be highly disproportional.

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

(b) In 2010, when Fidesz with a vote of 52% attained over two-thirds of the parliamentary seats, it used the power to enact a new Constitution, without any consensus or negotiation, though not with the intention to entrench constitutionalism, but rather to constitutionally entrench its political preferences by weakening checks and balances of its power and guarantees of rights. Fidesz called its constitutional imposition a revolution, the revolution of the voting booth, though the voters were not told during the elections that they were voting for comprehensive constitutional change. But in view of the citizens' lack of serious commitment to values of constitutionalism, the majority of those voters who are willing to vote are still supporting Fidesz. Most of those supporting other parties, and the almost 50% undecided voters, are disappointed, but mostly not because of the backsliding of constitutionalism.

(c) This sliding constitutionalism in Hungary after the 2010 elections, and especially after the new Fundamental Law came into force, constitutes a new, hybrid type of regime. What happened is certainly less than a total breakdown of constitutional democracy, but also more than just a transformation of the way liberal democracy is functioning. Hungary became an illiberal democracy. In this illiberal democracy, the institutions of a constitutional state (Constitutional Court, ombudsman, judicial or media councils) still exist, but their control power is strongly limited. Also, as in many illiberal democracies, fundamental rights are listed in the new Fundamental Law, but the institutional guarantees of these rights are endangered through the lack of an independent judiciary and Constitutional Court.

As in full-fledged constitutional democracies, also in Hungary, formally competitive elections with competing parties will be held in 2014, but the more disproportional election system and the introduction of gerrymandering favour the governing party. But we cannot say that the outcome of this election would be certain.

In this respect the hybridity of Hungarian constitutionalism differs from the "managed democracy" of Putin's Russia, where failing competing parties and candidates, the results of parliamentary and presidential elections, cannot be deemed uncertain.

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

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

The only survey of the new Fundamental Law, conducted by the Institute of Psychology of the Loránd Eötvös University on a 1,000 representative sample, shows, at least, aversion towards the new document.[423] The survey results indicated that no more than one-third of the population believed that a new Constitution was needed and 29.9% believed that the old Constitution expressed the intent of the people, more than the 20.1% of those who believed the new Constitution expressed the intent of the people, and 29.6% of people believed that the new Constitution was the result of background deals, in contrast to 16.8%, who believed that for the 1989-1990 Constitution. In line with these results are answers regarding the general assessment of the old and new Constitutions. The old

423 'Ismertetését lásd: Lencsés Károly, Az emberek több mint felének nem tetszik az új alkotmány', *Népszabadság,* 25 June 2011.

Constitution received a more positive assessment than the new one: it gave more security (24.9% *v.* 16.3%); strengthened democracy (24.7% *v.* 22.6%); one could identify oneself with it (24.4% *v.* 22.6%); united the nation (22.6 *v.* 18.5%); one could like it (20.8 *v.* 15.4%); less dictatorial (30.8% *v.* 17.4%). At the same time the areas where the new Constitution scored better than the old one are revealing: the new Constitution is considered to be more nationalistic than the old one (23.1% *v.* 17.1%), and the new Constitution is believed to express our most important values (22.4% *v.* 20.7%). The last result can be evaluated as a positive one and not necessarily read as an expression of a belief that the new Constitution does not bear on itself the universal values of constitutionalism. The most important values of the population were reflected in answers to other questions too. For example, 11% of the population believed that the votes of those who have made special efforts for the nation should weigh more in elections. According to 6 to 9% of the people, similar privileges could be given to big families, to those farming Hungarian land and to those paying high taxes. While one-third of the people surveyed believed that it is worth considering, one-fifth would even revoke voting rights of people with drug addiction. Similar restrictions are believed to be worthy of reconsideration: those regarding the physically and/or mentally challenged, those who were not born in Hungary, and even those who were born in Hungary but belong to ethnic minorities. Some 10% even advocated that those living on welfare should have restricted voting rights. The statement that one sometimes needs to use force against other groups of people to achieve one's goals found favour among more than half of the people (on a scale of 7 receiving 4 points). The statement that some groups of people are inferior was believed to be true by almost as many people (scoring 3.48 points). The democratic apprehension of the public was revealed when 40% agreed that the country needed to be led by an exceptional leader (with half of the Fidesz-, 27% of the Jobbik-, and 35% of the MSZP-voters agreeing).

The value system conveyed by the new Fundamental Law could be the reason for the high acceptance (almost two-thirds of the people) of the statement that the condition of rights guarantee is the fulfilment of duties and that the Constitutional court should not limit government actions (45% of all respondents and 56% of the FIDESZ voters thought so). A similar picture can be drawn from another survey that looked at citizens' democratic socialization while examining the reasons why most people were not concerned about the breakdown of the rule of law-state. The conclusion of this work is that the answer can be traced to several factors that have all contributed to the weak democratic culture and strengthened the position of the (Fidesz) government: the creation of a closed school system; the increased hardship on civil society; the exclusion of the most disadvantaged while giving further advantages to the wealthy.[424]

424 *See* D. Sik, 'Kiből lesz demokrata?' ['Who Will Be a Democrat?'], *Szuverén,* 20 April 20, 2012.

These findings (unfortunately) do not support the high expectations expressed by László Sólyom, former President of the Republic and first President of the Constitutional Court, that with a new Constitution the damage that occurred may not necessarily be irreparable, because there is a constitutional culture that can maintain the prospect of constitutionalism.[425]

What general conclusions regarding the sovereignty of the constituent power and the legitimacy of the resultant constitutions can we draw from the Hungarian Constitution-making processes of 1989-1990 and 2010-2011, respectively? The legitimacy of the product emanating from the process that Andrew Arato refers to as post-sovereign Constitution-making does not depend on the legality of the legislative body that adopts it. In a writing composed during the phase when the new Fundamental Laws were being drafted, Péter Takács took a position very similar to Arato's: he argues that legal origins are not necessarily a precondition for the legitimacy of a new Constitution because:

> [T]he new constitution constitutes a new order and its existence means the following: the constitution-making power wanted the order in question, posited and realized it, or is going to realize it. If constitutions had to be established in a legal way, then that would imply that the power that created the previous constitution would also have power over the constituent power that adopted the new constitution.[426]

Arato's thesis obviously refers to the legitimacy of the "negotiated" Constitution making of 1989-1990, which established a new order and was revolutionary in an Arendtian sense. Takács, in contrast, even though he does not explicitly refer to the new Hungarian Constitution that was born shortly after his writing was published, talks in more general terms, and his comments refer to all new Constitutions, therefore obviously including the Fundamental Laws as well. But can we really extend the unbounded sovereignty of Constitution-makers,

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425 *See* L. Sólyom, 'Az alkotmányosság esélyei' ['The Chances of Constitutionalism'], *HVG,* 8 January 2012. Half a year later (5 August, 2012), in a speech at a cultural festival, Sólyom repeated his optimistic view on constitutional culture: "there are several elements of constitutional culture that are still present: institutions like the ombudman's office, local governments, and most importantly, the conscious citizen, who is aware of his own balancing role in the political system, and even more, that he is the source of political power". Incidentally, Sólyom never defined constitutionalism and constitutional culture. His use of constitutional culture is not in line with other definitions. For instance, Robert Post uses the term referring to the beliefs and values of non-judicial actors, most of all the people. On the other hand, the term 'constitutional law' according to Post refers to constitutional law as it is made from the perspective of the judiciary in the American type of decentralized judicial review system, or in countries with a German-type centralized judicial review and constitutional courts. There is a dialectic relation between the two, as constitutional law is based on constitutional culture and is also its influencer. *See* R.C. Post, 'The Supreme Court 2002 Term. Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law', *Harvard Law Review*, Vol. 117, 2003, pp. 4-112, at 7. The Constitutional Court of Hungary, presided over by Sólyom, presented a constitutional law with the values of liberal democracy; this could not have a genuine effect on the constitutional culture of the country.

426 P. Takács, 'Az alkotmány legitimitása' ['The Legitimacy of the Constitution'], *Alkotmánybírósági Szemle*, No. 1, 2011, pp. 58-65.

the idea that they are not bound to legality, to non-revolutionary Constitutions as well? Can it really encompass the Fundamental Laws of 2011, even on a theoretical basis – which hardly anyone advocates in practice – that it marks the second stage of the 1989-1990 constitutional process; or based on the notion advanced by the governing parties that had drafted the Constitution, namely that the time (*i.e.* when the Fundamental Laws were created in 2011) of its adoption was the moment when the real regime transition occurred, which is why 2011 rather than 1989-1990 should correctly be labelled revolutionary, and hence the later date deserves the benefit of legitimacy without legality. Takács goes even further in arguing for the unfettered sovereignty of the constituent power that creates a new Constitution, specifically when he argues that the Constitution-maker may not lay down real "eternal" clauses, that it may not "cement itself" through requirements that render constitutional amendments impossible, and may not lay down procedural rules pertaining to the creation of a new Constitution – and may in fact not make any statement whatsoever concerning a new Constitution.[427] Several scholars hold similarly restrictive views concerning certain manifestations of constraints on the powers of Constitution-makers. Michel Troper, for instance, does not accept eternal clauses as rules that constituent powers may not change. His argument goes as follows: if we do not trust that the majority will respect the rights of the minority, then why do we consider that the Constitution adopted by this very majority will protect minority rights?[428] Jeremy Waldron objects to the consolidation of rights in those Constitutions that express their distrust towards future legislatures by making amendments very difficult.[429]

Still, numerous theoretical and practical objections may be raised against an approach based on the notion of the constituent power's unfettered sovereignty. In the following section I describe some modern constitutional solutions that illustrate the limits of the constituent power's sovereignty in a global constitutional environment: constitutionally enshrined "eternal clauses", the possibility of subjecting constitutional amendments and new Constitutions to constitutional review, constraints on the Constitution-making procedure, and compliance with international law obligations are the issues that will be discussed below. Before addressing them, however, I would like to discuss their common theoretical basis, which is consequently also the common basis for limiting constituent power.

Interestingly, historically, the first such ideas hail from England, home to the notion of unlimited parliamentary sovereignty. Edmund Burke, the merciless critic of the French Revolution's understanding of popular sovereignty, denied the constitutional identity of a government that fails to adhere to the minimum requirements of constitutionalism, such as the principle of due process enshrined in the Magna Carta.[430] His statement, made in

427 *Id.*

428 *See* M. Troper, 'The Logic of Justification of Judicial Review', *International Journal of Constitutional Law,* No. 1, 2003, p. 115.

429 J. Waldron, *Law and Disagreement*, Oxford University Press, Oxford, 1999, pp. 221-222.

430 E. Burke, 'Speech on Fox's East India Bill', *in* D. Bronwich (Ed.), *On Empire, Liberty, and Reform: Speeches and Letters of Edmund Burke*, Yale University Press, New Haven, 2000, p. 292.

the context of the East India Company Act of 1784, had a significant impact on the late 20th century Indian Supreme Court's construction of the basic constitutional norm.[431] But Burke's requirements for a constitutional minimum were at least as influential for theory as well: it found its way into various theoretical concepts advanced by 20th century legal philosophers, such as Lon Fuller's idea of "internal morality of law",[432] Ronald Dworkin's notion of the "integrity" of Constitutions,[433] or Herbert Wechsler's "neutral principles of constitutional law".[434]

According to the father of 19th century English constitutional law, Albert Venn Dicey, popular sovereignty can be established only by conventions, which correspondingly delimit the boundaries of parliament's Constitution-making or Constitution-amending powers, even if a failure to abide by these conventions cannot be sanctioned legally, but only politically. One such convention, for example, is that parliament may not adopt any kind of substantial constitutional amendments unless it was part of the winning party's or parties' manifesto at the last election.[435] Pursuant to another convention, substantial amendments of the Constitution require that parliament be dissolved, new elections be held, and the respective amendments be ratified by the next parliament.[436]

In French public law, Maurice Hauriou's doctrine of "supraconstitutionalité" represents an idea similar to Dicey's position, *i.e.* they both conceive of popular sovereignty as a central concept. According to Hauriou, the historically evolved principles and norms of natural law transcend the actual texts of individual French constitutions and boast a higher order validity, greater embeddedness and deeper roots than ordinary constitutional norms:

> There are many fundamental principles that could constitute a constitutional legitimacy places above the written Constitution […] Not to mention the republican form of government for which there is a text, there are many other principles for which there is no need to text because of its own principles is to exist and assert without text.[437]

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431 For more details on Burke's influence on the Indian Supreme Court's judicial practice in reviewing constitutional amendments, *see* Jacobsohn, 2006.

432 L. Fuller, *The Morality of Law*, Yale University Press, New Haven, 1964, p. 42.

433 R. Dworkin, *Law's Empire*, Harvard University Press, Cambridge, 1986, pp. 176-275.

434 H. Wechsler, 'Toward Neutral Principles of Constitutional Law', *Harvard Law Review,* Vol. 73, No. 1, 1959, pp. 1-35.

435 The Fundamental Laws adopted by the Fidesz-KDNP governing majority in 2011 obviously violate this convention, since neither of the future governing parties promised a new Constitution in its campaign manifesto for the 2010 parliamentary elections.

436 *See* A.V. Dicey, *The Law of the Constitution*, Liberty Fund, Indianapolis, 1982, p. 28, n. 51. The Fundamental Laws violate this latter convention as well, since even though the draft text contained a similar provision, it would only have pertained to future constitutional amendments, and was ultimately removed from the final text.

437 M. Hauriou, *Précis de droit constitutionnel*, Sirey, Paris, 1923, pp. 296-297.

Hauriou argues that these principles may be as fundamental as the Third Republic's Republic Clause; or they may have been part of several, though not all, Constitutions, such as the Declaration of the Rights of Man and of the Citizen in the Preamble of the Fourth Republic's Constitution; or they may have always been present in all Constitutions, in differing forms, such as the principles of "individualistic society".

Hauriou's theory had a demonstrable impact on Carl Schmitt, who in his 1928 Constitutional Theory (Verfassungslehre) posited a difference between the Constitution and constitutional law. For him, a Constitution is a decision of the political entity on the form and substance of its political system. This decision, often taken at a turning point in a state's history, a revolution or a defeat, antedates the drafting of the constitutional law and is not made in a formalized procedure and not fixed in writing, but is ontological in nature. Constitutional law, by contrast, is set down in a text and adopted in a formal procedure. Therefore, amendments are limited to constitutional law. He wrote:

> The authority to "amend the constitution," granted by constitutional legislation, means that other constitutional provisions can substitute for individual or multiple ones. They may do so, however, only under the presupposition that the identity and continuity of the constitution in its entirety is preserved. This means the authority for constitutional amendment contains only the grant of authority to undertake changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself. It is not the authority to establish a new constitution, nor is it the authority to change the particular basis of this jurisdiction for constitutional revisions.[438]

On the basis of this, Schmitt challenged the Weimar Constitution's Article 76, which permitted constitutional amendment by legislation, if enacted by a supermajority, for its lack of limitations pertaining to the substance of possible constitutional amendments, on the grounds that it cannot be legitimate – even if it may be legal – to use an amendment to change the fundamental nature, substance or identity of the Constitution:

> If a constitution foresees the possibility of revisions, these revisions do not provide a legal method to destroy the legality of the constitution, even less a legitimate means to destroy its legitimacy.[439]

438 C. Schmitt, *Constitutional Theory* (Jeffrey Seitzer trans.), Duke University Press, Durham, 2008, pp. 150-151.

439 C. Schmitt, *Legalität und Legitimität*, Duncker & Humblot, München, 1932, pp. 58-60. Schmitt's conception on the highest order of rules, which cannot be changed by the Constitution-makers – such as those that pertain to constitutional amendments – is referred to as 'three tiers of constitutionalism' (Constitution-making, Constitution-amending, legislation) by Andrew Arato. *See* Arato, 2011.

Schmitt's political argument was that *ad hoc* majorities must not be authorized to alter the Constitution's institutional framework in a way that shields those in power from further competition or from the constraints of the system of checks and balances.[440] Schmitt's warning was disregarded by the NSDAP when it used the Article 76 criticized by the scholar as a basis for the notorious Enabling Act that swept aside the Weimar Constitution, just as the French National Assembly disregarded Hauriou's ideas when it authorized the government on 10 July 1940 to adopt a new Constitution.[441] Still, there is a difference between the two cases, which is by no means inconsequential: while Hauriou could no longer object, Schmitt could have but chose instead – apparently deliberately – to justify the Nazis.

In Hungarian theory and practice, it was László Sólyom who argued as a constitutional court judge and a legal scholar that there exists an "invisible Constitution" with an inherent set of constitutional values, which is established by the Constitutional Court through a process of interpretation. This idea is divorced from the actual constitutional text, but at the same time it may serve as a basis for enforcing constitutional principles in the context of constitutional amendments too. Sólyom's concurrent opinion in the Constitutional Court decision 23/1990. (X.31.) on the abolition of the death penalty unequivocally displays the unmistakable signs of interpretive activism in terms of both the Constitutional Court's relation to Parliament and to the actual Constitution: "Parliament may preserve, abolish, or restore the death penalty as it sees fit - as long as the Constitutional Court makes a final pronouncement on the constitutionality of this form of punishment." One reading of this text rules out the possibility of restoring the death penalty at a later point through a constitutional amendment, thereby authorizing the Constitutional Court to declare even a constitutional amendment unconstitutional. Sólyom himself did not rule out this possibility in an interview with a journal: "The majority of the Constitutional Court does not desire to examine the constitutionality of constitutional amendments, even though that could be theoretically justified."[442]

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440 Schmitt, 1932, pp. 60-61. Some of the most serious criticism aimed at the 2011 Fundamental Laws in Hungary pertained to the enshrining of these political preferences in the Constitution.

441 *See* R. Schnur, *Einführung. Die Theorie der Institution und zwei andere Aufsätze von Maurice Hauriou*, Duncker & Humblot, Berlin, 1965, p. 18, n. 33.

442 G.A. Tóth, "'A 'nehéz eseteknél' a bíró erkölcsi felfogása jut szerephez". Beszélgetés Sólyom Lászlóval, az Alkotmánybíróság elnökével' ["'In the 'Difficult Cases' the Judge's Moral Views Come into Play". A Conversation with László Sólyom, the President of the Constitutional Court'], *Fundamentum*, Vol. 1, No. 1, 1997, p. 34.

2 Foreign and International Law in Constitutional Interpretation

Judicial use of foreign law is a product of globalization of the practice of modern constitutionalism: it has been made possible by a dialogue among high court judges with constitutional jurisdiction around the world, conducted through mutual citation and increasingly direct interactions. This growing "transjudicial communication"[1] can afford not only a tool for better judgments, but finally for the construction of a "global legal system".[2] The globalization of constitutional law means that constitutionalism is no longer the privilege of the nation-state, but has instead become a worldwide concept and standard.[3] Globalization is especially encouraged by advances in transportation and communication, and by the deepening of political, economic, cultural and legal ties.[4] Since economic globalization includes competition among nations for investment and human capital, these globalization processes are limited to countries that compete internationally for investment and human capital,[5] at least to those among them that use foreign law. As discussed later, constitutional jurisdictions tend to fall into one of three different categories, those that do not use foreign law (as we will see, the U.S. Supreme Court seldom cites foreign court decisions), those that do use foreign law, but do not do so explicitly (*e.g.* Hungary), and those that do so explicitly (*e.g.* South Africa).[6]

A recent research project focusing on 16 different countries' constitutional and supreme court explicit citations, has used grouped courts into only two categories: those that often resort to foreign precedents (Australia, Canada, India, Ireland, Israel, Namibia, South Africa) and those that only rarely cite such precedents (Austria, Germany, Hungary, Japan, Mexico, Romania, Russia, Taiwan, United States) according to a common methodology.[7] This means that there is an almost perfect correlation between the two groups of courts as presented in the research and the legal traditions that the courts belong to: to the first group belong the common law countries, or those with a mixed

1 For this expression, *see* A.-M. Slaughter, 'A Typology of Transjudicial Communication', *University of Richmond Law Review,* Vol. 29, 1994, p. 99.

2 *See* Slaughter, 2004, pp. 65-103.

3 Ackerman, 1997.

4 For connecting globalization and constitutional rights by means of market processes, *see* Law, 2008, p. 1280.

5 Tushnet, 2009.

6 *See* this categorization concerning the use of human rights law *in* Ch. McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights', *Oxford Journal of Legal Studies*, Vol. 20, 2000, p. 511.

7 *See* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013a.

tradition, while to the second group belong the civil law systems, with the exception of the U.S. Supreme Court.[8] In the common law countries the more frequent use of foreign precedents is a direct product of 'openness' of the legal systems, as demonstrated in the case of Australia, and of the legal culture of jurist, as in India, South Africa, Israel and Namibia, while the refusal of use can have different reasons, but in the case of both the United States and Russia, one of them can be a psychological resistance: great countries must be seen to act independently, preserving their national uniqueness.

Even though the research clearly shows that citations of foreign case law prevail in both groups of countries in human rights decisions, whereas they appear less frequently in institutional decisions, the differences between the two groups are significant. For instance, in the first group, 93% of the decisions of the Namibian Supreme Court refer to foreign cases,[9] or 52% of the decisions of the South African Constitutional Court cite foreign case law. Just to provide an example, the famous case of *State v. Makwanyane* on the abolishment of the death penalty contains 220 citations of foreign cases.[10] Ireland provides another relevant example: since 1937, 396 decisions of the Supreme Court on constitutional cases out of 902 (43.9%) cite foreign precedents.[11] The High Court of Australia during the period 2000-2008 cited foreign case law in 99 out of 193 constitutional cases (51.3%).[12] The Supreme Court of Canada from 1982 to 2010 cited foreign precedents in a total of 377 constitutional cases out of the 949 decided (39.7%).[13] From 1994 to 2010, the Supreme Court of Israel quoted foreign case law in 121 cases out of the 431 constitutional cases, representing 28% of the total, with a peak of 54% in 1995, the year when the landmark decision *United Mizrahi Bank ltd. v. Migdal Cooperative Village*, which introduced the judicial review of legislation in Israel, was ruled. This decision alone refers to 35 foreign precedents.[14]

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8 *See* T. Groppi & M.-C. Ponthoreau, 'Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, an Uncertain Future', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges,* Hart Publishing, Oxford, 2013c, pp. 412-413.

9 I. Spigno, 'Namibia: The Supreme Court as a Foreign Law Importer', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges,* Hart Publishing, Oxford, 2013, p. 171.

10 Ch. Rautenbach, 'South Africa: Teaching an "Old Dog" New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995-2010)', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, pp. 185-209, at 194.

11 C. Fasone, 'The Supreme Court of Ireland and the Use of Foreign Precedents: The Value of Constitutional History', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 117.

12 Ch. Saunders & A. Stone, 'Reference to Foreign Precedents by the Australian High Court: A Matter of Method', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 29.

13 G. Gentili, 'Canada: Protecting Rights in a "Worldwide Rights Culture". An Empirical Study of the Use of Foreign Precedents by the Supreme Court of Canada (1982-2010)', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges,* Hart Publishing, Oxford, 2013, p. 53.

14 S. Navot, 'Israel: Creating a Constitution – The Use of Foreign Precedents by the Supreme Court (1994-2010)', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 141.

In the second group of courts, the Taiwanese case represents 66 decisions out of the 680 (9.7%), which is almost equal to the figure of 179 out of the 1908 (9.3%) of the Indian court in the first group, but all but four of the Taiwanian citations are located in dissenting opinions.[15] In Mexico only 11 majority decisions and 18 separate opinions citing foreign cases have been detected.[16] In Romania only 14 out of the total of 13,250 decisions ruled by the Constitutional Court display a clear reference to foreign precedents (0.1%).[17] Even less, 6 out of 11,000 decisions contain foreign citations in the Russian Constitutional Court jurisprudence, all in separate opinions.[18] The Austrian, the oldest Constitutional Court, did not produce significantly more citations between 1980 and 2010: only 60 out of the 13,251 cases (0.45%), and even less, only 16 out of the 60 were parts of the Court's reasoning; in all the other cases, the quotation was made by only one of the parties.[19] In Germany, out of the sample of 1,351 decisions selected by analysing the decades of the 1950s, 1970s and 2000s, only 32 of them cite foreign cases (2.4%).[20] In Hungary, between 1990 and 2010, out of the 1,016 decisions, 19 cited foreign cases (1.8%).[21] In Japan, in the period analysed (1990-2008), there has been one single explicit citation out of the 234 constitutional cases in a dissenting opinion.[22] The research shows that in the United States during the years of the Rehnquist Court (1986-2004) only 0.3% of the cases cite foreign case law, while citations are almost absent in the years of the Roberts Court (2005-2010).[23]

15 *See* W.-C. Chang & J.-R. Yeh, 'Judges as Discursive Agent: The Use of Foreign Precedents by the Constitutional Court of Taiwan', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 381 about Taiwan. On the Indian case, *see* V. R. Scott, 'India: A "Critical" Use of Foreign Precedents in Constitutional Adjudication', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges,* Hart Publishing, Oxford, 2013, p. 85.

16 E.F. Mac-Gregor & R.S. Gil, 'Mexico: Struggling For an Open View in Constitutional Adjudication', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 308.

17 E.S. Tanasescu & S. Deaconu, 'Romania: Analogical Reasoning as a Dialectic Instrument', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges,* Hart Publishing, Oxford, 2013, p. 329.

18 S. Belov, 'Russia: Foreign Transplants in the Russian Constitution and Invisible Foreign Precedents in Decisions of the Russian Constitutional Court', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 367.

19 A. Gamper, 'Austria: Non-Cosmopolitan, but Europe-Friendly – The Constitutional Court's Comparative Approach', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 221.

20 S. Martini, 'Lifting the Constitutional Curtain? The Use of Foreign Precedents by the German Federal Constitutional Court', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 241.

21 Z. Szente, 'Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Foreign Judicial Precedents in the Jurisprudence of the Constititonal Court, 1999-2010', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges,* Hart Publishing, Oxford, 2013, p. 259.

22 A. Ejima, 'A Gap between the Apparent and Hidden Attitudes of the Supreme Court of Japan towards Foreign Precedents', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 284.

23 A. Sperti, 'United States of America: Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence', *in* T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 406.

According to the findings of the research, despite the declining influence of the U.S. constitutionalism[24] and the corresponding decline in the U.S. Supreme Court influence,[25] the nine justices still remain the main references for almost all courts examined. This is also a consequence of the influence of U.S. legal culture on legal higher education, through the 'Americanization' of the law schools, for instance in Israel. Decisions of the South African Constitutional Court, the Canadian Supreme Court and the ECtHR are experiencing an increasing influence, and U.K. courts are also still frequently quoted in Commonwealth countries. On the other hand, the influence of non-English language courts, such as the very active German Federal Constitutional Court, is made difficult by the linguistic barrier. Also almost exclusively, the bilingual Canadian Supreme Court quotes the French *Conseil Constitutionnel*.

According to some scholars, the explicit and non-explicit reference to judicial decisions in other jurisdictions can lead to a convergence among their and the exporter's constitutional system, even if this globalization does not entail uniformity. But the findings of the comparative research show that among the 16 countries examined, the practice of citation is rather circumscribed and belongs to a limited 'family' of courts.

Before going further we should clarify that 'using' foreign law in this work will typically mean the use of national law to another national jurisdiction. (In some cases we will also deal with the use of international law to national and national law to international jurisdiction.) The use to which this foreign law is put is in the context of the interpretation of a domestic legal provision, and not of a direct application of the foreign law in the domestic court's jurisprudence. Thus the focus is here on foreign law used transnationally.[26] As we will see, the cited foreign cases can have different degrees of influence. The less influential is when judges just mention the foreign law; the next step is when they actually 'follow' such cases as some sort of authority,

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24 *See* D.S. Law & M. Versteeg, 'The Declining Influence of the United States Constitution', *New York University Law Review*, Vol. 87, 2012, p. 762.

25 About this tendency, *see* first C. L'Heureux-Dubé, 'Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court', *Tulsa Law Journal*, Vol. 34, 1998, p. 15. Later also A. Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy', *Harvard Law Review*, Vol. 116, No. 16, 2002, p. 114.

26 This is also the approach of McCrudden's study. *See* McCrudden, 2000, p. 510. Rex D. Glensy argues for the distinction of the use of foreign domestic law and international law, by saying that comparing a domestic law with another domestic law means comparing apples with apples, but the use of international law, which by definition is not domestic, in this context is more akin to comparing apples with oranges. *See* R.D. Glensy, 'Constitutional Interpretation through a Global Lens', *Missouri Law Review*, Vol. 75, No. 4, 2010, p. 1174. The other difficulty concerning the use of external sources with international law is that the issue of precedent is controversial in international law. Most international tribunals are asked to limit themselves to the dispute at hand. For example, Art. 59 of the Statute of the ICJ proclaims that "the decision of the Court has no binding force except between parties and in respect of that particular case". Exceptions from the rare use of precedents are the ECJ and the European Court of Human Rights (ECtHR), which rely heavily on their past decisions, but even these courts refer very rarely to other courts' decisions. For instance, only 29 majority judgments of all 7,319 decisions that the ECtHR made before 30 October 30 2006 cited one or more decisions of foreign constitutional courts or international courts. (This proportion is higher in the separate opinions of the judges.) *See* E. Voeten, 'Borrowing and Nonborrowing among International Courts', *The Journal of Legal Studies*, Vol. 39, No. 2, 2010, p. 557.

and they can also 'distinguish' them.[27] With the exception of some here rarely discussed use of binding international law, the authority of the cited foreign law is only persuasive in the process of judicial interpretation.[28] The rise of persuasive authority is the most important factor of 'constitutional cross-fertilization'.[29] Even in the case of the South African Constitution, in which the interpretative rule is codified in Section 39, Justice Chaskalson, the then President of the Constitutional Court, one of the most strenuous supporters of citations of foreign cases, has not treated foreign precedents as having more than persuasive authority. In the famous *Makwanyane* case on the constitutionality of the death penalty he wrote: "We derive assistance from public international law and foreign case law, but we are in no way bound to follow it."[30] After looking at the normative basis of the use of citations I will investigate the question as to why and where these uses take place.

2.1 Normative Underpinning

It is generally agreed that the notion that foreign materials should be used in constitutional interpretation is gaining currency, and that the migration of constitutional ideas has been identified at a descriptive level. But many scholars complain that the basic conceptual issues, the methodology of migration, as well as the normative underpinning are lacking, and yet proponents of this practice cannot offer a theoretical justification for it. While some scholars argue that constitutional theory is just a vehicle to make sense of a constitutional practice,[31] others raise the even more general question about the legitimacy of constitutional comparativism and whether comparativism is only a methodology that is employed on a judge's particular theory, or, alternatively, whether a special comparative constitutional theory is possible. This theory is profoundly procedural in seeking a particular comparativist methodology, but also substantive in that it maintains the existence of universal norms.[32] One less convincing methodological reason for a comparative theory is that a parochial methodology places the countries following it (*e.g.* the United States) at odds with international norms and creates diplomatic tensions with foreign allies.[33]

27 McCrudden, *id.,* p. 512.

28 This is the situation in countries like Canada, where practice of the courts often results in the rethinking of the domestic interpretation of international law. *See* K. Knop, 'Here and There: International Law in Domestic Courts', *New York University Journal of International Law and Politics,* Vol. 32, 2000, p. 501 about the decision of the Supreme Court of Canada on the *Baker* case.

29 *See* Slaughter, 2004, pp. 75-78.

30 Mawanyane (1995) 3 SA 391 (CC) 39.

31 "Cases get decided, and behind them is a theory of constitutional law." L. Lessig, 'The Puzzling Persistence of Bellbottom Theory', *California Law Review*, Vol. 87, 1997, p. 1838.

32 R.P. Alford, 'In Search of a Theory for Constitutional Comparativism', *UCLA Law Review*, Vol. 52, 2005, pp. 639-714.

33 *See* H.H. Koh, 'Paying "Decent Respect" to World Opinion on the Death Penalty', *U.C. Davis Law Review*, Vol. 35, 2002, pp. 1123-1129.

Another explanation is to enhance transnational dialogue and the global rule of law through a 'global jurisprudence'.[34] Among the substantive reasons are the maintenance of the existence of universal norms, the advocacy of the internalization of international norms into the constitutional jurisprudence, together with the ability to promote political democracy, and substantive justice by respecting a morally defensible set of individual rights.[35]

In the scholarly controversy over the uses of comparative constitutionalism, especially the judicial recourse to foreign law, there are three broadly defined positions.[36]

(a) Those scholars supporting the idea of the use of foreign law legitimate this practice with the sameness of both the problems and solutions of constitutional law for all constitutional democracies. One of the most consequent scholarly representatives of this position is David Beatty, who claims that the ultimate goal of all constitutional adjudication is to subject constitutional controversies to resolutions according to the dictates of the principle of proportionality, which Beatty describes as the 'ultimate rule of law'.[37] This test for justification of rights' limitations articulated by many constitutional systems is a component of 'generic constitutional law', which offers a formula for limiting rights.[38] This position tends to national identification with transnational and international legal norm, towards constitutional universalism. This means that the representatives of this model claim a process of transnational norm convergence.

(b) The second position's starting point is that although the problems of constitutional law are the same for all democratic countries, the solutions to these problems should differ from one constitutional system to another. This position, which is advocated by Mary Ann Glendon in her writings,[39] highlights differences and tries to explain how different one constitutional system is from the other and why they differ from each other. This is also the very idea behind Vicki C. Jackson's engagement approach, considering

34 Slaughter, 2004, p. 78. Among the more and more international judicial fora, there is an increasing 'dialogue' anyway in order to follow each other's interpretation techniques. *Cf.* R. Teitel & R. Howse, 'Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order', *New York University Journal of International Law and Politics*, Vol. 1, 2009, pp. 988-989.

35 *See* R.H. Fallon, Jr., 'How to Choose a Constitutional Theory', *California Law Review*, Vol. 87, 1999, p. 539.

36 *See* this categorization in M. Rosenfeld, 'Principle or Ideology? A Comparativist Perspective on the U.S. Controversy Over Supreme Court Citations to Foreign Authorities', *in* Zs. Gaspár & A. Hanák (Eds.), *Sajó 2009*, Prime Rate, Budapest. 2009a. Vicki C. Jackson very similarly talks about three postures towards the transnational. *See* V.C. Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement', *Harvard Law Review*, Vol. 119, 2005, p. 109. But there are also authors who are talking only about two positions in this debate: the first is that the constitutional law of one country is, or should be, largely independent of the constitutional law of other countries; the second is that the constitutional law of one state inevitably influences, and should influence, constitutional law in other states. *See* R. Dixon & E.A. Posner, 'The Limits of Constitutional Convergence', *Chicago Journal of International Law*, Vol. 11, No. 2, 2011, p. 400.

37 *See* D.M. Beatty, *The Ultimate Rule of Law,* Oxford University Press, Oxford, 2004, pp. 159-188.

38 *See* M. Tushnet, 'Comparative Constitutional Law', *in* M. Reimann & R. Zimmermann (Eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford, 2008, pp. 1226-1257.

39 *See* M.A. Glandon, 'Rights in Twentieth-Century Constitutions', *University of Chicago Law Review*,Vol. 59, 1992, p. 532; M.A. Glandon, M.W. Gordon & C. Osakwe, *Comparative Legal Traditions*, West Publishing Company, St. Paul, 1994, 2nd edn., p. 10.

foreign or international law without a presumption that it necessarily be followed.[40] In other words, the engagement model does not treat foreign and international law as a binding source. Jackson argues that the appropriate posture for the U.S. Supreme Court to take would be one of engagement.

(c) The followers of the third position claim that neither the constitutional problems nor their solutions are likely to be the same for different constitutional democracies. Vicki Jackson calls this a resistance posture. This position goes back to Montesquieu's observation that "the political and civil laws of each nation […] should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another".[41] This other extreme position concludes that comparisons are likely to be arbitrary, and that comparativists' choices are driven mostly by ideology. For instance, Günther Frankenberg criticized comparativists to impose Western hegemonic approaches, not being able to avoid acting as a colonialist, and characterized constitutional comparativism as "a post-modern form of conquest executed through legal transplants and harmonization strategies".[42] Another objection, raised by O. Kahn-Freund, is that constitutional law is much less amenable to legal transplant from one country to another than is private law.[43]

Richard A. Posner claims that the citations of foreign decisions by U.S. Supreme Court Justices, like Antony Kennedy, are related to moral vanguardism. Posner labels Justice Kennedy as a kind of 'judicial Ronald Dworkin', and marks him (like Professor Dworkin) as a natural lawyer, arguing that the basic idea of natural law is that there are universal principles of law that inform and constrain positive law.[44] Indeed, some scholars argue that the citation of foreign law is best understood as an application of natural law[45] or post-modern natural law,[46] while according to others only a theory articulated in terms of *ius gentium*, *i.e.* "the accumulated

40 *See* Jackson, 2010.

41 Ch. de Secondat, Baron de Montesquieu, *The Spirit of Laws* (A.M. Cohler *et al.* eds. and trans.), Cambridge University Press, New York, 1989, p. 8.

42 G. Frankenberg, 'Stranger Than Paradise: Identity and Politics in Comparative Law', *Utah Law Review*, 1997, pp. 262-263.

43 O. Kahn-Freund, 'On Uses and Misuses of Comparative Law', *Modern Law Review*, Vol. 37, 1974, pp. 17-18.

44 *See* R.A. Posner, 'Forward: A Political Court', *Harvard Law Review*, Vol. 110, 2005, pp. 84-89. Besides this scholarly attack, there were also some political attempts leading members of Congress to call for the potential impeachment of Supreme Court Justices. For instance, Congressman Tom Feeney stated: "To the extent [judges] deliberately ignore Congress's admonishment [about the use of foreign law in court decisions], they are no longer engaging in 'good behavior' from the meaning in the Constitution and they may subject themselves to the ultimate remedy, which would be impeachment." *See* T. Curry, *A Flap Over Foreign Matters at the Supreme Court,* MSNBC.com (Mar.11.2004), <http://masnbc.com/id/4506232>. Quoted by D. Fontana, 'The Rise and Fall of Comparative Constitutional Law in the Postwar Era', *The Yale Journal of International Law*, Vol. 36, No. 1, 2011, p. 44. The most radical consequence for Justices Ruth Bader Gingsburg and Sandra Day O'Connor, who showed their favour towards citation of foreign law in several extrajudicial speeches, was not only criticism, but death threats: *See* A.L. Parrish, 'Storm in a Teacup: The US Supreme Court's Use of Foreign Law', *University of Illinois Law Review*, 2007, p. 645.

45 *See* for instance Alford, 2005, pp. 639-673.

46 C. Dupré, 'Globalisation and Judicial Reasoning: Building Blocks for a Method of Interpretation', *in* A. Halpin & V. Roeben (Eds.), *Theorising the Global Legal Order,* Hart Publishing, Oxford, 2009, pp. 107-123.

wisdom of the world on rights and justice from the decisions of judges and lawmakers", in other words, a consensus among "civilized" or "freedom-loving" countries justify the citations.[47] At the same time, some believe that even if there is no consensus, adaption by judges is justified on the basis of a cosmopolitan view of constitutional law.[48] Arguments for the use of comparative law in human rights are based on the universality of rights concept, or at least on their regionally divided existence, like the existence of the European *ius commune,* as the cultural relativism approach would make the comparison meaningless.[49]

The different normative arguments concerning the relevance of foreign materials in constitutional cases, especially in the U.S. Supreme Court practice, can be followed in a conversation between Justice Antonin Scalia and Justice Stephen Breyer.[50] They both agreed that the use of comparative law is not 'authoritative', *i.e.* that it is not binding as a precedent. But as Scalia noted, such citations are neither legitimate, nor useful, while for Justice Breyer, they are useful and legitimate, as long as they are considered for their insights and not regarded as authoritative. Breyer offered a pragmatic rationale, suggesting that foreign courts "have problems that often, more and more, are similar to our own […] If here I have a human being called a judge in a different country dealing with a similar problem, why don't I read what he says if it's similar enough? Maybe I'll learn something […]"[51] For Scalia's originalist view, foreign law "is irrelevant with one exception: old English law, which served as the backdrop for the framing of the constitutional text".[52] Scalia also stated that judges using foreign materials cite comparative law selectively, such that "when it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn't agree we don't use it".[53]

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47 *See* J. Waldron, 'Foreign Law and the Modern Ius Gentium', *Harvard Law Review*, Vol. 119, 2005, pp. 129-147.

48 *See* V. Perju, 'Cosmopolitanism and Constitutional Self-Government', *International Journal of Constitutional Law*, Vol. 8, 2010, p. 326.

49 *See* this recognition at Ch. McCrudden, 'Judicial Comparativism and Human Rights', *in* E. Örücü & D. Nelken (Eds.), *Comparative Law: A Handbook*, Hart Publishing, Oxford, 2007, p. 373.

50 The hour-long face-to-face conversation was sponsored by the U.S. Association of Constitutional Law, held on 13 January 2005 at the Washington College of Law at American University in Washington, D.C., moderated by Norman Dorsen from the New York University School of Law. The transcript was published in *International Journal of Constitutional Law*, Vol. 3, 2005, pp. 519-541.

51 *Id.,* p. 522.

52 *Id.,* p. 525.

53 *Id.,* p. 521. As one possible explanation, McCrudden mentions that the use of foreign judgments is simply result driven: that advocates and judges use the foreign decision that will support the result they want in the particular case before the court. He even raises the suspicion that the selective use of foreign judgments is inevitably associated with a rights-expanding agenda. But then he rejected this premise by referring to Justice Frankfurter, who was the U.S. Supreme Court justice most consistently disposed to citing foreign cases favourably, and who was certainly not pursuing a rights-expanding agenda. *See* McCrudden, 2000, p. 527. The role of ideology as a motivating force for the use of foreign and international sources is also suggested by Bork's words: "Perhaps it is significant that the justices who [borrow] are from the liberal wing of the [US Supreme] Court. This trend is not surprising, given liberalism's tendency to search for the universal and to denigrate the particular." *See* R. Bork, *Coercing Virtue: The Worldwide Rule of Judges,* AEI Press, Washington D.C., 2003, p. 22. Eric Voeten surveying the borrowing among international courts, especially in the jurisprudence of the European Court of Human Rights, says that judges who refer to external decisions in their separate opinions are more activist than are the judges who refrain from doing so on the same cases. *See* Voeten, 2010.

This means that the citation of comparative case law "lends itself to manipulation".[54] For Breyer, one of the justifications for citing the case law of other national courts was to consolidate judicial review in transitional democracies.[55] As Justice Breyer emphasized in the discussion, even where there are no apparent firm convergences, human beings across cultures and national borders confront many of the same problems. What is at stake in these situations is a 'dialogue' (à la Choudhry) or 'engagement' (à la Jackson) with foreign decisions, which does not necessarily mean any disposition to endorsement or adoption of particular foreign approaches.

The positions of Scalia and Breyer can also be seen as the dichotomy of American exceptionalism, *i.e.* the refusal of many U.S. courts and justices, including those of the Supreme Court to engage in comparative interpretation, and the 'post-war juridical paradigm' of rights protection, a common constitutional model found in a variety of liberal democracies.[56] As Scalia's arguments demonstrate, the starting points of American exceptionalism are that constitutional judicial review is undemocratic and illegitimate and consequently views the use of foreign law as a form of judicial activism, which further undermines the legitimacy of judicial review. American exceptionalism – as it seems from the opinions of Scalia as well – forbids not only the use of foreign law, but also that of international law.[57] Jed Rubenfeld says, for instance, that American constitutionalism is based on the idea of containment by domestic law only and not by international law. On this basis he argues that two diverging conceptions of constitutionalism, namely a genuinely 'European' one and a different 'American' one, exist. In that view 'international constitutionalism' is a genuinely European conception.[58] According to this argument, nations are bound by international law only if it is legitimate, but international law is not democratically legitimate and therefore not really law, which means that the United States is not legally bound by it.[59]

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54 McCrudden, 2000, *id.,* p. 531.

55 Sujit Choudhry criticizes this justification as crude, power-blown and realpolitic, as well as his failures to respond to Scalia's challenges and explain why courts should cite comparative case law. *See* Choudhry, 2006, pp. 4-10.

56 *See* this contrast of models in L. Weinrib, 'The Postwar Paradigm and American Exceptionalism', *in* S. Choudhry (Ed.), *Migration of Constitutional Ideas*, Cambridge University Press, Cambridge, 2006.

57 The past decade has seen international lawyers and political scientists discuss 'American exceptionalism'. This debate was characterized by the concern about perceived hegemonic and unilateral conduct of the 'last remaining superpower'. *See e.g.* M. Ignatieff (Ed.), *American Exceptionalism and Human Rights*, Princeton University Press, Princeton, 2005; H.H. Koh, 'On American Exceptionalism', *Stanford Law Review,* Vol. 55, 2003, p. 1479; N.T. Saito, *Meeting the Enemy – American Exceptionalism and International Law,* New York University Press, New York, 2010, pp. 54-55; S. Walt, 'The Myth of American Exceptionalism', *Foreign Policy,* November 2011; Jerome Karabel, '"American Exceptionalism", and the Battle for the Presidency', *Huffington Post,* 22 December 2011.

58 *Cf.* J. Rubensfeld, 'The Two World Order', *Wilson Quarterly*, Vol. 27, 2003, p. 28. Obviously the different concepts of 'international constitutionalism' contributed to the very fact that while there were almost no international public law concerns expressed in the United States after the killing of Osama bin Laden, several such corncerns were published in Germany. *See* S. Ulrich, 'Darf man Terrorsiten einfach töten? Juristen befürchten, dass Aktionen wie die Erschießung Osama bin Ladens das Völkerrecht verwässern', *Süddeutsche Zeitung,* 4 May 2011.

59 *See* for instance J.R. Bolton, 'Is There Really "Law" in International Affairs?', *Transnational Law and Contemporary Problems,* Vol. 10, 2000, p. 1.

As opposed, the post-war juridical paradigm model views judicially enforced constitutional rights as subjects of comparative constitutional interpretation. This 'constitutionalist' concept is of course in favour of the legitimacy and thus of the bindingness of international law as a source of constitutional interpretation.[60]

2.2 Jurisprudential Aspects

In this part I try to identify some criteria that can explain why particular judges and courts decide to use or not use foreign materials. Christopher McCrudden lists the following factors that seem to lead judges to engage with foreign materials: (a) type of political regime in which the foreign court is situated, (b) pedagogical impulse to look at more established democracies, or warning not to use certain laws, (c) audience, (d) existence of common alliances, (e) filling vacuum of temporary absence of (preferred) indigenous jurisprudence, (f) perceived nature of the Constitution as transformative or conservative, (g) theories of law and legal interpretation, (h) foreign law empirical fact, (i) perceived judicial competence in the area of foreign law in issue, (j) differences in constitutional structure.[61] But the most important criterion common in all of these factors is to look for good persuasive ideas in other national jurisprudences, which would help to solve similar constitutional problems through interpretation. The very few empirical surveys show that for many judges, foreign judge colleagues form a reference group on the resolution of constitutional questions. But the data indicate that this globalist conception of judges citing foreign law as a source of persuasive authority may apply to only a minority of judicial comparativists.[62] A survey study of 43 judges from the British House of Lords, the Caribbean Court of Justice, the High Court of Australia, the Constitutional Court of South Africa, and the Supreme Court of Ireland, India, Israel, Canada, New Zealand and the United States on the use of foreign law in constitutional rights cases has shown that 20 of the 43 judges felt that they used foreign law occasionally or rarely, while 23 felt they used it regularly. To the question whether they use comparative material in justifying their legal conclusions, 42% considered themselves frequent users, so the frequency with which judges used comparative material in justifying their conclusions was significantly related to the frequency with which they cited foreign law.[63]

As the number of liberal democratic countries is constantly increasing, the migration of constitutional ideas within this community cannot be a one-way process, some courts

60 *Cf.* M. Kumm, 'The Legitimacy of International Law. A Constitutionalist Framework of Analysis', *European Journal of International Law,* Vol. 15, 2004, pp. 907-931.

61 *See* McCrudden, 2000, pp. 516-527.

62 *See* B. Flanagan & S. Ahern, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges'*, International and Comparative Law Quarterly*, Vol. 60, 2011, p. 28.

63 *Id.,* pp. 14-15.

always being 'givers' of law, and others always being 'receivers'. Of course, the courts in the countries of the 'post-war juridical paradigm' (Weinrib) of rights protection use more case law from the courts of older and more established democracies, such as that of the U.S. Supreme Court. As Justice Albie Sachs of the South African Constitutional Court writes:

> If I draw on statements by certain United States Supreme Court Justices, I do so not because I treat their decisions as precedents to be applied in our Courts, but because their dicta articulate in an elegant and helpful manner problems which face any modern court dealing with what has loosely been called state/church relations. Thus, though drawn from another legal culture, they express values and dilemmas in a way which I find most helpful in elucidating the meaning of our own constitutional text.[64]

But the growing interdependency also means that courts with a long record of constitutional interpretation, such as the U.S. Supreme Court, should also 'learn something' as Justice Breyer said in the discussion with Justice Scalia. Before we discuss, in the next subchapter, the practice of some national courts, which after their transition to liberal democracy the most used foreign law in constitutional interpretation, let us examine the gradual development of the U.S. Supreme Court from the exceptionalist approach of the majority of the justices to some recent decisions, in which the majority did refer to foreign and international case law.

Paradoxically, as David Fontana's study proves, the first few decades after World War II can be characterized as the rise of comparative constitutional law, and its fall started in the early 1970s.[65] For instance, Earl Warren, Chief Justice of the Supreme Court in 1953, travelled to Germany, Japan and South Korea, speaking to audiences about the 'revival of comparative jurisprudence,' and later also publishing an essay on the importance of studying the constitutions of other countries.[66] Also, Justice William O. Douglas gave a series of lectures and published a book about the constitutional law of India.[67] But in the judicial opinions it remained an exception, what Justice Frankfurter did from the 1940s on, drawing on the opinions of other countries in the Anglo-Saxon tradition 'not less civilized than our own' as reflected in their statutes, decisions and practices. In *Adamson v. California*,[68] for instance, he based his interpretation on "those canons of decency and fairness which express the notions of justice of English-speaking peoples […] " a view he repeated in *Rochin v. California*,[69] and with which he became increasingly marginalized by his fellow justices, for instance by Justice Black who not without any irony asked "why we should consider

64 *S. v. Lawrence, S. v. Negal, S. v. Solberg*, (4) SA 1176, 1223 (South Africa 1997). Quoted by Slaughter, 2004, p. 77.
65 *See* Fontana, 2011.
66 E. Warren, 'The Law and the Future', *Fortune*, Vol. 106, 1955, p. 229.
67 W.O. Douglas, *We the Judges: Studies in American and Indian Constitutional Law from Marshall to Mukherjea,* Doubleday, New York, 1956.
68 332 US 46 (1947).
69 342 US 165 (1952), 169.

only the notions of English-speaking peoples to determine what are immutable and fundamental principles of justice."[70] In the *Furman v. Georgia* case,[71] which was the first major decision of the Supreme Court on the death penalty, Justice Thurgood Marshall argued that the abolition of capital punishment would enable the United States to "join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment". For Justice Powell, in dissent, the comparative experience pointed to the opposite conclusion. But despite the different outcomes of the opinions, those in favour and those against used comparative arguments. In *Thompson v. Oklahoma*,[72] Justice Brennan, in the course of the plurality's judgment, argued that to allow the execution of a criminal who was less than sixteen years old at the time of the offence would offend civilized standards of decency, and this "is consistent with the views that have been expressed […] by other nations that share our Anglo-American heritage, and by the leading members of the Western European community […]." Brennan also cited as evidence the brief of Amnesty International. In his dissent, Justice Scalia disagreed not just with a ruling, but also with the use of the comparative approach itself: "We must not forget that it is the Constitution for the United States that we are expounding."[73] In *Stanford v. Kentucky*[74] this dissenting view became the plurality. Despite the dissent's reliance on comparative arguments, Justice Scalia, writing this time for the majority, said that it is "American conceptions of decency that are dispositive, rejecting the conception of petitioners […] that the sentencing practices of other countries are relevant […] "[75] In *Knight v. Florida*,[76] where the question was whether twenty years on death row was cruel and unusual punishment under the Eighth Amendment, Justice Thomas for the majority observed that "Were there any support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council."[77] Justice Breyer in his dissent emphasized that the U.S. Supreme Court has a history of looking at "the way in which foreign courts have applied standards roughly comparable to our constitutional standards in roughly comparable circumstances".[78] In another dissenting opinion Breyer also cites The Federalist Paper No. 63. in support of the idea that "attention to judgement of other nations" is useful.[79] Not only in cases of rights, but concerning the relevance of

70 342 US at 176.
71 408 US 238 (1972).
72 487 US 815 (1987).
73 *Id.*, p. 869.
74 492 US 361 (1989).
75 *Id.*, p. 370.
76 528 US 990 (1999).
77 *Id.*, p. 990.
78 *Id.*, p. 997.
79 *Foster v. Florida* 537 US 990 (2002).

foreign constitutional experiences in the context of federalism is Justice Scalia rejective. In *Printz v. United States*[80] he said that "comparative analysis [is] inappropriate to the task of interpreting a constitution though it [is,] of course, quite relevant to the task of writing one".[81] Breyer's dissent admitted that "we are interpreting our own constitution, not that of other nations and there may be relevant political and structural differences", but nonetheless "their experience may […] cast an empirical light on the consequences of different solutions to a common legal problem".[82]

But around the beginning of the new millennium many observers noted that "the Court's manifest awareness of other constitutional systems is on the rise".[83] One early sign was *Washington v. Glucksberg*,[84] where the Court referred to the experience in foreign jurisdictions in its first decision on the constitutionality of assisted suicide. The one was *Atkins v. Virginia*, in which Justice Stevens, in a footnote, referred to the opinion of the "world community" in support of what he called a "national consensus" against the execution of the mentally retarded.[85] The reference was sharply criticized in dissents by both Chief Justice Rehnquist and Justice Scalia, who stated that "the Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal […] to views of assorted professionals and religious organizations, members of the so-called 'world community,' and respondents to opinion polls".[86]

But the decisive steps were the *Lawrence* and the *Roper* case. In *Lawrence v. Texas*[87] the Court struck down the criminal prohibition of sodomy, departing from its earlier decision in *Bowers v. Hardwick*.[88] In the majority judgment Justice Kennedy cited the decision of the ECtHR in *Dudgeon v. United Kingdom*[89] to illustrate "that the reasoning in Bowers has been rejected

80 521 US 898 (1997).

81 *Id.,* p. 921, n. 11.

82 *Id.,* p. 977.

83 *See* V.C. Jackson, 'Narratives of Federalism: Of Continuities and Comparative Constitutional Experience', *Duke Law Journal*, Vol. 51, 2001, p. 252. Jackson notes the citing of foreign constitutional law by even its most vocal opponent – Justice Scalia in a dissent – in *McIntyre v. Ohio Elections Comm'n*, 514 US 334, 381-388 (1995). Scalia invoked Australian, Canadian and English law in the mid-1990s when dealing with the question of whether the source of an election campaign leaflet opposing a school tax levy proposed in Ohio should be revealed to the public.

84 521 US 702 (1997).

85 536 US 304, 316 n. 21 (2002).

86 *Id.,* p. 337. Interestingly enough, when dozens of countries were creating Constitutions after the fall of the Berlin Wall, Chief Justice William Rehnquist, who was not supportive in his opinions towards the use of foreign law, wrote in a paper, "now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process". *See* W. Rehnquist, 'Constitutional Courts – Comparative Remarks' (1989), reprinted *in* P. Kirchof & D.P. Kommers (Eds.), *Germany and Its Basic Law: Past, Present and Future – A German-American Symposium,* Nomos, Baden-Baden, 1993, p. 412.

87 539 US 558 (2003). For background on the case, *see* D. Carpenter, *Flagrant Conduct: The Story of Lawrence v. Texas,* W.W. Norton & Company, New York, 2012.

88 478 US 186 (1986).

89 45 ECtHR (1981).

elsewhere".[90] One commentator went so far as to state that the citation "suggests that constitutional courts are all engaged in a common interpretative enterprise".[91] But Justice Scalia's dissent shows that there is no agreement on this within the Court. He first made it clear that the "Bowers majority opinion never relied on values we share with other civilization", and then emphasized that "[t]he Court's discussion of […] foreign views [ignoring of course, the many countries that have retained criminal prohibitions on sodomy] is therefore meaningless dicta. Dangerous dicta, however, since this Court […] should not impose foreign moods, fads or fashions on Americans."[92] In Roper both the debate on juvenile death penalty and over the migration of constitutional ideas continued. Justice Kennedy, arguing for the majority about the unconstitutionality of capital punishment for juveniles, reviewed a range of foreign sources and stated that they "while not controlling our outcome […] provide respected and significant confirmation for our own conclusions", and went on to declare this general praise for the use of foreign law:

> These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of reasons we honour the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.[93]

Scalia's dissent again attacks the Court's comparative approach by accusing the majority of holding the view "that American law should conform to the laws of the rest of the world" — a view that "ought to be rejected out of hand."[94]

The future of the use of comparative constitutional law at the U.S. Supreme Court is very hard to predict, since the two of the last four nominees during their confirmation hearings in the Senate rejected the approach. Then nominee Judge Roberts, now Chief Justice, emphasized that it would be absurd to look to foreign law as binding authority when no one genuinely believes that anyone participating in this debate about comparative constitutionalism is advocating using foreign or international authority as binding precedent: "If we're relying on a decision from a German judge about what our Constitution means,

90 539 US 558 (2003), at 2483.

91 *See* M. Ramsey, 'International Materials and Domestic Rights: Reflections on Atkins and Lawrence', *American Journal of International Law*, Vol. 98, 2004, p. 69.

92 539 US 558 (2003) at 598. As Glensy argues, Justice Scalia's bemoaning the selective nature of comparative analysis can be equally applied to any context within a judicial decision, and therefore actually does not become a critique of comparative constitutionalism, but rather, of decisional rule itself. *See* Glensy, 2010, p. 1239.

93 *Roper v. Simmons*, 543 US 551 (2005), p. 1200.

94 *Id.*, p. 1226.

no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet, he's playing a role in shaping a law that binds the people in this country."[95] Also, Justice Alito expressed his concerns about the use of foreign law: "Well I don't think that we should look to foreign law to interpret our own Constitution [...] I think the Framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world."[96] The picture in the case of lower level federal and state courts is not any better either. There were propositions, in 2010 and 2011, for legislative changes to prohibit the use of international and foreign law in state (and in some cases federal) courts that were even approved in two states.[97]

2.3 Case Studies

This section aims to discuss more empirical questions on the use of foreign materials, namely, how far does it happen, and where? For this purpose, I have selected four case studies, all of which fall under Lorain Weinrib's 'post-war juridical paradigm': Germany, Hungary, Israel and South Africa, and the explanation of this selection is as follows. The American exceptionalism, discussed in the previous section, is partly based on the very fact that till the end of World War II the U.S. Supreme Court was the only Constitutional Court that did enough worth studying for emerging new democracies[98] such as Germany or Israel. But since the beginning of the 1950s, when the German Constitutional Court was established, it also became an important source of migrating constitutional ideas for other new constitutional states, such as Hungary. In the beginning of the 1990s, other states governed by the rule of law emerged, like South Africa, whose Constitutional Court's decision on the unconstitutionality of death penalty used American, German and also Hungarian case law, and, needless to say, the decisive one was not that of the U.S. Supreme Court.

2.3.1 Germany

The constitutional law of the Federal Republic of Germany after World War II was definitely influenced by American constitutionalism, but the Basic Law of 1949 cannot be labelled as an imposed Constitution. Although the Constitution-making process was set in motion by the occupying Allied powers, and the final product was subject to Allied

95 *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before S. Comm. On the Judiciary,* 109th Cong. 42 (2005).

96 *See Confirmation Hearing on the Nomination of Samuel A. Alito to be an Associate Justice of the Supreme Court of the United States: Hearing Before S. Comm. On the Judiciary,* 109th Cong. 471 (2006).

97 *See* A. Fellmeth, 'International and Foreign Law in the U.S. State Legislatures', *ASIL Insights,* Vol. 15, No. 13, 2011.

98 *See* L. Henkin & A.J. Rosenthal (Eds.), *The Influence of the US Con. Abroad,* Columbia University Press, New York, 1990 about this important influence.

approval, the actual drafting was essentially a German process drawing on German models and traditions.[99] References to American constitutional ideas and principles in the Parliamentary Council covered a variety of subjects, for instance on issues of federalism and bill of rights, and scholars of German constitutional theory and practice have paid close attention to American constitutionalism.[100] The same can be said concerning the jurisprudence of the German Federal Constitutional Court: there were some important decisions first of all in the very beginning, which were influenced by U.S. Supreme Court rulings, and the number of directly cited decisions decreased after the Constitutional Court established its own jurisdiction.[101] But the influence of American constitutional thinking was always present among the various constitutional court justices, such as Gerhard Leibholz, Konrad Hesse, Dieter Grimm, Wolfgang Hoffmann-Riem and Brun-Otto Bryde.[102] This explains that there are no fundamental objections against referring to international and foreign sources in the German Constitutional Court. Discussion like the one in the United States that forms the background of their argument is plainly unthinkable in Germany.[103] One German constitutional scholar even advocates making comparative law "the fifth method of interpretation" in constitutional law, alongside text, context, history and policy.[104]

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99 *See* Schauer, 2005, pp. 908-909. Schauer states that although drafting in the shadow of the necessary approval of an occupying power undoubtedly had an effect on the process, it was less than the Allied powers had hoped for, and certainly much less than existed in Japan.

100 *See* H. Steinberger, 'American Constitutionalism and German Constitutional Development', *in* L. Henkin & A.J. Rosenthal (Eds.), *The Influence of the US Con. Abroad,* Columbia University Press, New York, 1990, pp. 212-216; and B. Pieroth, 'Amerikanischer Verfassungsexport nach Deutschland', *Neue juristische Wochenschrift,* Vol. 42, 1980, pp. 1333-1337. Hoffmann-Riem attributes a special role to the American constitutional adjudication in the creation of the German sister institution. *Cf.* W. Hoffmann-Riem, 'Two Hundred Years of Marbury v. Madison, The Struggle for Judicial Review of Constitutional Questions in the United States and Europe', *German Law Journal,* Vol. 5, 2004, pp. 685, 687-688, 696.

101 There is no comprehensive analysis of comparative constitutional law used by the German courts. One of the very few statistical data collected in 1974 counted 24 decisions of the Federal Constitutional Court, which had recourse to comparative law. *See* J.M. Mössner, 'Rechtsvergleichung und Verfassungsrechtsprechung', *Archiv für öffentliches Recht,* 1974, p. 193. Another analysis can be found at U. Drobnig, 'Rechtsvergleichung in der deutschen Rechtsprechung', *RabelsZ*, 1987, pp. 610-630. The latest survey refers mainly to the court practice of the Federal High Courts, including the Constitutional Court from 1950 to 1990. About 70 of the reported cases were handed down by the Federal Supreme Court (Bundesgerichtshof), another 25 cases originate from the Federal Constitutional Court (Bundesverfassungsgericht). In contrast, the other Federal High Courts used comparative law in only a few instances. *See* U. Drobnig, 'The Use of Foreign Law by the German Courts', *in* Sir B. Markesinis & J. Fedtke, *Judicial Recourse to Foreign Law*, University of Texas, Austin, 2006.

102 *See* A. Somek, 'The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review', *University of Pennsylvania Journal of Constitutional Law*, Vol. 1, 1998b, p. 296 about the influence of American thinking in the development of the German equality doctrine.

103 *See* B.-O. Bryde, 'The Constitutional Judge and the International Constitutionalist Dialogue', *in* Sir B. Markesinis & J. Fedtke, *Judicial Recourse to Foreign Law*, University of Texas, Austin, 2006, pp. 298-301.

104 *See* P. Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat', *Juristenzeitung,* 1989, p. 913. Later also in P. Häberle, *Rechtsvergleichung im Kraftfeld des Verfassungsstaates,* Duncker & Humblot, Berlin, 1992, p. 27.

There is an important difference between the German and the American Constitution towards international law, which makes at least the use of the rules of international law much easier in Germany. According to Article 25 of the German Basic Law (Grundgesetz), "the generally recognized rules of public international law are an integral part of federal law", and they have priority over national law. In disputed cases, the Federal Constitutional Court is entitled to interpret these rules. Article 100(2) requires any court to obtain a decision from the Federal Constitutional Court whenever, in the normal course of litigation, its judges doubt whether a general rule of international law is part of federal law or whether it directly creates rights and duties for individual persons.[105] In 1982, for instance, the Court added a further criterion for the examination of cases, in which an accused is sentenced in his absence, *i.e.* the minimum procedural requirement of public international law. The Court referred to the decisions of three European countries to show that the application of such standards is justified.[106] In some other cases, where the Court interprets procedural guarantees, which are not spelled out in the Basic Law, *e.g.* the presumption of innocence, they deduced this right from the rule of law, but since it has no textual basis in the national Constitution it cited the words of the ECHR and drew heavily on the case law of the Strasbourg organs in its jurisprudence.[107] In another case, in which collaborators and agents of East Germany's Ministry of State Security challenged the validity of their convictions for spying on the Federal Republic, the complainants, in their defence, cited binding norms of international law, one of them allegedly being that spying activities against West Germany carried out on East German territory could not be criminally punished in reunified Germany, the Court – also based upon a requested legal opinion prepared by the Max Planck Institute of International Public Law in Heidelberg – held that the trial and conviction did not infringe a general rule of international law in violation of Article 25.[108]

One of the first rulings citing foreign materials of the Court was the dissolution of the KPD case of 1956, when the Court banned the West German Communist Party, by partly distinguishing the Federal Republic of Germany from its Western neighbours:

> The constitutional logic of these [Western] democracies [. . .] lies in the fact that citizens are free or, as under the Italian Constitution of 1947, even encouraged to form political parties without limitation [. . .] Recent developments, have however, shown that free democracies can equally not ignore the practical and political problems of excluding parties from public life which are hostile to the constitutional order if the threat to the State reaches a certain level of

105 *See* D.P. Kommers, 'Germany: Balancing Rights and Duties', *in* J. Goldsworthy (Ed.), *Interpreting Constitutions. A Comparative Study*, Oxford University Press, Oxford, 2006, p. 195 about this 'verification proceeding' ('Verifikationsverfahren').

106 BVerfGE 59, 280, at 283 and 286.

107 BVerfGE 35, 311, at 320, BVerfGE 74, 102, at 121, BVerfGE 74, 358, at 370, BVerfGE 82, 106, at 114.

108 BVerfGE, 92, 320, 323.

> intensity […] The Communist Party was thus prohibited in France and Switzerland in 1939 and 1940 by government regulations. In the United States the party was required to register in order to allow public authorities to effectively monitor its activity as a subversive organization.[109]

One of the leading cases on freedom of expression and one of the Court's most important decisions overall is the *Lüth* case of 1958,[110] in which the Court cites both the French declaration of human rights in French and Justice Cardozo of the U.S. Supreme Court in English on "the matrix of indispensable condition of nearly every other form of freedom". In the famous Spiegel-decision of 1966, four judges out of the eight members of the Senate referred to papers presented at an international conference on the legal position of the press in criminal proceedings concerning the question whether members of the press can refuse to give evidence in criminal proceedings involving treason and opted against such a right.[111] This argument was rejected by the other four judges, but on substantial reasons, and not because of the use of comparative law.

As Justice Bryde states, despite the mentioned hidden background influence, there are relatively few open references to foreign law.[112] He mentions the following examples. When the Court decided against much popular opinion – both animal rights and xenophobic – for a Muslim halal-butcher it found helpful to point out that the Austrian Constitutional Court had reached the same result.[113] In establishing the constitutionality of same-sex unions it also made sense to put on the record in how many countries such unions have become accepted practice.[114] In another case the Court also referred to international human rights jurisprudence for the difficult task of reconciling the rule of law regarding the retroactive penalization with the avoidance of impunity for crimes committed in a non-democratic regime.[115] Drobnig refers to some other concrete decisions, such as the one regarding the interpretation of Article 4 § 3 of the German Basic Law, which deals with the right of conscientious objection to military service. In this case, the Court was looking for help from foreign legal systems, but found no common grounds concerning this legal institution either on the international level or in the Western democracies.[116] Another case concerned the interpretation of the notion 'political treaty' in Article 59 § 2 of the Constitution. The Court found a uniform understanding of that concept in the laws of several

109 BVerfGE 5, 85, at 135-136.
110 BVerfGE 7, 198.
111 BVerfGE 20, 162, at 229-221.
112 According to Drobnig, important as some of the decisions citing foreign law are, their share of all the published decisions amounts to no more than 1%. *See* Drobnig, 2006, p. 141.
113 BVerfGE 104, 337, at 349.
114 BVerfGE 105, 313, at 315.
115 BVerfGE 95, 96, at 133.
116 BVerfGE 28, 243 at 258.

Central European countries, and used this as a basis for its decision.[117] A similar result was reached by the Court concerning the interpretation of the term 'home,' which Article 13 § 1 of the Basic Law declares as inviolable. The Court finding decisions in four countries, which interpreted 'home' relatively broadly, also joined this approach.[118]

Without concrete citations and even despite different arguments used, but seemingly considering decisions of the U.S. Supreme Court, one can find decisions where the German Federal Constitutional Court reached results similar to those of its American counterpart. One example is abortion rights, which were carved out by both courts after different approaches.[119] In the first two cases, ruled in the 1970s, *Roe v. Wade*[120] and *the German Abortion I* case,[121] the two courts struck almost the same balance between the pregnant woman's right to obtain an abortion and the state's interest in the protection of the fetuses' right to life, although the doctrinal analyses are in sharp contrast to each other: while the U.S. Supreme Court's analysis starts with the recognition of importance of the pregnant women's liberty and privacy interest, the German Constitutional Court bases its reasoning on the rights to life and human dignity.[122] According to Drobnig, in this case the German Court endeavoured to assess not only the content of a foreign rule but also its consequences, by examining the legal situation in countries that had incorporated a different legal solution in their laws.[123] Interestingly enough, later both the U.S. and Germany restricted the constitutionally permissive scope of abortions. In its decision the German Court made a general reference to experiences with different legal solutions abroad, although expressing some reservations "because the uncertain degree of comparability of the circumstances" qualified the relevance of such experiences.[124]

The same is true concerning communication rights: the American law is freer in its individualism and more zealous in the protection of expression. For example, in *R.A.V. v. St. Paul*, the Supreme Court protected the right of white individuals to express hatred by placing a burning cross in the dead of night in the fenced-in yard of a black neighbour across the street.[125] In the *Auschwitz Lie* case, the German Constitutional Court banned a demonstration intending to assert that the Holocaust never occurred, by arguing that "freedom of opinion by no means always takes precedence over protection of personality […]"[126] (That is why some American

117 BVerfGE 1, 372, at 382.

118 BVerfGE 32, 54, at 70.

119 *See* this example: Rosenfeld, 2009a, pp. 190-191, but also *in* R.E. Levy & A. Somek, 'Paradoxical Parallels in the American and German Abortion Decisions', *Tulane Journal of International and Comparative Law*, Vol. 9, 2001, p. 109.

120 410 US 113 (1973).

121 BVerfGE 39, 1.

122 *See* D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edn., Duke University Press, Durham, 1997, p. 336.

123 Drobnig, 2006, p. 142.

124 BVerfG 28 May 1993, JZ special issue of 7 June 1993.

125 505 US 377 (1989).

126 BVerfGE 90, 241, 148.

scholars call the German Constitution a "constitution of dignity", whereas the American Constitution is labelled a "constitution of liberty".[127]) The German Court here formulates its approach of the limitation of hate speech against the American one. Andrzej Rapaczynski terms this as a 'negative influence', a process in which a model (for instance, the American one) is known, considered and rejected, or in which an experience perceived as undesirable is used as an argument for not following that example.[128] But despite these different approaches based on the different historical backgrounds and legal cultures, the right to communication is equally essential parts of the two constitutional systems.[129]

On the other hand, significant differences may arise in the field of judicial review of measures of social welfare. In February 2010, the German Federal Constitutional Court struck down legislation on individual rights to social welfare (the so-called Hartz Legislation),[130] mainly on grounds of irrational and opaque standards for the calculation of the needs of the persons on the receiving end. The Court based its judgment on the fundamental individual right to a minimum of subsistence which it deduced from the provision on human dignity (Art. 1, para. 1 of the German Basic Law) and the principle of the social State (Art. 20, para. 1). The Court held that this right was not fully to the disposition of the legislature[131] and considerably reduced the legislative discretion in this area. The decision intervened in a political question of major importance and has a significant financial impact. It is almost impossible to conceive of a decision by the U.S. Supreme Court that would be as wide-ranging in its financial consequences as the German decision was.[132]

2.3.2 India

In India, in contrast to the United States and Germany, monism does not prevail, and the norms of international treaties do not automatically become integrated into the national

127 Donald P. Kommers argues that "in the American view [as contrasted with the German], the community has no valid claim upon the individual person, particularly in the domain of mind and morals". *See* D.P. Kommers, 'The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany', *Southern California Law Review*, Vol. 53, 1980, p. 694.

128 *See* A. Rapaczynski, 'Bibliographical Essay: Influence of the U.S. Constitution', *in* L. Henkin & A.J. Rosenthal (Eds.), *The Influence of the US Con. Abroad*, Columbia University Press, New York, 1990. Similarly, Kim Scheppele also investigates constitutional influence through the use of negative models. *See* K.L. Scheppele, 'Aspirational and Aversive Constitutionalism. The Case for Studying Cross-Constitutional Influence through Negative Models', *International Journal of Constitutional Law*, Vol. 1, No. 2, 2003, pp. 296-324.

129 *See* E.J. Eberle, *Dignity and Liberty. Constitutional Visions in Germany and the United States,* Praeger, Westport, 2002, pp. 231-236.

130 BVerfG 125, 175. (an English translation of the Judgment is available at <www.bverfg.de/entscheidungen/ls20100209_1bvl000109en.html>, last accessed on 19 March 2012.

131 *Id.,* para. 133 of the English translation.

132 S. Gardbaum, 'The Myth and Reality of American Constitutional Exceptionalism', *Michigan Law Review,* Vol. 107, 2008, p. 450.

legal system. In this sense, India follows the Anglo-Saxon tradition, where the international customary law is part of a country's legal system as long as it does not contradict its principles.[133] At the same time, the Supreme Court has made efforts to innovatively incorporate certain rights into the Indian Constitution by giving constitutional interpretation in line with international treaties. This was the case regarding the right to home. Despite the fact that international law does not require the state to provide housing to the homeless, the Supreme Court, in line with certain international treaties, interpreted a provision of Paragraph 21 of the Constitution that without a legal procedure one cannot be deprived of life and personal freedom.[134]

In one of its decisions regarding enforceability of a debtor's liability, the Supreme Court of India referenced the International Covenant on Civil and Political Rights (ICCPR), according to which one cannot be deprived of one's personal freedom simply because of one's incapability of fulfilling a contractual agreement. It was stressed by the Court that India is part of the ICCPR, and Point c) of Article 51 of the Constitution requires the state to comply with international laws and treaties. In addition, it also referenced the interpretation principle, widely used by national legal systems, according to which, in case of uncertainty, national laws need to be interpreted in line with the country's international obligations. Because of this, the court has ruled not to imprison a debtor incapable of paying.[135]

In another decision the court argued that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, and that the right to shelter includes adequate living place and therefore it is a fundamental basic human and constitutional right.[136] The judges have consequently been of this opinion and used the first paragraph of Article 25 of the Universal Declaration of Human Rights and paragraph 1 of Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[137]

While the right to privacy by itself was not identified under the Constitution, the Supreme Court presented it as an entitlement based on the following text of Article 17 of the International Covenant on Civil and Political Rights "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."[138]

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133 *See* A.P. Vijapur, 'Domestic Application of the International Covenant on Civil and Political Rights – With Special Reference to Rights of Minorities in India', *in* K.P. Saksena (Ed.), *Human Rights and the Constitution. Vision and Reality,* Gyan Publishing House, New Delhi, 2003, p. 222.

134 *Cf.* R Sachar, 'International Human Rights Covenants and Treaties: Their Applicability in Domestic Jurisdiction', *in* K.P. Saksena (Ed.), *Human Rights and the Constitution. Vision and Reality,* Gyan Publishing House, New Delhi, 2003, p. 205.

135 *Jolly George Varghese v. Bank of Cochin*: (1980) 2 Supreme Court Cases 360.

136 *Chameli Singh v. State of UP*: (1996) 2 SCC 549.

137 *Shantistar Builders v. Narayan Khimalal Totane*: (1990) 1 SCC 520.

138 People's Union for Civil Liberties kontra UOL: (1997) 1 SCC 301.

2.3.3 Israel

The uniqueness of the case of Israel concerning the use of foreign law in constitutional interpretation is the very fact that the state has no formal written constitution.[139] This means that the Israeli judges are engaged in an ongoing process of constitutionalization.[140] After the first elections on 25 January 1949, all legislative powers of the Provisional State Council were passed on to the Constituent Assembly, which then enacted the Transition Law, 1949, in which it called itself 'The First Knesset'. The First Knesset debated at length the question of a Constitution, which in 1950 ended with a compromise solution, known as the Harari resolution. This endorsed, in principle, the goal of eventually adopting a Constitution through the periodic adoption of "Basic Laws", as chapters in the future Constitution.

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139 Israel came into being on 14 May, by way of the 1948 Declaration of Independence, a mainly political document, which tried to distinguish between legislative and constitutive powers by creating a Provisional State Council and a Constituent Assembly. There were and are still several arguments against the enactment of a written Constitution (*see* for instance A. Shapira, 'Why Israel Has No Constitution', *St. Louis U. Law Journal,* Vol. 37, 1993, p. 283). The first such argument, the 'in-gathering of the exiles' argument, was propagated by strong political leaders of the day like David Ben-Gurion, who argued that because of expected immigration in the years to come it would be neither socially prudent nor politically legitimate to entrench the underlying normative principles of the Israeli state in well-defined constitutional terms, as these would be difficult to alter in the future. Of course, Ben-Gurion, as the first Prime Minister of Israel, represented the interest of the executive for which it was far easier and more convenient to rule without a constitution limiting the power of the Government. Menachem Begin, then the leader of the minority Herut movement, went even further by stating that Ben-Gurion's opposition to a Constitution was fundamentally attributable to his fear of losing all or some of his power (cites G.J. Jacobsohn, *Apple of Gold. Constitutionalism in Israel and the United States,* Princeton University Press, Princeton, 1993, p. 98.). Even though the process of constitutionalization was later accompanied by the departure from the Westminster model of parliamentary supremacy and the established British legal tradition of judicial restraint, a second factor working against a written Constitution was the inherited English tradition of the newly established state, which runs counter to majoritarian precepts of a democracy. The third obstruction in adopting a Constitution means orthodox and secularist circles taking a decisive position on the unresolved questions of the relationship between religion and state, and the national and cultural or religious nature of the declared Jewishness of the state. In this context some political-legal issues have arisen, such as the question 'who is a Jew?' which is relevant in matters of marriage and divorce. Further problems have arisen under the law of return and the rights to automatic citizenship. These problems are also related to the fundamental characteristic of the Jewish law that there is no distinction between law and equity, between legal and ethical norms (*see* H.H. Cohn, 'The Spirit of Israel Law', *Israel Law Review*, Vol. 9, No. 4, 1974.). The final obstacle to the adoption of a Constitution has been the conflict between Israel and the Arab world. The unresolved national security predicament has made many Israelis hesitant in their attitude towards enacting a Constitution when the physical survival of the nation has not yet been guaranteed and is constantly challenged. This might mean enshrining the Government, and particularly the military authorities, with far-reaching emergency, security-motivated powers in the Constitution.

140 Following World War II, countries have taken varying approaches to the process of constitutionalization. Ran Hirschl, who differentiates between six broad scenarios, classifies Israel's approach, together with that of New Zealand and Canada, as the 'no apparent transition' scenario. Their constitutional reforms neither have been accompanied by nor are the result of any apparent change in political or economic regimes. In these countries, societies are deeply divided along political, economic and ethnic lines. *See* R. Hirschl, *Towards Juristocracy*, Harvard University Press, Cambridge, 2004, pp. 7-10.

To date, 11 Basic Laws have been passed, and although it would be difficult to mould them into a Constitution,[141] they serve as the core of Israeli constitutional law. The first nine Basic Laws deal mostly with the state organization (The Knesset, 1958, The President, 1964, The Government, 1968, The Army, 1976, The Judiciary, 1984),[142] while the last two, both enacted in 1992, cover fundamental rights (Basic Law: Human Dignity and Liberty; and Basic Law: Freedom of Occupation). Although there is no explicit legal provision that laws inconsistent with these Basic Laws are void or even voidable, meaning that there is no operative difference between a Basic Law and a regular law, provisions in some Basic Laws indicate that a simple majority cannot change them. For instance, the first Basic Law: The Knesset, which also contains the national proportional representation system, can only be changed by 61 out of the 120 members of the legislation, and also the two human rights. Basic Laws declare that modification by ordinary laws is allowed only where approved by an absolute majority of Knesset.

There are different views among Israeli judges and academics about the beginning of judicial review of Knesset statutes. Aharon Barak, former President of the High Court of Justice (HCJ), argues that judicial review, and with this a constitutional revolution, started in 1992. After these two Basic Laws, which contain the possibility of limitations of the enumerated rights, the HCJ started to review not only administrative acts, but legislation as well. In November 1995 the HCJ ruled its historic decision in the *United Mizrahi Bank* case (the Israeli *Marbury v. Madison*) drawing on the constitutional entrenchment of the right to property as specified in Basic Law: Human Dignity and Liberty, virtually to invalidate a Knesset law. With this, the HCJ acknowledged the Basic Laws' formal constitutional status as superior to any ordinary legislation. Others date judicial review from a 1969 HCJ decision, *Berman v. Minister of Finance* (and name this ruling as Israel's Marbury), in which the Court using Basic Laws nullified a particular party finance practice. The landmark ruling was followed by an increased use of the review of administrative decisions, policies and practices through the 1970s and 1980s as well as increasing human rights jurisprudence within the judiciary beginning in the 1970s. The litigation of Basic Laws between 1992 and 2002 has increased to 11% of the HCJ decisions. This activism concerning fundamental rights was partly due to the appointment of several new judges educated in Israel rather than continental Europe.[143] The HCJ favoured secular positions and Western liberal values, while some circles that are totally opposed to a Constitution, such as the haredi parties, together with some

141 *See* R. Gavison, 'The Controversy over Israel's Bill of Rights', *Israel Yearbook on Human Rights*, Vol. 15, 1985, p. 119.

142 For a detailed description of the Israeli state organization, *see* A. Zysblat, 'The System of Government', *in* I. Zamir and A. Zysblat (Eds.), *Public Law in Israel,* Clarendon Press, Oxford, 1996, pp. 1-17.

143 *See* P.J. Woods, *Israel's Court Driven Constitutional Revolution*, <www.clas.ufl.edu/users/pjwoods/Woods%20APSA%202005.pdf>.

advocates of a Constitution,[144] support a separate Constitutional Court.[145] The highly activist doctrine of the Isreali HCJ adopted in the 1980s was a consequence of the decline of the political, social and cultural hegemony of the Labor movement and the renewal of religious fundamentalism in the second half of the 1970s. The group of 'the liberal former hegemons' – identified with Western, securlar liberal values – lost much power in Israeli politics and culture and found itself facing an alternative cultural option for the country, premised on the Halakhah and traditional Jewish heritage. The liberal former hegemons shifted much of their political action to the HCJ, which collaborated with them. Justice Aharon Barak, the Court's Chief Justice for twelve years, and the person most closely identified with the Court's activism, represented the view that any court of law should have competence to legally review any legal norm regulated human conducts. Critics consider this as a sort of legal fundamentalism and over-legalization, which has made the HCJ in the eyes of religious groups a partisan institution.[146]

In the *United Mizrahi Bank* case,[147] Chief Justice Aharon Barak,[148] arguing for judicial review of constitutionality by the Israeli Supreme Court, refers to *Marbury v. Madison*

144 Despite the constitutional revolution through Basic Laws and the practice of the HCJ, there is ongoing public debate over whether to adopt a formal Constitution. Most of the former Justices of the Supreme Court are in favour of a new written Constitution. Shimon Agrarat said in an interview that "'The trouble is that we don't have a constitutional bill of rights, that we don't have a constitution." (Jerusalem Post, 6/6/1987.) Also Aharon Barak opposed the original arguments against the written Constitution: "I think that this argument is wrong. It was wrong when it was made. It is wrong now. In our declaration of independence it was provided that a 'Constitution [...] shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948'. Thus, a Constitution should have been adopted then." (B. Tóth & G. Halmai, '"A zsidó értékek elismerése mellett érvényesíthetők a demokratikus értékek is". Beszélgetés Aharon Barakkal, az izraeli legfelső bíróság leköszönt elnökével' ['"Besides Jewish Values, Also Democratic Ones Can Be Acknowledged." Interview with Aharon Barak, Former President of the Isreali Supreme Court'], *Fundamentum,* Vol. 11, No. 3, 2007, p. 27.) During 1985 and 1986, a Constitution-drafting process was undertaken at the Tel Aviv Law School by four law professors, with a draft published in 1988, and one segment was enacted by the Knesset in 1992: the law providing for the popular, direct election of the Prime Minister, which was then repealed in 2001. In 1998 two-thirds of the Israeli public supported the adoption of a formal Constitution; by the turn of the millennium this has exceeded 75%. In May 2003, the Constitution, Law and Justice Committee of the Knesset, initiated the Constitution by Broad Consensus Project, which aims to write a Constitution for the State of Israel. The Committee has been meeting weekly since then with the aim of producing a draft Constitution. A draft prepared by the Committee was presented to the Knesset on 13 February 2006. The proposed Constitution is supposed to be ultimately brought to the Knesset and the people for consideration and ratification.

145 *See* R. Gavison, 'A Constitution for Israel – Lessons from the American Experiment', *Azure*, 2002, p. 5762. But Aharon Barak strongly rejects the establishment of a separate Constitution Court: "I am very much against having a separate constitutional court for Israel. We have a constitutional court in Israel. This is the Supreme Court. Like USA and Canada, we don't need this new institution. A constitutional court served a very important role in Europe and South Africa. It was a necessity for Transitory Justice. It is not necessary for Israel. It will politicize the judicial process. It will have a negative effect on human rights in Israel." *See* the interview with *Fundamentum*, *id.*, p. 28.

146 *See* M. Mautner, *Law and Culture of Israel*, Oxford University Press, Oxford, 2011. p. 3.

147 *United Mizrahi Bank Ltd. v. Migdal Village*, Supreme Court (Israel), C.A. 6821/93, 49(4)P.D.221 (1995).

148 About Aharon Barak's commitment to the use of comparative law *see* Chapter 10 of his book, A. Barak, *The Judge in a Democracy,* Princeton University Press, Princeton, 2006.

of the U.S. Supreme Court, besides Hamilton (The Federalist No. 78), H.A. Hart (The Concept of Law), John Rawls (Political Liberalism) and John Hart Ely (Democracy and Distrust: A Theory of Judicial Review). Legitimizing the test of the constitutionality of constitutional amendments, he mentions the opinion of the Supreme Court of India in the case of *Kesavananda v. State of Kerala*[149] and quotes the following words of the Federal Constitution Court of Germany: "Laws are not constitutional merely because they have been passed, in conformity with procedural provisions [...] They must be substantively compatible with the highest values, and must also conform to unwritten fundamental constitutional principles as well as the fundamental decisions of the Basic Law."[150]

Freedom of expression is probably the area of constitutional law where the doctrinal development in the United States had the most influence in Israel.[151] The first important decision was the *Kol-Ha'am Co. Ltd. v. Minister of Interior case*.[152] In 1953, the daily newspaper *Ha'aretz* reported that the Israeli Ambassador to the United States stated that in the eventuality of a war between the United States and the Soviet Union, Israel would supply the United States with a military force of 200,000 troops. The newspaper of Israel's Communist Party, *Kol-Ha'am* (The Peoples Voice), published an editorial denouncing the "anti-nationalist policy of the Ben-Gurion government which profiteers in the blood of Israeli youth". Four days later, the Minister of Interior suspended publication of the papers for periods of ten and fifteen days. A unanimous panel of three justices[153] overruled the order. Justice Agnarat, writing for the Court, declared freedom of expression and freedom of the press to be basic principles of Israel's unwritten constitutional law by virtue of Israel's commitment to democracy, concluding that given the components of the probable dander test, the suspension order could not stand. According to commentators of the decision, the 'probability' test breaks "from the notion of 'acceptable speech' and focuses on concrete harms to society", which is very similar to the American test of 'clear and present danger'.[154]

Another landmark case was the *Ha'aretz v. Electronic Company,* in which during a recession, one of Israel's largest governmental enterprises purchased a luxury car for its director general. *Ha'aretz* published an article asserting that the Company, against its former

149 A.I.R. 1973 S.C. 146.

150 BVerfGE 6, 32.

151 This is the very reason that Gary Jeffrey Jacobsohn, in his book on the comparison of constitutionalism in Israel and the United States, discusses the Israeli Supreme Court's embrace of American free speech doctrine. *See* Jacobsohn, 1993, pp. 177-227.

152 7 P.D. 871 (1953).

153 Israel's highest court typically sits not on bench, but in a panel of three. In this case, Justice Agranat was joined by Justices Sussman and Landau.

154 P. Lahav, 'American Influence on Israel's Jurisprudence of Free Speech', *Hastings Constitutional Law Quarterly*, Vol. 9, 1981 p. 27. *See* a similar assessment of this test by M. Cohen-Eliya & G. Stopler, 'Probability Threshold as Deontological Constraints in Global Constitutionalism', *Columbia Journal of Transnational Law*, Vol. 49, 2010, pp. 75-114. This latter article suggests combining the means-ends analysis and balancing models with the probability threshold of the clear and present danger test in constitutional rights adjudication.

promise, had no interest in selling the car. The Company brought a libel suit. First the Supreme Court's ordinary panel of three justices overruled the district court decision against *Ha'aretz* by a two-to-one vote (*Ha'aretz I*).[155] Justice Shamgar, one of the majorities, used the arguments of the U.S. Supreme Court in *New York Times v. Sullivan* favouring the free criticism of public officials.[156] Four years later the Israeli Supreme Court reversed its decision and reinstated the libel verdict (*Ha'aretz II*),[157] rejecting the Sullivan test, and protecting the reputation of the public official.

The third major case is *Kahane v. Broadcasting Authority,*[158] in which Justice Barak used the 'near certainty of a real injury' test, when deciding the constitutionality to ban the broadcast of the radical Rabbi Kahane's hatred speech towards Israeli Arabs, which was again similar to the American 'clear and present danger' test, used in the case of the prohibition of the march of the Nazis in the streets of Skokie, Illinois.[159] Barak argued that the Broadcasting Authority could not prevent Kahane's broadcasts on the ground that this constitutes an improper exercise of prior restraint. Barak maintained, however, that not only is this blanket exclusion of Kahane (not including news coverage of his activities) unconstitutional, but also that the Broadcasting Authority could not impose a policy of excluding the broadcast of racist views and sentiments on the basis of its content alone. Justice Gabriel Bach, who argued that the type of racist speech that Kahane was known for should be categorized as unprotected, criticized this position.[160] Justice Barak cited 18 American cases (and 14 scholarly work), some of which provoked Justice Bach to say that "one should not apply these decisions to the case at bar, which deals with the right of public authorities to prevent broadcast of specific programs banned by an explicit law".[161] This debate was not about the use of foreign law, but definitely about its limits. As we can see, American free speech jurisprudence, sometimes embraced, sometimes rejected, has been an important source in forming the praxis of the Supreme Court. As in the case of Germany, where the historical circumstances very much influenced the use of the U.S. Supreme Court's free speech jurisprudence, the same happened in Israel also, where the communal integrity was a decisive factor in the implementation of American doctrine.

2.3.4 Hungary

During its transition to democracy Hungary has chosen its own unique method of Constitution-making, retaining – if in name rather than form – the Constitution from

155 31 (2) P.D. 281 (1974).
156 376 US 254 (1964).
157 32 (3) P.D. 337 (1978).
158 41 (3) P.D. 255 (1986).
159 United States District Court decision in *Collin v. Smith*, 447 F. Supp. 676 (1978).
160 Kahane, 41 (3) P.D., p. 312.
161 Id., p. 316.

the beginning of the country's communist period, but radically changing its content in a process of comprehensive amendment in 1989. Similarly to the High Court of Justice in Israel, the Constitutional Court in Hungary too developed an activist practice of judicial review of parliamentary legislation. Recent years in Hungary have seen discussion – just as in Israel – over whether to adopt a totally new Constitution. Hungary – together with the other post-communist and post-Soviet countries – belongs to the "dual transition" scenario.[162] Here transition is part of a move to both a Western model of democracy and a market economy. In 1989-1990, when the communist system changed in Eastern and Central Europe in almost all of the countries of the former Soviet Union, new Constitutions were enacted, and separate constitutional courts were established. The first nine-year cycle of the Hungarian Constitutional Court's proceedings came to an end in 1999. These nine years will enter into not only Hungarian political and public law history as the era of the Sólyom Court, but – and what is at least as important to a genuine constitutional judge/court – into legal textbooks as well. Judge László Sólyom was the president of the court during this time, and the Court's jurisprudence and style very much reflected his leadership. Especially in this period the use of foreign law in the interpretation of the Constitution was a deliberate strategy by the Hungarian Constitutional Court, which merely designates the law of a foreign legal system without being bound by it in the same way as when a foreign law is incorporated, or international law ratified.

As Catherine Dupré's book[163] on the import of the concept of human dignity shows, the judges first carefully chose the German as a suitable model and then instrumentalized it through a very activist interpretation of the Hungarian Constitution.[164] On that basis, the Court developed its own, autonomous concept of human dignity.

The first sign of this active instrumentalization was the Decision 8/1990. This decision judged unconstitutional the pre-transition regulation of the Labour Code, which empowers labour unions to represent workers – even if they are not union members and perhaps even against their expressed will – without their separate power of attorney. The basis for nullifying this regulation was the principle of human dignity in the Constitution, which the Constitutional Justices (on the recommendation of Sólyom as the presenting Justice in the case) declared to be an expression of "the general rights of individuals". This right,

162 *See* the classification of Hirschl, 2004, pp. 7-10.

163 Dupré, 2003.

164 A German scholar observes that the influence of the German Federal Constitutional Court was decisive on the jurisprudence of political and civil rights. *See* A. Zimmermann, 'Bürgerliche und politische Rechte in der Verfassungsrechtsprechung mittel- und osteuropäischer Staaten unter besonderer Berücksichtigung der Einflüsse der deutschen Verfassungsgerichtsbarkeit', *in* J.A. Frowein & T. Marauhn (Eds.), *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa,* Springer, Berlin, 1998, pp. 89-124. The then President of the Hungarian Constitutional Court and his advisor acknowledge this use of German law in the constitutional interpretation in the same volume. *See* L. Sólyom, 'Anmerkungen zur Rezeption auf dem Gebiet der wirtschaftlichen und sozialen rechte aus ungarischer Sicht', *in* J.A. Frowein & T. Marauhn (Eds.), 1998, pp. 213-227; G. Halmai, 'Bürgerliche und politische Rechte in der Verfassungsrechtsprechung Ungarns', *in* J.A. Frowein & T. Marauhn (Eds.), 1998, pp. 125-129.

which does not appear in the Constitution, is according to Sólyom's view, "carved out" from the right to human dignity, a "birthright"; namely, it is a subsidiary of such a fundamental right that the Constitutional Court as well as all the courts in every instance can cite it in defence of individual autonomy if none of the specifically named fundamental laws apply to the case in question. Next, the Justices determined in Decision 57/1991 that "the right to self-identity and self-determination is part of the 'general rights of individuals'". Further, this right includes everyone's most personal right to discover his or her parentage. The following year, Decision 22/1992 declared unconstitutional the requirement that enlisted officers request permission from their superiors to marry, on the basis that the right to marry, as part of the right to self-determination, is such a fundamental right that it stands under Constitutional guardianship.

As Dupré also indicates,[165] the Hungarian Constitutional Court elaborated another conception of human dignity, reading it in connection with the right to life as an absolute, not allowing any limitations on it. The very first and most prominent example of this concept is the Court's decision on the death penalty (23/1990). Dupré criticizes the Hungarian judges for focusing on the individual's dignity, while failing to mention the society's need for retribution and protection against deeds.[166] This critique is only partly justified. Since the justices were unable to reach an agreement on the mentioned matters, among them on the very aim of criminal punishment, including the death penalty, the majority judgment relies exclusively on the absolute interpretation of the right to human dignity with the right to life. But concurring justices offer alternative conceptions as well. Justice Szabó, for instance, emphasizes the repressive aim of criminal punishments, while Justice Zlinszky, in his concurring opinion, the preventive one, adding that according to the current scientific results, the preventive effect of the death penalty cannot be proved; therefore it is unconstitutional.

The next major examples of the Hungarian Constitutional Court's liberal understanding of human dignity are the decisions on abortion (48/1991 and 64/1998) AB), which centre on the individual and human autonomy, and are divested of human dignity's implication and impact on the community and the society. Dupré argues that although the concept of human dignity as applied by the Hungarian Court resonates German jurisprudence, the internal logic of the approaches followed by the two courts is radically different.[167] Dupré's main argument is that in stark contrast to the German position, the Hungarian Constitutional Court did not consider that the rights to life and human dignity under Article 54 of the Constitution meant that the foetus had a right to be born. But the author seems to forget that even without the legal capacity of the foetus – which the new statute also failed to consider – similar to the first decision of the German Court, the Hungarian judges

165 *See* Dupré, 2003, pp. 70 *et seq.*
166 *Id.*, p. 124.
167 *Id.*, pp. 114-117.

derived from Article 54 the obligation of the state to protect all human life, including that of the foetus's, which limits the right of the mother for self-determination.

Describing the genesis of a new legal system in Hungary, Dupré states that relying on law importation to develop its case law in the transitional period, the Hungarian Constitutional Court discovered new rights in the wake of human dignity and the general personality rights. The main characteristic of this imported law is that it is between natural law and globalization, or, more precisely, "not global but German", as the author highlights the particular nature of Hungarian law importation. The discourse on law importation can be likened to a modern form of natural law.

As a conclusion, Dupré tries to answer the question: does law importation work? Her short answer is yes, because it has enabled the Hungarian Court to: (a) lay down the foundations of the constitutional order on liberal principles, (b) add a number of important constitutional rights to the existing Constitution to protect individual autonomy and (c) filter out from the legal order some of the most significant characteristics of communist law. In less than ten years, the Hungarian Constitutional Court has achieved a standard protection of rights similar to that existing in the older democracies.

Catherine Dupré's long answer, however, is caution and vulnerability. As regards the general social situation, she observes waning enthusiasm for the West and widespread disillusionment with the transition, which also led to the election of successors of the communist party in Hungary. This proves that law importation's success depends on a number of factors over which the elite importers have little control, such as economic prosperity, the renewal of élites and widespread retraining of the legal community. In Germany, the general courts are quite sensitive to constitutional issues; this is still not the case in Hungary and other East-Central European countries. This means that the importation of a particular right into constitutional case law can only be the first step, and the second one would be to bring the ordinary judiciary in line with the Constitutional Courts.

The other main area of the use of foreign law for both Germany and Israel is freedom of expression, especially hate speech. As we have already seen, the used American free speech doctrine was clearly more liberal than its German and Israeli counterparts. However, as Michel Rosenfeld and András Sajó observe, "paradoxically, it may be that anti-liberalism towards authoritarianism may be a better weapon in the fight of liberalism against illiberalism in formerly authoritarian polities such as Germany and Hungary".[168] But assessing the free speech jurisprudence of the latter, they conclude that the Hungarian Constitutional Court in many respects adopted an absolutist theory of speech going beyond the U.S. Supreme Court's position.[169] The free speech practice of the Court can be rather

168 M. Rosenfeld & A. Sajó, 'Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech Rights in New Democracies', *in* S. Choudhry (Ed.), *Migration of Constitutional Ideas*, Cambridge University Press, Cambridge, 2006, p. 149.

169 *Id.*, p. 159.

characterized by the divide in the standards applied in American jurisprudence, which rejects all limitations, and those of a (Western) Europe inclined towards more resolute limitation based on the "concept of militant democracy". The Hungarian Constitutional Court first encountered the problem in examining the constitutionality of the provision in the nation's Criminal Code concerning public incitement. In Decision 30/1992, the Constitutional Court found the facts of the crime of incitement of hatred to be constitutional and annulled the form of defamation. Its reasoning was based on the notion that the freedom of expression has a distinguished role among other fundamental rights guaranteed by the Constitution; that in fact it is a sort of a "mother right" of the so-called rights to "communication".

According to the Court justices, the right to free expression of opinion protects opinion without regard to its content in terms of value and truth, for this condition alone lives up to the ideological neutrality of the Constitution. In confirming the constitutionality of the facts of the crime of incitement, the justices apparently reasoned on grounds similar to U.S. Supreme Court Chief Justice Oliver Wendell Holmes's famous test of "clear and present danger". At the same time, it must be said that the "danger" attached by the Hungarian Constitutional Court justices as a condition of constitutionality is more distant and contingent than the sort their erstwhile American peers had in mind. Presumably, this is why the Constitutional Court elaborated on its decision by explaining that the "unavoidable social tensions of system-change" (*i.e.* the post-1989 political-economic transition) notably increase the danger of incitement, before large public audiences, to hatred against certain groups. In contrast to U.S. jurisprudence, the Hungarian Constitutional Court did not address the problem of the "scope" of the facts, that is, whether the incitement provision can be applied even in the absence of a real possibility that hatred will develop. In other words, the Hungarian justices did not set a constitutional standard that requires incitement to hatred to actually *cause* "clear and present danger". This approach, along with the citing of the historical circumstances of the change of system, recalls not so much the American concept of justice in this respect, but that of Germany's Federal Constitutional Court, which likewise cites historical reasons in reacting to militant threats to democracy by limiting the freedom of expression – namely, Germany's interest in avoiding a repeat of the scenario that followed the collapse of the Weimar Republic. The main reasons for declaring defamation unconstitutional was, however, that in this case the Hungarian Parliament had in fact made its qualification on the basis of the value content of the opinion expressed, in other words, with the violation of public peace attached to this only on the basis of presumption and statistical probability. Moreover, the Constitutional Court pointed out, not even the public peace is independent of the degree of the freedom of expression that prevails in society. Indeed, in countries where people can encounter numerous different opinions, public opinion becomes more tolerant, whereas in closed societies particular instances in which people express opinions out of the norm have far more

potential to disturb the public peace. Further, the needless and disproportionate limitation of the freedom of expression has a detrimental effect on an open society. Indeed, in such a society those who use abusive language only mark themselves as "slanderers" in the arena of public opinion. Criticism is the appropriate response to slander, not criminal prosecution, argued the Constitutional Court justices. At the same time they added that the need to protect the "dignity of communities" might constitute a valid constitutional limitation on the freedom of expression. Thus the Court decision does not rule out the possibility that Hungary's lawmakers might establish such protection under criminal law even beyond the scope of incitement to hatred. In the assessment of the justices, however, the expansion of other legal instruments, *e.g.* non-pecuniary compensation, is also suitable for the effective protection of the "dignity of communities". In other words, in deciding on the constitutionality of this particular element of fact in the statutory provision on incitement, the justices looked to an American standard still being applied in the present day.

At the same time, the uncertainty caused by the application of varying standards is reflected in László Sólyom's later remark, in which he rejected the idea of adopting certain consequences of U.S. Supreme Court jurisprudence. "[I]f here in Hungary we follow the simple logic that would see us adopt the decision on flag-burning brought in *New York Times v. Sullivan*, why then, in the name of unlimited freedom of expression must we consequently also adopt the test applied in the *Skokie* case and allow neo-Nazis to hold a threatening procession in a Jewish district?"[170] However, if the justices had consistently upheld the principle of guaranteeing special protection to the freedom of expression without regard to truth or value content in determining the crime of defamation to be unconstitutional, then this principle should have been applied with respect to the constitutionality of the crime of incitement as well.

One of the key conditions of the new, open society occasioned by Hungary's change of system was the dismantling of the earlier inviolability of state authority and public officials and representatives – that is to say, the ban on criticizing them. With Decision 36/1994 the Constitutional Court annulled, with immediate effect, the provision of the Criminal Code referring to "the defamation of state authority or a person in public office". This was the statutory provision based on which courts had condemned politicians and social scientists who had criticized heads of government ministries. As for the patterns that served as the basis for this decision, one is by all means the famous 1964 U.S. Supreme Court decision in the case of *New York Times v. Sullivan*. The other pattern followed by Hungary's Constitutional Court justices was the consistent jurisprudence of the ECtHR, whose most

170 *See* the interview with László Sólyom: A.G. Tóth, "'A 'nehéz eseteknél' a bíró erkölcsi felfogása jut szerephez". Beszélgetés Sólyom Lászlóval, az Alkotmánybíróság elnökével' ["'In the 'Difficult Cases' the Judge's Moral Views Come into Play". A Conversation with László Sólyom, the President of the Constitutional Court'] *Fundamentum,* Vol. 1, No. 1, 1997, p. 42.

important decisions are indeed cited in the reasoning of the Hungarian decision, as the most well-known among these *Lingens v. Austria* (1986). The Hungarian Constitutional Court's 1994 decision thus follows not only the jurisprudence of the U.S. Supreme Court, not even mentioning any of their decisions, but especially also that of Strasbourg, besides the *Lingens*-case explicitly referring to four other cases (*Sunday Times v. UK, Castells v. Spain, Oberschlick v. Austria* and *Thoirgeirson v. Island*) in setting a lower threshold of allowable criticism in the case of politicians than private individuals, arguing that the reputation of such public figures must be balanced with society's interest in ensuring the free and open debate of public affairs.

The only time the Constitutional Court stated that "the Hungarian jurisprudence is influenced by and committed to the legal opinion of the European Court of Human Rights" was in its decision 18/2004. (V. 25.). This statement has had only a limited effect on the practice of the Court as judges continue to reference the practice of the Convention without it being claimed as obligatory in regard to their constitutional interpretations.[171]

Frequent reference to the legal practice of the Strasbourg Court and the European Convention of Human Rights is a general practice of the judges, especially in cases related to fundamental rights. While the constitutional argumentation of the 40 most frequently quoted decisions of the Constitution Court between 1990 and 2010 were examined by András Jakab, referencing international human rights treaties and/or their cases found in 17 decisions, most were references to the European Convention and the ICCPR and to the UN Convention on the Rights of the Child. It is not unusual to have general references to "international treaties" rather than concrete articles, as is the case with the decision 38/1993. (VI. 11.) on judicial independence and the decision 64/1991. (XII. 17.) on abortion of the Constitutional Court. There was even a case where the Court referenced an international treaty that was not obligatory for Hungary at the time of the reference. Such was the case of the decision 23/1990. (X. 31.) about the abolishment of the death penalty where the European Convention on Human Rights was referenced.[172]

According to Jakab's research, in the twenty-year period examined, less than half of the 40 examined cases referenced international law.[173] In most cases the purpose of

171 This lack of binding force of the Convention is criticized by Pál Sonnevend Pál with the hope that paragraph (2) of Art. Q of the Fundamental Law will make the constitutional rule of the binding nature of international treaties more unequivocal against the domestic norms regulating otherwise, and this will encourage domestic courts to initiate concrete norm control before the Constitutional Court against domestic norms violating the Convention. *See* P. Sonnevend, 'The Position of the European Convention on Human Rights in the Hungarian Legal Order'*, in* E. Hassani, P. Paczolay & M. Riegner (Eds.), *Constitutional Justice in Southeast Europe*, Nomos, Baden-Baden, 2012, pp. 163 *et seq*.

172 *See* A. Jakab, 'Constitutional Reasoning in the Hungarian Constitutional Court. Mapping Constitutional Reasoning Across the World', *Comparative project of the Max Planck Institute for Comparative Public Law and International Law,* Heidelberg, <www.conreasonproject.com/uploads/1/7/1/1/17115308/cr_hungary.pdf>.

173 *Id.*

the reference is to justify a decision based on similar decisions in other countries, or to juxtapose a decision with one in another country. For example, in the decision 60/1994. (XII. 24.) 23/1990. (X. 31.) regarding lustration, the Court presented the German argumentation as an illustration of a different view. References were found to be quotations, as in the death penalty case decision, where the 'different' viewpoints of related decisions of the Supreme Court of the United States were quoted. At the same time, one can note that the use of quotes does not seem to be systematic, based on geographical, legal or other systems, but seems rather incidental to which country's case law appears in a Court reasoning.

In other cases, without any quotes, there may be general references used, such as "in most European legal systems" (21/1996. (V. 17.)), "in modern constitutions and court decision" (64/1991. (XII. 17.)), "the Constitutional Court has made comparative work among constitutions of Constitutional democracies" (11/1992. (III. 5.), "as usual practice of the constitutional courts around the world" (4/1997. (I. 22.) "constitutions of democratic countries" (38/1993. (VI. 11.)), "trend of democratic countries in Europe" (36/1994. (VI. 24.)). As observed by Jakab, references to "modern constitutions" and "usual practice of Western democracies" tend to be a hint to the understanding of the German legal system, which, as discussed earlier, was most likely influenced by the German federal legal system because of the legal socialization of the Hungarian judges.

In other research, a more substantial analysis was conducted by Zoltán Szente, who examined the use of international and foreign law in 721 decisions of the Hungarian Constitutional Court between 1999 and 2008.[174] There were 73 decisions, *i.e.* 10% of all decisions used international and/or foreign case law reference. Ninety percent were in the area of fundamental rights (66 cases), the rest were in the area of governance, while the proportion of cases covering the former is much lower (77.8%) in the entire docket as compared with the latter. References were mostly used in cases covering fair trial, freedom of expression and self-determination as well as the area of privacy (13 cases in each of the 3 thematic areas). Less reference was used in cases related to personal freedom (7), right to equality (6), property rights (5), minority rights (2), right to assembly (2), voting rights (2), right to healthy environment (1) and right to citizenship (1).

The Constitutional Court judges made most extensive use of the ECtHR's legal practice in a given period of time: 236 decisions of the ECtHR were referenced in 65 different decisions. (At the same time, only 15 of the decisions of the European Court of Justice are listed among the references.) The second most frequently quoted source was the Federal Constitutional Court of Germany with 12 of its decisions referenced in 11 cases by the Hungarian Constitutional Court. The third example is the United States with 16 decisions of federal courts and the Supreme Court of the United States referenced in four Hungarian decisions in the

174 *See* Szente, 2013.

areas of freedom of expression and the right to self-determination (specifically, regarding the issue of euthanasia). Besides these cases, only one reference was made to the work of the French Constitutional Council, and only one reference was made to cases of the Constitutional Courts of Austria, Belgium, Czech Republic, Cyprus, Italy, Slovenia and Poland. Dupré's observation is valid for the 1990s when the Sólyom-Court widely and systematically adopted foreign, mostly, German, models in its work, with the aspiration of developing its own legal standards while systematically making use of different doctrines, arguments and tests. The second decade, examined by Szente, revealed an incoherent, illustrative use, often driven by the intent of justification.

The lack of systematic use of international law in constitutional interpretations is also presented by László Blutman,[175] who, based on the use of international laws and the arguments employing them, distinguishes two extremes. One extreme occurs (*e.g.*, decision 41/2003. (VII. 2.)) when international laws, listed among the legal norms taken into account, appear neither in the arguments of the decision nor in the content of the argument, and therefore it is quite likely that they have not had any influence on the interpretation. The other extreme is when certain requirements of international norms appear in the declaratory part of the decision as constitutional requirements. Such is the case of the Decision 58/1995. (IX. 15.) that presents the requirements of paragraph (1) Article 14 of the International Covenant on Civil and Political Rights and of paragraph (1) Article (6) of the European Convention on Human Rights as constitutional requirements. According to Blutman, the international law in such cases was not used for the purpose of constitutional interpretations, but, essentially, for constitutional adjustments. Meanwhile, real constitutional interpretation took place in certain decisions where the Court gave protection to rights that are present and protected in international norms but were not explicit in the Hungarian Constitution (*e.g.*, 22/1992. (IV. 10.)). In these cases, as pointed out by Blutman, the arguments based on international norms resulted in notable, constructive reasoning in defining constitutional norms.[176] At the same time, Blutman believes that the use of norms that are not directly related to the interpretation of legal responsibilities (*e.g.* the recommendations of the Committee of Ministers of the Council of Europe) as defining, constitutive arguments is problematical.[177]

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175 *See* L. Blutman, 'A nemzetközi jog használata az Alkotmány értelmezésénél' ['The Use of International Law in the Interpretation of the Constitution'], *Jogtudományi Közlöny,* Vol. 7-8, 2009, pp. 301-315.

176 *Id.* p. 309. Rights that are not explicitly stated in the Constitution but are "melted out" of rights that are, especially those from the right to human dignity, are considered by Béla Pokol as the 'activist credo' of the first Constitutional Court led by László Sólyom. Pokol argues that here even the constitutionally binding minimum on which to base the Constitutional Court's decisions disappeared to be replaced by the merest sense of justice. *See* B. Pokol, 'Az alkotmánybíráskodás' ['Constitutional Review'], *in* B. Pokol, *A magyar parlamentarizmus* [*The Hungarian Parliamentarism*], Cserépfalvi, Budapest, 1994, Chapter V.

177 Decision 46/2007. (VI. 27.) is mentioned as an example, as the content of 61. § (2) of the Constitution regarding the conditions and guarantees to obtain the rights to broadcasting were clearly and exclusively defined by the Constitutional Court according to the recommendations on independence and functions of regulatory authorities for the broadcasting sector of the Council of Europe Committee of Ministers (CM/Rec(2000)).

Meanwhile, in the decision 33/2012. (VII. 17.) regarding the retirement age of judges, the Court, supporting principle, selectively used only point 49-50 of the recommendations of the Committee of Ministers to Member States (CM/Rec (2010) 12 on judges: independence, efficiency and responsibilities) arguing that tenure and irremovability to be key elements in the independence of judges. The information that in all EU member states the retirement age of judges is higher than 62 years (except for Slovakia, where it is the same as in the new Hungarian regulation, *i.e.* 62), was also presented as a supportive argument in the majority reasoning of the constitutional court decision that declared the lowering of the retirement age of judges (effecting 274 judges in a year without allowing preparatory time) to be retroactively unconstitutional.

One of the points in the constitutional complaint filed by the former judges arguing that, based on Protocol 1. of the European Convention on Human Rights and the decisions of the European Court on Human Rights, their right to property was harmed according to the section on fulfilment of international obligations of the state of paragraph (2) of Article Q of Fundamental Law has, apparently, not been answered by the Constitutional Court. The reason for the avoidance of this point is likely to be related to the earlier practice of the Court that did not recognize any relation between the right to property and the rights to social security and treatment.[178] This also suggests (based on a short-time practice since its entry into force) that the somewhat reworded section of the Fundamental Law about the relation of the national and international laws has not made the Constitutional Court change its disproving view regarding the obligatory nature of the Convention.[179] Some judges have even more radical views about the binding nature of international treaties signed by Hungary. Béla Pokol, the old-time opponent academic of any judicial activism after becoming judge of the Constitutional Court frequently argues against the subordination of Hungary as an independent state to the "global fiscal and economic power mechanisms", which he calls "global constitutional oligarchy", the biggest threat to the Constitution-making activity of sovereign states.[180]

2.3.5 South Africa

The country's transition from apartheid to a constitutional democracy was very much influenced by constitutional borrowings. Both the interim Constitution under which the country was governed until the general election was held, and the final one, negotiated by

178 *Cf.* Decision 26/1993. (IV. 29.).

179 For the time being it has not confirmed the related expectations of Pál Sonnevend. *See* Sonnevend, 2012, pp. 163 *et seq*.

180 In his dissent to Decison 34/2013. (XI. 22.) AB he refers to P. Allott, 'The Emerging International Aristocracy', *International Law and Politics,* 35, 2003, pp. 309-338. And C. Elmendorf, 'Advisory Counterparts to Constitutional Courts', *Duke Law Journal,* Vol. 4, 2007, pp. 953-1028.

the democratically elected representatives, drew heavily upon comparative constitutional law, particularly the law of the United States of America, Canada, Germany and the European Convention on Human Rights.[181] One of the obvious reasons for this was the simple fact that South African lawyers had had no real experience of constitutional law and bill of rights prior to the Interim Constitution.[182] The Constitutional Court established by the Interim Constitution was required to certify that the text of the final Constitution complied with the 34 principles of the Convention for the Democratic South Africa agreed by the negotiating partners. This new text for the first time in constitutional history enabled the Court to import international and foreign law: Section 39 of the 1996 Constitution (indexed as Interpretation of the Bill of Rights) states that

> (1) When interpreting the Bill of Rights, (a) a court, tribunal or forum *must* promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) *must* consider international law; and (c) *may* consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum *must* promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.[183]

From the very first decisions delivered shortly after its establishment in 1995, the Constitutional Court made extensive use of international and foreign law.[184] In *Zuma and others v. State,*[185] the Court declared the provision of the criminal procedure code in force during apartheid, according to which a confession or guilt could be gathered even by police force members without its having to be repeated during the trial. The Court lists how the same issue was dealt

181 *See* D.M. Davis, 'Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstruction of Comparative Influence: The South African Experience', *International Journal of Constitutional Law*, Vol. 1, 2003, p. 186.

182 When drafting the Interim Bill of Rights it was difficult to find any five South African experts for the Technical Committee who actually had the knowledge and expertise to draft a Bill of Rights. *See* R. Spitz & M. Chaskalson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement,* Witwatersrand University Press, Johannesburg, 2000, p. 255.

183 Emphasis added. Section 35 of the Interim Constitution of 1993 contained a similar provision, but with a phrase removed from the final text regarding the use of international and foreign law as an obligation only 'where applicable'. The only other national Constitution providing a similar clause is the 1994 Constitution of Malawi, enacted after the South African interim Constitution. Section 11.2 establishes: "In interpreting the provisions of this Constitution, a court of law shall […] where applicable, have regard for current norms of public international law and comparable foreign case law".

184 A scrutiny of Supreme Court and Constitutional Court judgments between July 1994 and August 1998 found no fewer than 1,258 references to the decisions of American, Canadian, British, German, European and Indian courts alone. *See* J. Fedtke, *Die Rezeption von Verfassungsrecht. Südafrica 1993-96*, Nomos Verlagsgesellschaft, Baden-Baden, 2000, p. 446.

185 CCT 5/94.

with by the United States and the Canadian Supreme Courts, analyzing three American cases (*Tot v. United States* of 1969, *Country Court of Ulster Country, New York et al. v. Allen et al.*), and two Canadian cases (*Regina v. Big M. Drug Mart Lt.* of 1985, and *Regina v. Oakes* of 1986). In its landmark decision in *Makwanyane v. State*[186] the Court investigated the constitutionality of the provision of the Criminal procedure act on the capital punishment in relation to Section 8 (equality before law), 9 (right to life), 10 (protection of human dignity) and 11 (unlawfulness of cruel, inhuman or degrading treatment and punishment) of the Interim Constitution. The Court engaged in a critical assessment of various countries' constitutional jurisprudence on the death penalty. First the Court examined the U.S. Supreme Court's rulings that have confirmed the constitutionality of the death penalty, not being cruel and unusual punishment. The next subject for comparison was the 1949 Constitution of India and the jurisprudence of the Indian Supreme Court, which was also not considered to be compatible or useful for resolving the problem of the death penalty's unconstitutionality under the South African constitutional system. On the contrary, the *Canadian Supreme Court in Kindler v. Canada* of 1992 defines the death penalty as cruel and inhuman treatment that damages human dignity, and also Decision 23/1990 of the Hungarian Constitutional declaring the capital punishment as violation of both right to life and human dignity was referred to. Actually the only case quoted with unqualified approval, as the equivalent and possible source of the Court's decision was the decision of the Hungarian Constitutional Court, while the other materials were used by the Court primarily as a means to distinguish the South African case.[187]

In this case also the Court has urged caution in respect of the use of comparative Bill of Rights jurisprudence and foreign case law. The judges noted that these sources "will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law, but will not necessarily offer a safe guide to the interpretation of the Bill of Rights".[188] But despite this quest for using an indigenous concept of rights, the *Makwanyane* case was the first, and last case, in which the Court also applied 'ubuntu' as a "world-view of African societies and a determining factor in the formation of perceptions which influences social conduct; a philosophy of life, which represents personhood, humanity, humaneness and morality, group solidarity, the potential of being human".[189] The "need for ubuntu and not victimization" as values of collective unity and group solidarity, which can translate into the spirit of national unity demanded of the new South African society, was mentioned in the preamble of the Interim Constitution of 1993, but was not included in the final Constitution of 1996. The reason why it has not been used in further judgments of the Constitutional Court could

186 CCT 3/94.

187 *Cf.* Klug, 2006, pp. 289-290.

188 CCT 3/94, para. 37.

189 *See* this description of the term 'ubuntu' in J.Y. Mokrogo, 'Ubuntu and the Law in South Africa', *Seminar report of the First Colloquium Constitution and Law,* Konrad-Adenauer-Stiftung, Johannesburg, 1998.

be that the values of ubuntu are no different from those found in any other civilized society or legal system. As Irma J. Kroeze argues, it tries to do too much, the terms in the above definition are by and large empty, without self-evident meaning. The result is that the concept becomes endlessly manipulable and alternative to liberalism: if liberalism is individualistic, ubuntu must be communitarian, meaning group rights.[190]

In the *De Klerk v. Du Plessis* case,[191] the question was whether the constitutional guarantee of freedom of expression could serve as a defence to a defamation action, but the case also raised questions about the retroactivity of constitutional guarantees as well as about the horizontal effect of constitutional rights to private actions. All of the opinions in the decision devote considerable attention to analysing how other jurisdictions have approached the question of the relationship between private law and constitutional rights, as well as the question of retrospectivity. For instance, Justice Kentridge discusses in detail the U.S. Supreme Court's ruling in *Shelley v. Kraemer*, as well as Canadian, Irish and German case law, while Justice Ackermann analyses 'Drittwirkung', the German approach to horizontality. With the substantial influence of this German legal thinking, the Court finally opted for an indirect application of fundamental rights in the private sphere.

But the use of comparative law was not uncontroversial in *Klerk v. Du Plessis*. In his dissent, Justice Kriegler emphasized the unique character of the South African constitutional arrangements, warned against too much reliance on foreign law, sometimes without the understanding of the legal system of the cited jurisdiction. He later repeated these concerns in the *Bernstein and Others v. Bester NO and Others* case,[192] as well as in *State v. Mamabolo*.[193] In some cases also, other Justices joined his concerns,[194] and there were also decisions in which the majority rejected the recourse to foreign law. One of them is *Ferreira v. Levine NO and Others,*[195] which dealt with the statutory duty of company employees to disclose confidential business information under specific circumstances. Justice Ackermann, after referring to the writings of Sir Isaiah Berlin and the opinion of Dickson CJC in the Canadian case *R. v. Big M Drug Mart*, proposed to expand the protective scope of the Interim Constitution's provision on human dignity to include a general right to freedom. Finally, the majority of the judges rejected Ackermann's approach, though not simply because it was strongly influenced by foreign law, but rather, because it would have

190 *See* I.J. Kroeze, 'Doing Things with Values II: The Case of Ubuntu', *Stellenbosch Law Review,* Vol. 13, 2002, pp. 252-264.

191 CCT 3/96.

192 CCT 4/96.

193 CCT 5/2000.

194 *See* for instance Sir S. Kentridge, 'Comparative Law in Constitutional Adjudication', *in* Sir B. Markesinis & J. Fedtke, *Judicial Recourse to Foreign Law,* University of Texas, Austin, 2006, p. 334.

195 CCT 1/96.

amounted to a full legal transplant, not just an expansion or development of the law on the basis of constitutional principles already enumerated in the 1993 text of the Interim Constitution.[196] The other case, *State v. Solberg*,[197] was a decision that upheld a ban on the sale of certain alcoholic beverages on Sundays, Good Friday and Christmas as not violating the freedom of religion provision of the Interim Constitution. In a concurring opinion, Justice Sachs, relying on the U.S. First Amendment's Establishment Clause and its jurisprudence, for instance in *Lynch v. Donelly,* argued that the law did violate freedom of religion.[198]

In *Sanderson v. Attorney-General Eastern Cape,*[199] a case dealing with the right of an accused to be tried within a reasonable time, the Court argued that "[…] the use of foreign precedent requires circumspection and acknowledgment that transplants require careful management". This circumspection is even more practiced in cases not involving Bill of Rights. While, for instance, the Court clearly aimed to reduce the tensions inherent in the continuing conflict between provincial and national governments, it also took the opportunity to preclude an alternative American interpretation of federalism by saying that "unlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states".[200]

But despite these debates within the Court, the very extensive use of comparative judgments means that the Court insists that the migration of constitutional values throughout the legal systems is absolutely vital, and it also draws heavily on comparative and international law in reaching this conclusion.[201]

196 *See* Sir B. Markesinis & J. Fedtke, *Judicial Recourse to Foreign Law*, University of Texas, Austin, 2006, p. 95.

197 CCT 10/97.

198 *See* M. Rosenfeld, 'Constitutional Migration and the Bounds of Comparative Analysis', *NYU Annual Survey of American Law,* Vol. 58, 2001, p. 67. Rosenfeld focuses on Justice Sachs's opinion rather on that of the Court's majority.

199 CCT 2/98.

200 National Education Bill Case, CCT 3/96, para. 23.

201 *See* M. Moran, 'Inimical to Constitutional Values: Complex Migration of Constitutional Rights', *in* S. Choudhry (Ed.), *Migration of Constitutional Ideas*, Cambridge University Press, Cambridge, 2006, p. 254.

The Constitutionalization of International Law: International Human Rights before Domestic Courts

The use of human rights by domestic courts is a product of the globalization of the practice of modern international law. This development started with the emergence of international human rights law after the Holocaust and the consequent creation of the Universal Declaration of Human Rights, which, as a promise by governments that future genocides would not happen, conceptually challenged the idea of unconditional sovereignty of the state with respect to governance within its boundaries, the fundamental rule of public international law since the Peace of Westphalia in 1648, also firmly laid down in Article 2(1) of the United Nations Charter.[1]

Domestic courts can have two different functions with regard to the protection of international law, including international human rights or rule of law.[2] The first function is to review the legality of national acts in the light of international obligations and to ensure rule-conformity. In recent times across the world, national courts have been given or have assumed the power to review acts of their state's executive or legislative branches against international law. For instance, in the *Narmada* case[3] the Indian Supreme Court reviewed the legality of displacement of people resulting from the building of a dam in the Narmada river under the ILO Indigenous and Tribal Populations Convention of 1957. Also, the Israeli Supreme Court, sitting as the High Court of Justice, nullified six orders pertaining to the seizure of land in the West Bank, based on the Fourth Geneva Convention and the 1907 Hague Regulations.[4] In the *Hamdan* case, the U.S. Supreme Court reviewed the detention of suspected terrorists against the 1949 Geneva Conventions.[5] Moreover, the U.K. Supreme Court in *HM Treasury v. Mohammed Jabar Ahmed*[6] holds that individual rights were protected notwithstanding the obligation of the United Kingdom under Article 25 of the UN Charter. In these cases, national courts compensated for the lack of international courts as a systemic force in the protection of the international rule of law, without creating inter- or supranational institutions that states would find to restrict their sovereignty. But as many cases illustrate, even when states agree to empower an international court, that will not contribute to the rule of law unless it is backed up by an effective national court. This happened to the judgment of the *Southern African Development Community Tribunal* (SADC) in a case of a white farmer of Zimbabwe who sought

1 *See* Falk, 2009, p. 84.

2 André Nollkaemper describes a third function, namely the role national courts can play in the interpretation of international law. *See* A. Nollkaemper, *National Courts and the International Rule of Law,* Oxford University Press, Oxford, 2011, pp. 9-10. One aspect of this third function is the role of domestic court in using international law while interpreting national constitutions, discussed in the previous part of this book.

3 *Narmada Bachao Aadolan v. India*, AIR 2000 Supreme Court of India 3751.

4 *Beit Sourik Village Council v. Israel and the Commander of the Israeli Defense Force in the West Bank* (2004).

5 *Hamdan v. Rumsfeld*, Secretary of Defense 548 US 557, 126 S Ct 2749 (2006).

6 *HM Treasury v. Mohammed Jabar Ahmed* (FC), (2010), UKSC 2.

legal protection against threatened expropriation of property.[7] After unsuccessfully seeking legal protection in Zimbabwe, he prevailed in the SADC court, which found that the expropriation was discriminatory. His attempt to have that judgment enforced in Zimbabwe has failed, as the High Court found that the judgment could not be enforced because it was contrary to public policy of the state.[8]

The second function of domestic courts is to decide international claims. The emerging constitutionalization of international law, which can also be seen as 'a modest beginning of a new international morality',[9] also attempts to limit the jurisdiction of the State, which is not willing to act according to the international law. From the point of view of the acting forum State on the other hand, this is a kind of self-limitation, providing the possibility for foreign citizens before a court of another State to enforce international human rights norms. With this gesture, the forum States replace the legal protection rejected by another State, and at the same time complete the legal remedies provided by the emerging bodies of international human rights. Since the international mechanisms, from the Nuremberg Trials after World War II till the establishment of the International Criminal Court in the late 1990s, are still not fully adequate to address most international human rights abuses, most enforcement efforts take place in domestic legal systems.

The first step in this development arising from the Nuremberg Trials was the recognition of the international law principle of universal jurisdiction in criminal cases, which authorizes, and in some circumstances even obligates, any nation in which evildoers (*hostis humani generis*, enemies of all mankind) are found, using the principle *aut dedere aut judicare* to either prosecute those accused or extradite them to another nation that will put them on trial. This concept of universal jurisdiction in criminal cases gave life to modern civil litigations partly by aliens, partly by own nationals in U.S. courts against foreign private actors, multinational corporations and, in exceptional cases, even jurisdiction over foreign states.

7 *Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe* (2/2007) (2008) SADCT 2 (28 November 2008).

8 *See* Nollkaemper, 2011, pp. 6-9.

9 In his book, Elazar Barkan has singled out restitution for the Jewish suffering during World War II, especially for the Swiss reimbursement and compensation initiative, as a defining moment that separated the past from the future on such matters, and started a potentially new international morality. *See* Barkan, 2000.

3 The Universal Jurisdiction in Criminal Law

This approach of the implementation of international human rights by domestic courts is a consequence of the growing support around the world for 'globalization' of accountability for crimes of high governmental officials, to revise the earlier tendencies towards *de facto* impunity for them. This necessarily challenges the principle of State sovereignty in relation to international criminal law, which means no interference in the domestic affairs of another sovereign State, leading to the doctrine of sovereign or State immunity and the act of State doctrine, as well as territorial jurisdiction as the primary basis for criminal jurisdiction.[1]

In other words, universal jurisdiction in criminal law is a tool to end the impunity of individuals responsible for gross and serious violations of human rights in the form of national jurisdiction by States having neither territorial nor active (the perpetrator) or passive (the victim) nationality or protective (over crimes that are injurious to its national security) jurisdiction.[2] This means that universal jurisdiction is based on the custody or presence of suspects. As Theodor Meron states, "Indeed, the true meaning of universal jurisdiction is that international law permits any state to apply its laws to certain offenses even in the absence of territorial, nationality or other accepted contacts with the offender or the victim."[3]

Some claim that universal jurisdiction is associated with the presence of a suspect in the executing State, while others argue that universal jurisdiction allows all States to exercise jurisdiction. For instance, K.C. Randall argues that jurisdiction is truly 'universal' because any State may unilaterally launch an investigation, even *in absentia*.[4] On the other hand, Luc Reydams claims that the *in absentia* proceedings, although they do not interfere with the domestic affairs of other States since the alleged crimes are indeed crimes under international law, but the fact is that jurisdiction exercised by a State without its having an objective or legal link with either the offence or the offender erodes the very concept of jurisdiction.[5] According to the Princeton Principles on Universal Jurisdiction, a State can

1 K. Kittichaisaree, *International Criminal Law*, Oxford University Press, Oxford, 2001, p. 6.
2 *See* C.M. Bassiouni, *Crimes against Humanity in International Law,* Martinus Nijhoff, Dordrecht, 1992, p. 511 about these bases of jurisdiction recognized under international law.
3 *See* T. Meron, 'International Criminalization of Internal Atrocites', *American Journal of International Law*, Vol. 89, 1995, p. 570.
4 *See* K.C. Randall, 'Universal Jurisdiction under International Law', *Texas Law Review,* Vol. 66, 1988, p. 785.
5 L. Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives*, Oxford University Press, Oxford, 2003, p. 224.

seek extradition of a suspect based on universal jurisdiction, but the actual exercise of adjudication can take place only after the suspect is in custody.[6] This means that the absence of a suspect is allowed only in pretrial proceedings, but the actual conduct of a court trial in the absence of a suspect (trial *in absentia*) entails a possible violation of his or her human rights.

3.1 International Law

The very idea of universal jurisdiction was already expressed in Hugo Grotius's two-volume De Jure Belli AC Pacis, first published in 1625,[7] concerning the 'enemies of the human race' (*hostis humani generis*) on the high seas, namely, the pirates. Because the right to freedom of navigation on the high seas was universally applicable, it followed that an infringement upon that right by pirates would be universally punished. The jurisdiction of any State that has custody of suspects of piracy was widely recognized to be in conformity with international law. So the crime of piracy is the longest recognized crime to be a subject of universal jurisdiction, and this doctrine became the foundation of the modern theory of universal jurisdiction for certain international crimes.[8]

In the modern international law, the first challenge to the Westphalian ideology of unconditional territorial sovereignty with no legal accountability beyond the law of the State in the aftermath of World War II were the trials concerning the war crimes. But these trials did not demonstrate the exercise of universal jurisdiction. The Nuremberg and the Tokyo Tribunals were international institutions established under multilateral treaties, while the crimes prosecuted and punished by the national courts of the Allied States were based mainly on the exercise of national jurisdiction and on territorial jurisdiction and/or passive personality jurisdiction of the victims, since the military tribunals located in Germany, Italy and the Netherlands usually tried offences committed against the country's own nationals.[9]

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6 Principle 1(2) and (3) read as follows: "A state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law as specified in Principle 2(1), provided that it has established a *prima facie* case of the person's guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the prosecution of human rights in the context of criminal proceedings." Princeton Principles on Universal Jurisdiction, Princeton University Program in Law and Public Affairs, 2001.

7 H. Grotius, *The Law of War and Peace* (English translation by Francis W. Kelsey), Clarendon Press, Oxford, 1925.

8 *See* M.C. Bassiouni, 'The History of Universal Jurisdiction and Its Place in International Law', *in* S. Macedo (Ed.), *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, Philadelphia, 2004, p. 43.

9 *See* M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Intersentia, Antwerpen-Oxford, 2005, p. 56.

In addition to the prosecution of war crimes conducted in the domestic courts of the Allied States, there were also international efforts to make universal jurisdiction customary international law.

3.1.1 The 1949 Geneva Conventions

The first among these attempts were the 1949 Geneva Conventions.[10] All four conventions oblige State Parties to search for and try suspects in their own courts. According to the majority opinion, these are prescriptions of universal jurisdiction. However, other commentators argue that since universal jurisdiction is not mentioned explicitly in the texts, it is not prescribed. But it is generally acknowledged that the scope of the provisions in the Geneva Conventions can entail universal jurisdiction. This universal jurisdiction implied under the Conventions is an obligation for the Contracting States, and from the wording of the provisions, prosecution is emphasized over and above the extradition of suspects. On the other hand, there are certain limitations to universal jurisdiction inferred in the Conventions. One of them is that the provisions cannot be applied for lesser crimes and for all war-related crimes, but only to 'grave breaches' of the Conventions committed during an international armed conflict.

3.1.2 The 1948 Genocide Convention

To forbid cruel treatment of nationals by their own States, the UN General Assembly in 1948 adopted Resolution 96(I), which declared that the punishment of the crime of genocide is a matter of international concern, and affirmed that "genocide is a crime under international law which the civilized world condemns". Nevertheless, although universal jurisdiction was proposed on several occasions, the final version of Article 6 of the 1948 Genocide Convention laid down territorial jurisdiction and the jurisdiction of an international criminal tribunal, and definitely does not provide for universal jurisdiction. Some contracting states, chiefly the Soviet Union, was of the opinion that universal jurisdiction invades State sovereignty just as an international criminal court might. On the other hand, there was also distrust concerning the impartiality and fairness provided by other States' judicial systems, and finally the compromised text of the Convention was a result of UN Member States' efforts to avoid more international conflicts among States. In the 1970s and 1980s, there were several efforts made to prescribe universal jurisdiction over genocide in both conventional and customary international law, but all of these efforts failed.

10 The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I); the Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II); the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV).

3.1.3 The 1970 Hague Hijacking Convention

Since the late 1960s terrorist activities – especially through hijacking of aircrafts – have posed a serious threat to the life of passengers and to the viability of international civil aviation, and new international instruments have been drafted against these terrorist acts. Although the need for the international action was similar to the one leading to the establishment of customary rules on the universal jurisdiction over the crime of piracy, the first attempt, the Tokyo Convention in 1963, did not refer to universal jurisdiction or the principle of *aut dedere aut judicare*. This Convention laid down the jurisdiction of the State where the aircraft was registered as the main jurisdiction and included nationality jurisdiction, passive personality jurisdiction and protective jurisdiction, but did not mention universal jurisdiction among the exceptions. It was the Hague Hijacking Convention in 1970 that first incorporated universal jurisdiction, providing the principle of *aut dedere aut judicare* and including a provision to allow extradition among States, even without requiring a special bilateral agreement before the extradition.

3.1.4 International Tribunals

The 1990s can be characterized as a period of spread of universal jurisdiction, when the jurisdictional system underwent a great transition in conjunction with the development of international criminal law and humanitarian law.[11] First, two ad hoc UN tribunals were established: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Although in the Statutes of these ad hoc tribunals there is nothing on the exercise of universal jurisdiction by States, indirectly the tribunals have made a great impact on the development of universal jurisdiction, since according to the UN Security Council's Resolution, the States are obliged to cooperate with them.
The establishment and functioning of the ad hoc tribunals also encouraged the establishment of a long envisaged permanent international criminal court. The Statute of this International Criminal Court (ICC) was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on 17 July 1998. The Preamble of the Statute reads as follows:

> […]Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation,
> Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

11 *See* Inazumi, 2005, pp. 83-100.

> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes […]"

As we can see, the text itself does not explicitly prescribe universal jurisdiction, not mentioning on which jurisdictional basis States must rely. But according to the Statute, one of the basic principles of the ICC's activity is complementarity: Article 17 says that the ICC will exercise its jurisdiction only when national legal systems are 'genuinely unable or unwilling' to prosecute their own offenders.

3.2 National Legislation

Another important impact of the ICC Statute was that many States, in the implementing national legislation they have adopted while preparing to ratify the Rome Statute, have also introduced or broadened already existing provisions to allow or beef up universal jurisdiction. In what follows I discuss some national legislation where criminal statutes exist, and which, by providing important cases, play a dominant role in shaping universal jurisdiction. They are all continental European countries, because these are the ones that claim more extensive extraterritorial jurisdiction than common law countries, in which "all crimes are local".[12]

3.2.1 Belgium

The Belgian Law of 1993 punishes grave breaches of the Geneva Conventions irrespective of the place of the commission of such offences as well as the nationality of the suspect or victim. This law was amended in 1999 to explicitly include genocide and crimes against humanity. This law also acknowledged universal jurisdiction *in absentia*. Owing to these characteristics of the legal regulation, Belgium received a number of complaints accusing foreigners, including some currently or formerly in high state positions, of gross human rights violations. The only case so far successfully concluded through the exercise of universal jurisdiction is the prosecution of four Rwandans, including two Catholic nuns, for taking part in the murders of Tutsi tribe members by Hutu militia in 1994.[13]

Among the cases concerning State officials was the complaint against former Chilean President Augusto Pinochet,[14] as well as the complaint against Ariel Sharon, as Defense

12 My analysis very much relies on Part II of the book of Reydams, 2003, which discusses 14 countries with the existence of either a criminal code with provisions of universal jurisdiction or cases of universal jurisdiction. His broader selection of countries also takes into account the representativeness of the major legal systems and the role of some countries in international law and policy.

13 *Public Prosecutor v. Higaniro et al.*

14 *Aguilar Diaz et al. v. Pinochet*. The decisons of British courts concerning different countries' extradition requests in the case of *Pinochet I* is discussed later in this paper.

Minister of Israel, because of the massacre of Palestinian refugees in the camps of Sabra and Shatila in Lebanon.[15] Another case was against Hissène Habré, the former President of Chad, which was a continuation of the *Habré* case in Senegal.[16]

In the case of Ndombasi, the Brussels magistrate issued an arrest warrant against the former Foreign Minister of Congo on 11 April 2000.[17] This prompted the Democratic Republic of Congo to file an application against Belgium to the International Court of Justice (ICJ) on 17 October 2000. Belgium stated at the hearing that the arrest warrant was also based on passive personality, in view of the Belgian nationality or residence of the victims. The ICJ upheld the immunity of Ndombasi and ordered Belgium to cancel the arrest warrant.[18] Although the ICJ did not rule on the legality of universal jurisdiction *in absentia*, some judges, including President Guillaume, stated that universal jurisdiction *in absentia* has no legal basis in international law, while others, such as Judges Higgins, Kooijmans, Buergenthal and Van den Wyngaert, approved it.

Reflecting on the judgment of the ICJ, and also because the law affected Belgium's diplomatic relations with some States, the Parliament amended it in April 2003, adding some requirements for the exercise of universal jurisdiction *in absentia*, stating that there shall be no prosecution of persons who enjoy immunity, such persons including Heads of State, heads of government and ministers of foreign affairs during their term in office. This was followed by another, even more radical, amendment of the law in August 2003, which required a foreigner desiring to submit a complaint to be resident in Belgium for a minimum of three years. This means that the current Belgian law places more emphasis on passive personality than universal jurisdiction.

3.2.2 France

The French criminal law provides general active personality jurisdiction, protective jurisdiction as well as passive personality jurisdiction. This latter was first introduced only for crimes and since 1994 also for misdemeanours. Prosecution on the basis of the active or passive personality principle is subsidiary to the jurisdiction of the territorial State. The presence of the offender in France is not required, and the trial is possible also in his absence. In 1990, the Cour d'assises of Paris tried and convicted *in absentia* Captain Alfredo Astiz, a member of the Argentine military junta, for the kidnapping and disappearance in Argentina of two French nuns.[19] In the French component of the Pinochet

15 *Abbas Hijazi et al. v. Sharon et al.*

16 *See* S.P. Marks, 'The Hissène Habré Case: The Law and Politics of Universal Jurisdiction', *in* S. Macedo (Ed.), *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, Philadelphia, 2004 about the entire case.

17 *Public Prosecutor v. Ndombasi et al.*

18 Judgment of 14 February 2002.

19 *Public Prosecutor v. Astiz*, Cour d'assises of Paris, 16 March 1990.

case, an examining magistrate in Paris issued an international warrant against the former Chilean President for false imprisonment accompanied by torture of French citizens in Chile. The provisions of the French Penal Code are complemented by a provision in the code of criminal procedure on the jurisdiction of the courts. Universal jurisdiction is established only if a treaty obliges to do so. Exceptions are the ICTY and ICTR cooperation laws that provide for retrospective universal jurisdiction over offences within the jurisdiction of both tribunals, provided there is an "objective and material link consisting of the presence of the presumed culprit on French territory". Although the principle of prosecutorial discretion applies to territorial as well as extraterritorial offences, the victims of a crime may trigger proceedings themselves with an examining magistrate. Both the ICTY and the ICTR implementation and cooperation laws explicitly mention this right. Victims of wars and ethnic violence in the former Yugoslavia and Rwanda or their relatives initiated several such proceedings.[20]

Since the ICC collaboration law from 2002 does not provide for universal jurisdiction, and the 1949 Geneva Conventions have been held to be non-self-executing, trials on the basis of universal jurisdiction for violations of international humanitarian law are not to be expected in France.

3.2.3 Germany

The German penal code regulates three categories of extraterritorial offences: (a) offences against nationally protected rights or interests, which comprise 15 crimes that are punishable irrespective of the law of the *locus delicti*, provided there is a specific link with Germany at the time of the commission, (b) offences against internationally protected rights and interests, (c) 'other situations', which include a general passive and general active personality clause. The German criminal law also contains all possible doctrinal versions of the universality principle. The penal code includes a domestic *aut dedere aut judicare* for common offences and a general enabling clause for treaty offences. Additionally, the Code of Crimes Against International Law provides for universal jurisdiction over genocide, crimes against humanity and war crimes. The provisions of this latter unique law apply even when the offence bears no relation to Germany, but the jurisdiction of the German courts is limited by constraints of a procedural nature. This means that the exercise of universal jurisdiction *in absentia* is possible, but only as a last resort.

In Germany – by comparison with other countries – more foreigners have been prosecuted for crimes committed abroad against foreigners. The German authorities investigated and

20 The case of *Javor et al. v. X* is the result of a complaint by Bosnian refugees, while the case of *Duparquier et al. v. Munyeshyaka* is one of several cases that arose out of the presence of alleged perpetrators of genocide from Rwanda in France.

prosecuted, in particular, many citizens from the former Yugoslavia for atrocities committed during the Balkan war. All the defendants, one way or another, had strong ties with Germany.[21]

3.2.4 Spain

The Organic Law on Judicial Power creates general active personality jurisdiction over crimes if the offence is also punishable in the territorial State, and a complaint by the victim or the foreign authorities has been received and the offender has not yet been tried. The law also provides protective jurisdiction over nine specific offences, while general passive personality jurisdiction is lacking, which means that Spanish courts ordinarily do not have jurisdiction over extraterritorial offences against Spanish nationals. The law provides a basis for universal jurisdiction over any offence that Spain is obliged to prosecute under a treaty. But in the case of genocide, terrorism and offences in connection with prostitution, the law does not expressly require the presence of the foreign offender for the initiation of the proceedings; however, trials *in absentia* are only allowed in certain exceptional circumstances.

Spain is one of the State parties to the Genocide Convention that have established a domestic legal basis for universal jurisdiction over genocide, despite the mentioned Article VI of the Convention. The case *Union Progresista de Fiscales de Espana et al. v. Pinochet* was an example of the unilateral limited universality principle put into practice. Later in the case *Manchú Tum et al. v. Montt et al.,* which arose out of the civil war between 1962 and 1996 in Guatemala between insurgency groups and an authoritarian military government, the highest court qualified the exercise of universal jurisdiction over genocide on the ground that Spanish jurisdiction is subsidiary to the jurisdiction of the territorial State.[22]

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21 *Public Prosecutor v. Tadic* (1994), *Public Prosecutor v. Djajic* (1997), *X v. SB and DB* (1998), *Public Prosecutor v. Jorgic* (1999), *Public Prosecutor v. Sokolic* (2001).

22 The use of universal jurisdiction was necessary in the case of General Efraín Ríos Montt, former dictator of Guatemala, because as a member of the Guatemalan Congress until 12 January 2012, Montt could not be prosecuted in Guatemala as he had immunity. The 86-year-old served as president of Guatemala from the time of his military coup in March 1982 until he was forced out in August 1983. On 26 January 2012, Montt was the first head of state tried for genocide in the courts of his own country and became a defendant in a case in which other generals were being prosecuted. The trial court verdict, issued on 10 May 2013, held that Ríos Montt was guilty of genocide and crimes against humanity, but ten days later in a 3-2 Decision, the Constitutional Court of Guatemala, the country's highest tribunal, annulled a portion of the trial and vacated the trial court verdict, based on an alleged violation of due process. That violation involved Montt's dismissal of his entire defence team on the first day of the trial on March 19 and the trial court's brief expulsion of his newly appointed defence counsel, leaving him unrepresented by counsel of his choice for a few hours. As Aryeh Neier's article states on the decision that appeared in June 2013, it was difficult to predict whether the case would move forward or whether it would be abandoned. *See* A. Neier, 'Will Justice Be Done?', *The New York Review of Books*, 19 June 2013.

The investigation of extraterritorial offences can be initiated by the public prosecutor, by the victim or by any private citizen or organization before the central examining magistrate, while appeals against the decision of the magistrate are heard by the Audencia Nacional, which is also the trial court for extraterritorial offences.

3.3 Leading Cases

Before listing some cases of the use of universal jurisdiction in criminal cases, let me begin with one of the most disappointing examples: the United States – which has no national legislation on universal jurisdiction – tried to bring Pol Pot, the leader of the Khmer Rouge regime in Cambodia, to justice in another State for crimes committed while in power between 1975 and 1979. But this attempt failed. As initiatives to establish some form of accountability in Cambodia crystallized in 1997, the United States considered arresting and extraditing Pol Pot to one of those States that had enacted universal jurisdiction provisions into their criminal codes, most notably, Israel, Spain and Canada.[23] But all of these states declined the invitation, perhaps because none had any particular historical link with Cambodia or any national interest in this matter.[24] But as a result of this, one of the worst dictators in all of history was never brought to justice.[25]

3.3.1 The Eichmann Trial

The most prominent precedent for universal jurisdiction over genocide becoming customary international law was *the Eichmann trial*. Abducted by the Israeli secret police in 1960 from Argentina where he was hiding, the former high-ranking SS officer and head of the Gestapo's Department for Jewish Affairs was flown to Jerusalem, where he stood trial in an Israeli court for his pivotal role in both the design and the implementation of the Final Solution in accordance with Israeli law, the Nazis and Nazi Collaborators (Punishment) Law of 1950. This domestic law was modelled on the 1948 UN Genocide Convention and was intended to prosecute such crimes committed against Jews. In other

23 E. Becker, 'U.S. Spearheading Efforts to Bring Pol Pot to Trial', *New York Times*, 23 June 1997, A1.

24 *See* this explanation by W.A. Schabas, 'Foreword', *in* L. Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives*, Oxford University Press, Oxford, 2003, p. IX.

25 The international community had to wait until late 2011 for a trial of three of the surviving leaders of the Khmer Rouge: Nuon Chea, the No. 2 leader in the Pol Pot regime, Khieu Samphan, the former head of state, and Ieng Sary, who was foreign minister, to face charges of crimes against humanity, genocide and war crimes. The Extraordinary Chambers in the Courts of Cambodia are a hybrid court of Cambodian and international judges, established by a treaty between the Cambodian government and the United Nations. *See* M. Abramovitz & M. Sarna, 'Long-Awaited Justice for Victims of the Khmer Rouge', *Washington Post*, 20 November 2011.

words, Israel exercised its jurisdiction over someone who was not an Israeli national or resident, for crimes committed outside its territory before the existence of the State of Israel.

The trial consisted of two decisions. The first is the decision by the District Court of Jerusalem on 12 December 1961, and the second is the decision by the Supreme Court of Israel on 29 May 1962.[26] Before the courts, Eichmann did not contest the basic facts of the charge; instead, he strongly challenged the jurisdiction of the Israeli domestic courts. First, he denied the jurisdiction based on an illegal arrest and abduction. The District Court admitted that the method of bringing the suspect to Israel might be disputed as being a violation of international law, but argued that this dispute would be solved between the two States and would not affect the proceedings of the prosecution.[27] The defence also made objections against jurisdiction including the problem of the retroactive application of the law, but the courts rejected these objections, and approved jurisdiction over the case on three different bases: besides passive personality, jurisdiction of the Jewish victims and protective jurisdiction of Israel at the time of drafting the domestic Nazis and Nazi Collaborators (Punishment) Law, also on the grounds of universal jurisdiction.

Concerning universal jurisdiction, both courts ruled that the crimes defined in the mentioned domestic law were not only crimes under the domestic law of Israel, but also represented a violation of international law. In the absence of an international criminal court, international law does not restrict or deny the authority of a judicial organ of each State to try these crimes, but requires them to do so, because the jurisdiction to adjudicate crimes against international law is universal. The Supreme Court also held that it was justifiable to apply universal jurisdiction because the crime dealt with in this case was a crime against humanity. In response to the claim that universal jurisdiction could not be exercised before efforts had been made to extradite the suspect to the territorial State or the State of which the suspect was a national, the courts pointed to the fact that neither Argentina nor Germany had requested the extradition of Eichmann.[28]

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26 For details on the background and proceedings, *see* H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, The Viking Press, New York, 1963a, and D. Lipstadt, *The Eichmann Trial*, Schocken/Nextbook, New York, 2011. While Arendt's book is a later publication of her serialized eyewitness report essay for the *New Yorker*, Lipstadt's was published on the 50th anniversary of the trial.

27 If one thinks about the alternative to abduction, it would have been the immediate killing of Eichmann on the streets of Buenos Aires by the Mossad agents. Seemingly, this approach was followed by the American government in the case of killing al-Qaeda terrorists, like Osama bin Laden in May 2011 by the soldiers of the U.S. Navy Seals in Pakistan, and al-Qaeda cleric Anwar Al-Awlaki by a drone strike in October 2011 in Yemen.

28 According to the documents released 50 years later, West Germany knew Eichmann's hiding place as early as 1952. *See* 'Germany Knew Eichmann's Hiding Place Years before His Capture', <www.spiegel.de/international/germany/0,1518,738757,00.html>.

3.3.2 *The Demjanjuk Case*

Another case of universal jurisdiction over genocide is the *Demjanjuk* case, in which the U.S. courts (lacking legislation prescribing universal jurisdiction for genocide at the national level) allowed the extradition of the suspect in 1986 to Israel on the basis of recognition of these States' universal jurisdiction. Demjanjuk was suspected of killing tens of thousands of people, mostly Jews, by operating a gas chamber while he was working in a Nazi concentration camp in Poland during World War II.[29]

Israel issued an arrest warrant against Demjanjuk in 1983 based on the same domestic law, as in the case of Eichmann. Before the U.S. courts, Demjanjuk raised similar objections to the legality of the Israeli jurisdiction as Eichmann did, namely, that he was neither an Israeli national nor an Israeli resident, because the alleged crime was committed in the territory of Poland, not Israel, and because the State of Israel did not exist at the time of the alleged commission of the crime. But both the District Court and the Court of Appeal recognized that Israel enjoyed universal jurisdiction under international law and accordingly gave permission for Demjanjuk's extradition. In their reasoning the courts held that international law allows any State to prosecute crimes that are common enemies to the human race (*hostis humani generis*), which means that any person who commits war crimes or crimes against humanity would be subject to universal jurisdiction. The courts also argued that although it would have been possible to claim that Israel had jurisdiction based on protective jurisdiction and passive personality jurisdiction, there was no need to further investigate other aspects of Israel's jurisdiction since it was admitted that Israel had universal jurisdiction, This means that unlike in the *Eichmann* case, here the courts recognized Israeli jurisdiction solely on the basis of universal jurisdiction, and, to be more precise, *in absentia*. Contrary to Eichmann, Israel did not have Demjanjuk in custody. Therefore, the U.S. courts acknowledged that universal jurisdiction has an active character, according to which the extradition of a subject can be requested from custodial States.[30]

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29 Demjanjuk was originally from the Ukraine, became a U.S. citizen and after proof of his relationship with the Nazi secret police, his naturalization was cancelled.

30 Following these decisions and their approval by the Supreme Court, Demjanjuk was deported to Israel after more than 30 years in the United States. Court proceedings commenced in Israel, and he was acquitted and released by the Supreme Court in 1993 after prosecutors misidentified him as a guard at the Treblinka camp known as Ivan the Terrible. What followed after Demjanjuk's return to the United States was another sixty years of legal wrangling as he fought efforts to retry or deport him. Finally, Germany succeeded in extraditing him a second time, in 2009. In May 2011 a German first instance court in Munich found Demjanjuk guilty of 28,060 counts of accessory to murder, one for each of the Jews exterminated during the six months that he worked as a guard at the Sobibor death camp in Poland. *See* D. Lipstadt, 'Demjanjuk in Munich', *The New York Times*, 16 May 2011, <www.nytimes.com/2011/05/17/opinion/17Lipstadt.html>.

3.3.3 *The Pinochet Litigation*

This active feature was also one of the characteristics of the most celebrated case in the 1990s that drew much attention to universal jurisdiction. The case of Gen. Augusto Pinochet, the notorious former Chilean Head of State, represented a joint effort of many others, making him legally accountable for crimes of state. As generally known, General Pinochet as a leader of the Chilean armed forces organized a violent coup to overthrow the government of the democratically elected president, Salvador Allende on 11 September 1973. Some months later Pinochet declared himself as President of Chile. With a self-amnesty decree before his resignation in 1990, and with a permanent position in the Chilean Senate afterwards, he assured for himself impunity for the gross human rights violations he had committed as head of the State.

The case first received international attention when Pinochet was arrested in the United Kingdom on 16 October 1998, in accordance with the arrest warrant issued by a Spanish judge, Baltasar Garzón. While South American States, including Chile and Argentina, criticized the arrest as an act against State sovereignty, through the violation of Pinochet's immune status as 'special envoy' of the Chilean State, many European States supported the arrest on the basis of human rights, and such support triggered extradition requests from Switzerland, France and Belgium. As some argue, the case offers more evidence of what is called 'universality plus', meaning the exercise of universal jurisdiction when it is bolstered by other bases of jurisdiction to rely on.[31] The proceeding in the French courts, as well the original Spanish request for extradition, although it moved in the direction of universality, started with explicit appeal to passive personality concerning French and Spanish victims of the Pinochet regime. Only the proceedings in Belgian courts were universally deemed to be a sufficient ground of jurisdiction.[32]

The Spanish request for extradition of Pinochet to face charges relating to genocide, terrorism, and torture was based both on the Spanish Criminal Procedure Act and the 1957 European Convention on Extradition. The first British response was a provisional warrant for Pinochet's detention at a clinic where he was undergoing medical treatment, issued by a London magistrate under the Extradition Act of 1989. This was followed by a second international arrest warrant issued by Spain that dealt with the additional

31 *See* D.F. Orentlicher, 'The Future of Universal Jurisdiction in the New Architecture of Transnational Justice,' *in* S. Macedo (Ed.), *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, Philadelphia, 2004, p. 216.

32 *Cf.* P. De Greiff, 'Comment: Universal Jurisdiction and Transitions to Democracy', *in* S. Macedo (Ed.), *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, Philadelphia, 2004, p. 120. M. Cherif Bassiouni claims explicitly that 'the Pinochet case [...] does not stand for the proposition of universal jurisdiction, nor for that matter is the extradiction request for torture based on universal jurisdiction.' *See* Bassiouni, 2004. p. 56.

enumerated crimes of torture and conspiracy to commit torture, detention of hostages, and conspiracy to commit murder. After Pinochet responded by seeking a writ of habeas corpus and a leave for judicial review of his detention, the Divisional Court of the Queen's Bench Division quashed both warrants, partly by regarding Pinochet as immune during his period as the head of state and partly by refusing to regard extraterritorial claims to prosecute for a murder committed in Chile as entitled to be treated as an 'extradition crime'. The Crown Prosecution Service appealed on behalf of Spain to the House of Lords. In the meantime, Spain expanded its extradition request once again to include genocide, torture, murder, and hostage-taking in Chile and elsewhere. A specially constituted Appellate Committee of the House of Lords upheld the extradition, but Pinochet's counsel successfully filed a petition with the House of Lords contending that the verdict be set aside because of the undisclosed connections between that of the judges and Amnesty International. The judgment of a panel of unusually seven Law Lords on 24 March 1999 denied the claim of state immunity by a 6:1 majority, and held Pinochet extraditable, but only for the commission of torture subsequent to 29 September 1988, the date on which Britain enacted Section 134 of the Criminal Justice Act, making torture a crime in the United Kingdom regardless where it was committed or the nationality of the perpetrator. This decision, however a narrow response to the Spanish request, acknowledges at least that international crimes, to the extent that they are incorporated into domestic law, are not shielded from judicial prosecution by state immunity or by notions of the territoriality of criminal law.

Even though the British decision denies the Spanish request for all but the most marginal instances, and the authorities after keeping Pinochet under house arrest for sixteen months allowed him to return home on grounds of ill health, it should still be viewed as groundbreaking, because it was the first time that a former head of state was at least potentially being held legally accountable before an extraterritorial domestic court for alleged criminal activity of a political character during his period of rule.[33] The proceedings against Pinochet in Europe had a catalytic effect in Chile as well. Numerous charges were pressed against him following his return to Chile in March 2000. In May a Chilean court ruled for the first time that Pinochet's immunity as a senator for life was not a bar to his indictment in connection with certain crimes.[34]

33 *See* R. Falk, 'Assessing the Pinochet Litigation: Whither Universal Jurisdiction?', *in* S. Macedo (Ed.), *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, Philadelphia, 2004, p. 119.

34 Efforts to prosecute Pinochet in Chile came to an end as a result of a ruling by an appeals court in Santiago in July 2001 that decided the former president, then 85 years old, was mentally unfit to stand trial. One year later the ruling was reaffirmed by Chile's highest court. *See* Orentlicher, 2004, p. 228, note 100.

4 Universal Jurisdiction for Civil Litigation

The United States, which was once an adherent of the common law rule that crime is territorial, has since the end of World War II, as a far-reaching impact of the Nuremberg Trials, increasingly been claiming extraterritorial jurisdiction, mostly by creating the legal space for human rights litigation.[1] In the extradition cases cited of John Demjanjuk, the U.S. authorities assisted and recognized the requesting State's assertion of universal jurisdiction over genocide, crimes against humanity and war crimes. In the cases *United States v. Yunis, United States v. Yousef* and *United States v. Rezaq,* the United States itself exercised universal jurisdiction over aircraft hijackers and attackers after apprehending them abroad and, in the case of Rezaq, even after a foreign conviction. But this U.S. practice lacks reciprocity, one of the most important principles of international law. The U.S. government refused to sign the Statute of ICC, because it was horrified at the prospect of an international tribunal or another country trying a U.S. agent for human rights violations.[2]

Although not on the basis of reciprocity, the United States uniquely in the world also became active in universal jurisdiction for civil litigation. In the past three decades, partly foreign and partly U.S. nationals as private litigants have brought hundreds of cases to U.S. courts seeking to establish civil liability on the part of foreign defendants accused of violating internationally recognized human rights.[3]

One group of these actions is based on the liability of private, non-state actors and corporations, while the other, more exceptional, set of suits is directed against states.

4.1 Liability of Private Actors

The principal basis for the approach of universal jurisdiction against non-state actors has been the Alien Tort Statute (ATS) of 1789, which provides in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed

1 *See* G. Skinner, 'Nuremberg's Legacy Continues: The Influence of the Nuremberg Trials on Human Rights Litigation in U.S. Courts under the Alien Tort Statute', *in* B.A. Griech-Polelle (Ed.), *The Nuremberg War Crimes Trial and Its Policy Consequences Today*, Nomos, Baden-Baden, 2009, pp. 99-100.

2 *Cf.* Reymans, 2003, p. 219. This story was told by David Scheffer, who served as an expert for Madeleine Albright, the U.S. ambassador to the UN between 1993 and 1996, and who later became the first ambassador of the United States to deal with war crimes during the second Clinton administration. *See* D. Scheffer, *All the Missing Souls. A Personal History of the War Crimes Tribunals*, Princeton University Press, Princeton, 2012.

3 *See* B. Stephens, J. Chomsky, J. Green, P. Hoffman & M. Ratner, *International Human Rights Litigation in U.S. Courts*, Martinus Nijhoff Publishers, Boston, 2008, about these civil litigation means.

in violation of the law of nations or a treaty of the United States."[4] Since 1992, the Torture Victim Protection Act[5] (TVPA) has provided a second basis for suits in U.S. courts based upon acts committed abroad when the alleged violations entail extrajudicial executions and torture. In contrast to the ATS, which provides jurisdiction only when the plaintiff is an alien, the TVPA provides a cause of action for both U.S. nationals and aliens. Under these two laws, foreign government defendants can also be sued. The third opportunity for civil litigation is provided by the Antiterrorism Act (ATA),[6] which authorizes civil suits of U.S. nationals for victims of international terrorism.

4.1.1 The Alien Tort Statute

Enacted as part of the Judiciary Act of 1789, soon after the ratification of the U.S. Constitution, the ATS was intended to show the outside world, particularly European powers, that the newborn nation would not tolerate violations of the Law of the Nations, especially when victims were ambassadors or merchants. But ATS remained, for the most part, unnoticed and unused for nearly 200 years. Even when plaintiffs rarely invoked the statute, the general view of the courts was that it had principally a poorly jurisdictional character. This dormant status of ATS ended when the Center for Constitutional Rights brought the Filartiga action. After a Paraguayan doctor and his daughter discovered that a former military leader of their country, who had tortured their son/brother, resided in New York, they brought an ATS action against him. The district court dismissed the case, ruling that the ATS did not provide the courts with jurisdiction over the claim, since the torture had occurred abroad. The Second Circuit Court of Appeals in *Filartiga v. Pena-Irala*[7] reversed the decision of the district court, finding that the prohibition against torture had risen to the level of 'law of the nations'. Therefore the court held that the ATS did provide for subject-matter jurisdiction even though the torture had occurred within another sovereign State's borders when (a) a foreigner (alien) sues, (b) for any tort, (c) committed in violation of international law. The Filartiga court's ruling was a subject of early debate. Some judges, such as Judge Robert H. Bork in *Tel-Oren v. Libyan Arab Republic,*[8] used an originalist interpretation by arguing that the ATS enabled federal district courts to adjudicate violations of the Law of Nations as that term was understood in 1789, and wrongs committed abroad against foreigners to the extent Congress, in subsequent legislation, specifically creates additional causes of action. But most courts over the next two decades followed Filartiga, and recognizing universal jurisdiction, stated that non-citizens could

4 28 U.S.C. Section 1350.
5 28 U.S.C. Section 1350 note.
6 18. U.S.C. Sections 2331-2338.
7 630 F.2d 876 (2d Cir. 1980).
8 726 F.2d 774 (D.C. 1984).

bring ATS claims for violations of the law of the nations so long as the norm at issue was 'specific, universal and obligatory'.[9]

The U.S. Supreme Court was first faced with ATS in 2004 in the case of *Sosa v. Alverez-Machain*.[10] The Court held that the ATS is a jurisdictional statute only, rather than a statute that created a cause of action, but it also stated that, owing to its incorporation of the Law of Nations, cause for action already existed under the federal common law without the need to enact any other legislation. This means that the Court accepted that jurisdiction under the ATS existed even for acts by another country's foreign officials against that country's own citizens. Most courts agree that the Sosa test is functionally the same as the mentioned' specific, universal and 'obligatory' test utilized in almost all prior ATS decisions.

Sosa courts have found that norms such as crimes against humanity (including genocide), war crimes and forced labour as violations of international law are norms that give rise to ATS claims. One of the important post-Sosa decisions finding that there is a customary law norm against crimes against humanity by relying on the Nuremberg Trials was the 2005 decision in *Mujica v. Occidental Petroleum Corp*.[11] Courts have also found war crimes to be actionable under the ATS, *e.g.*, in another 2005 case, *Presbyterian Church,*[12] or in the 2006 decision in *Sarei v. Rio Tinto*.[13] Courts adjudicating ATS claims even before Sosa, starting as early as in 1999 in the *Iwanowa* case,[14] found that forced labour is a violation of the Law of Nations and thus constitutes a cognizable claim under the ATS.

Another important possible direction of the ATS litigation is the liability of non-state actors for human rights violations, although the U.S. Supreme Court has not yet decided whether private, non-state actors can be liable under the ATS.[15] Even though circuit courts are split over this issue, there are some decisions that answer the question affirmatively. For instance, in the 1995 case of *Kadic v. Karadzic*[16] the court found that non-state actors could be held liable for certain violations of the Law of Nations, such as genocide, war crimes and crimes against humanity.

After the *Kadic* case, the number of lawsuits brought against corporations also increased, and this trend continued over the next decade as well. The first decision, which addressed

9 *See*, *e.g.*, In re Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994).

10 542 U.S. 692 (2004). In the case the plaintiff, Mr. Alvarez-Machain, brought a claim under the ATS against Mr. Sosa after Mr. Sosa had abducted him, held him overnight, brought him to the United States and handed him over to the U.S. authorities, who tried him for murder. Mr. Alvarez-Machain was acquitted, but the Supreme Court dismissed his ATS case on grounds that arbitrary detention of one night did not rise to the level of a violation of the Law of Nations and thus could not be the subject of a suit under the ATS.

11 381 F.Supp.2d, 1164, 1179-1180 (C.D.Cal 2005).

12 374 F.Supp.2d, 338, n. 11.

13 PLC, 456 F.3d 1069, 1077 (9th Cir.2006).

14 67 F.Supp.2d, 440.

15 In Sosa the Court notes that there is a dispute among courts as to whether there is sufficient international consensus on whether international law extends the scope of liability for violations of a given norm to private actors, but declines to resolve the issue.

16 70 F.3d., 240-243. The claims of the victims from Bosnia-Herzegovina were brought against Karadzic as an individual, since he was a self-proclaimed president of the unrecognized Bosnian-Serb republic.

whether corporations can be held liable for violations of international law under the ATS was the already cited 1999 case of *Iwanowa v. Ford Motor Co.,* in which the district court rejected the defendant's argument that private corporations were not bound by norms of international law, and found that corporations could be liable under the ATS. In the 2003 *Presbyterian Church I* case, the court, rejecting the defendant's claim that corporations are legally incapable of violating the Law of Nations, stated that even though corporate entities, such as the Farben Corporation, were not put on trial in Nuremberg, "the concept of corporate liability for *jus cogens* violations has its roots in the trials of German war criminals after World War II".[17] In 2005, the district court in the case *In Re Agent Orange* similarly found that corporations could be civilly liable for violating international law.[18] Also in 2005 in the cited Presbyterian Church, the district court reaffirmed its earlier decisions on corporate liability, stating that the In Re Agent Orange court "carefully treated the defendants' objections to corporate liability before decisively rejecting them, surveying the Nuremberg Trials".[19] In the 2006 *Bowoto* case, the district court also rejected Chevron's argument that corporations could not be held liable for human rights violations under international law.[20]

Almost all of the cases concerning corporate liability also raised the question of complicit liability for human rights violations, such as aiding and abetting. The first significant case to adjudicate whether aiding and abetting claims could be brought under the ATS was the 2000 district court case of *Bodner v. Banque Paribas,*[21] ruling that such claims could be brought. In the 2003 *Presbyterian Church I* case the court not only found that the industrialist cases of World War II supported aiding and abetting liability, but relied on them in determining the standard for such liability as "knowing, substantial practical assistance". In the cited 2005 *In Re Agent Orange* case, the court found that aiding and abetting liability exists when corporations assist states that engage in human rights abuses, holding that the prohibition against aiding and abetting war crimes and other human rights violations is recognized as customary international law.

The issue of private, corporate and complicit liability under the ATS is unclear for some individual scholars, as well as for certain academic institutions.[22] The question remained

17 244 F.Supp.2d, 315.

18 373 F.Supp.2d, 54-58.

19 2005 WL 2082747, *4 (S.D.N.Y.2005).

20 2006 WL 2455752, *9.

21 114 F.Supp.2d 117, 122 (E.D.N.Y.2000).

22 Among scholarly works *see* S.R. Ratner & J.S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd edn., Oxford University Press, Oxford, 2001. Page 16 states: "It remains unclear [...] whether international law imposes criminal responsiblility on groups and organizations." Authors for The Institute for International Economics in Washington, D.C. call the ATS litigation against corporations a "nightmare scenario". They argue that the ATS litigation can cause severe collateral damage to trade and foreign direct investment both in the United States and in target countries. They state that ATS conflicts with other jurisdictions of states, and represents judicial imperialism, where U.S. law serves as a supreme law for the world. Therefore they urge the U.S. government to narrow the ATS. *See* G.C. Hufbauer & N.K. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789*, Institute for International Economics, 2003.

an open one for the courts as well until the Supreme Court decided about it. The case to be decided was *Kiobel v. Royal Dutch Petroleum,* in which the suit was filed by 12 Nigerians, who said two Shell units were complicit in torture and executions in the country's Ogoni region from 1992 to 1995 because of their actions aiding Nigerian soldiers who carried out the abuse. The U.S. Court of Appeals for the second Circuit in New York ruled that the ATS was aimed at a limited set of violations and that 'imposing liability on corporations for violations of customary law' was not allowed. That was the issue the Supreme Court originally took on, but then the Justices changed the thrust of the case to decide whether the ATS had any application to actions that occurred beyond U.S. shores.

The Supreme Court's long-awaited decision from 17 April 2013 unanimously dismissed Esther Kiobel and her fellow plaintiffs' claim of torture, killing and crimes against humanity, giving Shell a pass for the human rights abuses. The majority opinion of the Court, delivered by Chief Justice John G. Roberts, Jr., joined by Justices Alito, Kennedy, Scalia and Thomas, ruled that American courts should rarely – if ever – decide claims that foreigners have committed atrocities against foreigners in foreign lands. The five Justices who signed onto the majority opinion held that, as a general rule, the law does not apply extraterritorially, and is presumed to apply only to the United States and its territory, which means that the ATS cannot be the basis for a lawsuit in which all of the conduct challenged occurred in a foreign country where there was a functioning, legitimate government. The decision suggested that the presumption against applying the law outside the United States might possibly overcome "where the claims touch and concern the territory of the United States". The Court explicitly avoided deciding whether any ATS case, under any circumstances, could be brought against a corporation, foreign or domestic. Thus, what the Court has not done is to completely wipe out the ATS, nor has it ruled that companies are absolved of human rights liability. The majority opinion relies on the following arguments: to avoid conflicts with other nations, to avoid juridical interference with diplomacy, to protect U.S. citizens from similarly being haled into foreign courts and to avoid trying to set up the United States as the '*custos morum* (moral custodian) of the whole world'. Justice Kennedy's brief separate opinion said that the Court left open "a number of significant questions regarding the reach and interpretation" of the 1789 law. As future cases arise, Kennedy argued, "the presumption against extraterritorial application may require some further elaboration and explanation". Justice Alito, in his separate opinion, joined by Justice Thomas, wrote that the Court should have gone further, and barred any ATS lawsuit unless it targeted 'domestic conduct' that would definitely violate a norm of international law that had "acceptance among civilized nations". Justice Breyer's separate opinion, which was joined by Justices Ginsburg, Kagan and Sotomayor, says that he would not have used the extraterritorial bar at all. This opinion argued that ATS cases should be allowed where the wrongdoing "occurs on American soil" and the target of the lawsuit is "an American national", and where the target's wrongdoing "substantially and adversely affects an important American national interest, and that includes a distinct interest in

preventing the United States from becoming safe harbour (free of civil as well as criminal liability) for torturer or other common enemy of mankind".

4.1.2 The Torture Victim Protection Act

The Supreme Court heard the *Kiobel v. Royal Dutch Petroleum* case in conjunction with another, *Mohamad v. Rajoub,* which involves a suit filed by the widow of Azzam Rahim, a U.S. citizen who was allegedly tortured and killed in 1995 in Jericho. The suit named the Palestinian Authority and Palestine Liberation Organization. The U.S. Court of Appeals for the D.C. Circuit said that the law allows lawsuits only against an individual who violates human rights, rather than a political organization. This latter suit was filed under the TVPA.

The TVPA permits claims by an 'individual' for torture or extrajudicial execution, if committed 'under actual or apparent authority' or 'under colour of laws' of any foreign nation. The statute includes a ten-year statute of limitations. TVPA cases are often filed in conjunction with ATS claims also on issues left open by the ATS. For instance, in *Cabello v. Fernández-Larios,* the plaintiffs, survivors of Winston Cabello, a Chilean economist, who was executed by Chilean military officers in 1973, filed an action in 1999 against an officer who participated in his execution. Plaintiffs included Cabello's mother and two sisters, all U.S. citizens, and his brother, a Chilean citizen, as well as his estate, also considered as a citizen of Chile. The complaint therefore contained, on the one hand, TVPA claims for torture and extrajudicial killing on behalf of all of the plaintiffs, and ATS claims for crimes against humanity and cruel, inhuman or degrading punishment on behalf of Cabello's estate and his brother, as non-citizen plaintiffs on the other. The trial jury awarded the plaintiffs 4 million dollars in damages, and the Eleventh Circuit upheld the verdict, finding that the ten-year statute of limitations had been tolled and that both the ATS and the TVPA extended liability to those who conspired with or assisted violations, as well as the direct perpetrators.[23]

As we can see, the TVPA authorizes an individual who has been subjected to torture to sue for damages and authorizes a suit for extrajudicial execution by either the legal representative of the person killed or by "any person who may be a claimant in an action for wrongful death". This means that there is no requirement that the individual or the representative be either a U.S. citizen or an alien, or that the plaintiff or the acts have any connection to the United States. The TVPA holds liable an individual who, under actual or apparent authority, or colour of law, of any foreign nation subjects an individual to either of the two specified violations: torture or extrajudicial execution. The TVPA has a "genuinely

23 402 F3d, 1157-1158 (11th Cir. 2005).

retroactive effect", meaning that it can be applied to violations committed before it was enacted in March 1992 if it does not impair rights of a party possessed when he acted, increase a party's liability for past conduct or impose new duties with respect to transactions already completed.[24]

4.1.3 The Antiterrorism Act

The ATA of 1992[25] provides jurisdiction and a cause of action for claims by U.S. nationals injured by an act of international terrorism. In other words, this statute permits claims by U.S. nationals injured by criminal acts either outside the United States or "transcending national boundaries", if the act "appeared to be intended" to intimidate or coerce civilians or a government. The ATA excludes acts of war and suits against the United States or foreign states and their employees acting within their official capacity or under colour of legal authority.

Many ATA cases were filed against Palestinian organizations and individuals. For instance, in *Bilton v. Palestinian Interim Self-Government Authority,* victims of a bombing in an Israeli settlement sued the Palestinian Interim Self-Government Authority and the Palestinian Liberation Organization. The court rejected the defendants' claim to sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), because Palestine is not recognized as a foreign state under FSIA, and rejected a political question of defence as well. The court also concluded that the bombing was not an act of war and allowed the action to proceed.[26]

Another group of cases under ATA targeted banks and other organizations accused of funding Palestinian groups. In *Linde v. Arab Bank,* U.S. citizen plaintiffs alleged that the bank's activities in administering death benefits to families of Palestinians who undertook suicide bombings made the bank liable under the ATA. The district court found that the bank could be held liable under aiding and abetting and civil conspiracy theories based on allegations that the bank knew that the groups for which it provided services were engaged in terrorist activities.[27] There were also ATA claims arising out of the 9/11/2001 terrorist attack. In a case filed against a long list of individuals and organizations, plaintiffs claimed that the defendants provided material support to Al Qaeda. The court dismissed claims against several banks, holding that the ATA requires knowledge that the defendant's actions had contributed to the alleged terrorist acts.[28]

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24 *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).
25 18 U.S.C. §§ 2331-2339C.
26 412 F. Supp. 2d 1 (D.D.C. 2005).
27 384 F. Supp. 2d 533-538 (E.D.N.Y. 2005).
28 349 F. Supp. 2d 834 (S.D.N.Y. 2005).

4.2 Jurisdiction over States

The concept of state sovereign immunity based on the very idea of state sovereignty is a doctrine of international law, which is applied in accordance with national law in national courts. This means that although its requirements are governed by international law, the individual national law of the state before whose courts a claim against another state is made determines the precise extent and manner of application.[29]

Seemingly, the International Court in The Hague is not inclined to limit state immunity. In its decision on 3 February 2012, the Court argued that Germany is not liable for claims presented to foreign courts by the victims of the Nazi regime.[30] According to this decision, the Italian Supreme Court in 2008 violated the right to sovereign immunity of Germany, when by its decision, Italian citizens could claim compensation from Germany owing to their deportation in 1944. The Italian complaint against the decision submitted to the International Court in September 2011 was that the court procedure in a foreign country was necessary because there was no other way to exercise compensation to deportees. The International Court did not find this argument convincing and held that legal remedy in international law cannot be based on the availability (or lack thereof) of other possibilities. This verdict marked the end of thousands of compensation claims against Germany.[31]

Currently, eight countries, namely, the United States, the United Kingdom, Australia, Canada, Malaysia, Pakistan, South Africa and Singapore, have enacted legislation on state immunity adopting restrictive approaches.[32] Five countries, namely, Kenya, Ireland, New Zealand, Nigeria and Zimbabwe, have no legislation, but their courts have accepted that the restrictive doctrine is now applicable.

In fact, the only state, which in its legislation allows exceptions from the general rule of absolute state immunity for certain acts contrary to international law, is the United States. The U.S. FSIA[33] creates jurisdiction over foreign states, but only if the claim falls within a short list of enumerated exceptions of immunity. One of these exceptions, the expropriation and the commercial activity exception, were a subject of the case between the heirs of Baron Mor Lipot Herzog against Hungary. The suit of the Herzog family demanded that Hungary return precious paintings by El Greco, Cranach the Elder and Courbet (among others)

29 *See* H. Fox, *The Law of State Immunity*, Oxford University Press, Oxford, 2002, p. 1.

30 Jurisdictional Immunities of the State (*Germany v. Italy:* Greece intervening). 3 February 2012 Judgment.

31 The decision was harshly criticized by Amnesty International, who argued that it was a step backwards in the area of human rights protection. Two parties of the Bundestag (the green Die Grünen and the left wing Die Linken) also disapproved of the decision and requested government action to compensate the victims of the Nazi regime. *See* R. Müller & S. Löwenstein, 'Den Haag stärkt Deutschlands Immunität', *Frankfurter Allgemeine Zeitung,* 3 February 2012. For the critique of the decision in legal literature *see* P.C. Bornkamm, 'Against Claims Arising from War Crimes: The Judgement of the International Court of Justice in Jurisdictional Immunities of the State', *German Law Journal,* Vol. 13, No. 6, 2012, pp. 773-782.

32 *See* Fox, 2002, pp. 124-254 about the State practices.

33 28 U.S.C. Section 1605(a)(7).

that were seized by the Nazis and had spent decades in the possession of Hungarian museums. The family argued that the baron's collection had been misappropriated and that Hungary had also breached its bailment obligation "to protect the property and return it to the Herzog family". Hungary's lawyers have argued since the case was filed in 2010 that under the pair of post-war treaties, there is no exception to its immunity as a foreign sovereign from the Herzog family's misappropriation claims. In her ruling on Hungary's motion to dismiss in September 2011, Judge Ellen Huvelle of the District Court for the District of Columbia found for various reasons that the expropriation exception to the FSIA applied to the family's suit, despite the post-war treaties. But the District of Columbia Circuit Court of Appeal said it did not have to reach the expropriation exception since all of the Herzogs' allegations stemmed from bailment.[34] Instead, argued the appeals court panel of three, the commercial activity exception to the FSIA applied to this case because repudiation of bailment obligations is a commercial activity with an impact in the United States, where some Herzog heirs reside today. The appeal court rejected Hungary's argument that the family granted custody of looted work to Hungarian museums for safekeeping. The complaint actually alleges that, by entering into bailment agreements to retain possession of the expropriated artwork and later breaching those agreements by refusing to return the artwork, Hungary took affirmative acts beyond the initial expropriation to deprive the family of their property rights in the collection. These allegations distinguish this case from one "in essence based on disputed takings of property and thus outside the purview of the commercial activity exception", the court argues. With this the appeals court agreed with the U.S. District Court ruling that the family could proceed with a suit demanding that Hungary return the artwork despite Hungary's defence that the FSIA shields it from the case.[35]

Another exception to the FSIA is provided by the State Sponsors of Terrorism exception, a 1996 amendment to FSIA permitting civil suits against a limited set of foreign states for torture, extrajudicial killings, aircraft sabotage or hostage-taking, or the provision of material support or resources for such an act. The exception permits personal injury suits by U.S. citizens when the defendant government is on the U.S. government's list of 'state sponsor(s) of terrorism'. Currently, there are four countries determined by the Secretary of State to have repeatedly provided support for acts of international terrorism: Cuba, Iran, Sudan and Syria.[36] Iraq, North Korea and Libya were also on the list when the exception was enacted in 1996 but have since been removed.

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34 *David L. De Csepel, et. al., Appellees/Cross-Appellants v. Republic of Hungary, A Foreign State, et. al.*, Appellants/Cross-Appellants, United States Court of Appeals for the District of Columbia Circuit, No. 11-7096, Argued 23 January 2013, decided 19 April 2013.

35 Alison Frankel, *D.C. Circuit leaves no easy out for Hungary in Nazi art recovery suit,* 22 April 2013, <http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=75197&terms=%40ReutersTopicCodes+CONTAINS+'ANV>.

36 <www.state.gov/s/ct/c14151.htm>.

5 Future Directions

Concerning the indirect use of international human rights law by national courts, we can conclude that there are more and more judicial bodies in countries that 'engage' international law in this manner in their domestic proceedings. However, the future of the direct application of human rights law in terms of universal jurisdiction for both criminal and civil cases is uncertain.

The good news is that most universal jurisdiction criminal cases have been brought against the very types of defendants who the international community has most clearly agreed should be prosecuted and punished, but their own state has not defended. Therefore, the argument of critics that universal jurisdiction disrupts international relations, provokes judicial chaos and interferes with political solutions to mass atrocities seems to be unfounded. But this does not mean either that defenders of universal jurisdiction are necessarily correct in claiming that it serves as a crucial tool to bring justice to victims, to deter State or quasi-state officials from committing international crimes, or to establish a minimum international rule of law by substantially closing the 'impunity gap' regarding international crimes. All in all, we can conclude that universal jurisdiction is equally unlikely to result in the minimum international rule of law to which its supporters aspire or lead to the dangerous abyss that its detractors fear.[1]

As we have also seen, universal jurisdiction raises concerns in civil litigation as well. The U.S. Supreme Court's decision from April 2013 in *Kiobel v. Royal Dutch Petroleum* might have left the door of federal courts ajar for human rights claims, also those involving abuses by corporations and even those involving injuries in foreign countries, but only slightly so.[2] But on the other hand, cases that can no longer be brought in federal courts under the ATS can still be brought in state courts under other labels, which means that this decision will most probably push some significant international human rights cases from federal courts into state courts.[3]

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1 This is the suggestion of Maximo Langer, after analysing the role of the political branches, specifically the executive and the legislature, in five European States most frequently using universal jurisdiction – Germany, England, France, Belgium and Spain. *See* M. Langer, 'The Diplomacy of Universal Jurisdiction: The Regulating Role of the Political Branches in the Transnational Prosecution of International Crimes', *UCLA School of Law Public Law and Legal Theory Research Paper Series*, Research Paper No. 10-16, 2010.

2 *See* L. Denniston, *Opinion recap: Backing off human rights cases,* SCOTUSblog (17 April 2013), <www.scotusblog.com/2013/04/opinion-recap-backing-off-of-human-rights-cases/>

3 *See* K. Redford, *Commentary: Door still open for human rights claims after Kiobel,* SCOTUSblog (17 April 2013), <www.scotusblog.com/2013/04/commentary-door-still-open-for-human-rights-claims-after-kiobel/>.

The more general, but also still open, question of the use of human rights law by domestic courts is how far international law can be used as a source for the migration of ideas. The real question behind this is whether current international law is really able to serve the aims of transnational human rights.

Epilogue: Towards Global Constitutionalism?

We can conclude that despite the different postures towards to use of foreign law, constitutionalism and judicial review have 'gone global', and there is definitely a growing horizontal communication between constitutional systems, and given this dramatic development, the traditional neglect of the study of comparative law is becoming harder to justify.[1] This means that there are more and more countries engaging with foreign and international, *i.e.* transnational norms. The expanding universe of law through the Internet also makes much harder nowadays to avoid taking position on the role of international or foreign law.[2] Whether the consequence of this development will be the emergence of a 'transnational or cosmopolitan constitutionalism'[3] or the international community becoming a constitutional community,[4] is to be seen.

One of the signs of this global trend is that more and more polities accept supranational core principles of rule of law in their constitutions, and these principles cannot be changed and can be regarded as intrinsic to its specific identity. As we have seen, the international trend is moving towards accepting the Indian basic structure doctrine, explicitly through constitutional provisions that are deemed unamendable, or implicitly through judge-made laws.[5] There are two kinds of protected supra-constitutional principles: universal and particular. The universal ones are common to all modern democratic societies, such as the democratic nature of the state, human dignity of the individual, and the rule of law, while other, such as federalism, official language, and a state religion might be regarded as particular, as they reflect the specific ideals and values of a distinct constitutional culture.[6]

One of the conditions of such a development is that more and more polities strengthen their defences against illiberal and antidemocratic challenges, subscribing to constitutional

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1 *Cf.* Hirschl, 2004, p. 222.

2 *See* this argument in V.C. Jackson, 2010, pp. 5-6.

3 As Goldsworthy formulates: "We live in an era of 'cosmopolitan constitutionalism' in which lawyers and judges increasingly look beyond their own borders and borrow ideas from other jurisdictions." J. Goldsworthy, 'Introduction', *in* J. Goldsworthy (Ed), *Interpreting Constitutions: A Comparative Study,* Oxford University Press, Oxford, 2006a, p. 3.

4 The Italian philosopher, Massimo Cacciari uses the metaphor archipelago to describe the type of mutual interdependence between cultural, linguistic, national or ethnic groups as islands, communicating with each other as part of an archipelago. *See* M. Cacciari, *L'arcipelago* (1997), referred to by A. Lollini, 'Legal Argumentation Based on Foreign Law. An Example from Case Law of the South African Constitutional Court', *Utrecht Law Review*, Vol. 3, No. 1, 2007, p. 74.

5 *See* Fusaro & Oliver, 2011, p. 428.

6 *See* Roznai, 2013a.

patriotism.[7] This means that citizens have to endorse what John Rawls once called 'constitutional essentials', they have to be attached to the idea of a constitution, and from the debates about it a 'constitutional identity' or 'constitutional culture' can emerge. The core of this kind of constitutional patriotism is a constitutional culture centred on universalist liberal-democratic norms and values, refracted and interpreted through particular historical experiences. It is of course possible to find oneself confronted with unconstitutional patriotism, for instance as we have seen the kind of nationalism that violates constitutional essentials in the name of "national interest" in the case of the Hungarian constitutional "counter-revolution" after 2010. In such situations, as Jan-Werner Müller argues, the normatively substantive theory of constitutional patriotism would counsel dissent or even civil disobedience, all in the name of the very constitutional essentials that are being violated and the constitutional culture that is being damaged.[8]

It is even more difficult to foresee, whether this movement will lead to a convergence toward a liberal democratic constitutional model as universalist followers of the convergence posture predict or even claim. For instance Trevor Allan sets out a constitutional theory framed around "the basic principles of liberal constitutionalism" which is "broadly applicable to every liberal democracy of the familiar Western Type".[9] Also Lorraine Weinrib states that the migration of constitutional ideas has already led to the emergence of a constitutional model and a convergence of constitutional analysis across different jurisdictions.[10] A survey of constitutional developments across the 20th century suggest that constitutional regimes across the 192 nations that are members of the United nations in the contemporary world reveals a remarkable degree of convergence in terms of constitutional institutions and ideals. Two of these become particularly widespread: written bill of rights and the institution of judicial review. Of the 106 national constitutions that have been adopted since 1985, every one contained a written bill of rights, and all but five established a mode by which rights can be reviewed.[11] But the authors also note that many of these countries however engaged in external convergence, *e.g.* on fundamental rights, but avoided internal convergence on separation of powers.[12] This means that constitutional ideas today are more similar at a macro level than they were at the beginning of the 20th century. Yet, despite this overall similarity

7 After Dolf Sternberger's and Jürgen Habermas' conceptions of constitutional patriotism in the end of 1970s and 1980s respectively, both of which have been answers to particular German challenges, Jan-Werner Müller developed a new theory of the term, concentrating on universal norms and constitutional culture. *See* J.-W. Müller, *Constitutional Patriotism*, Princeton University Press, Princeton-Oxford, 2007.

8 *See* Müller, 2007, *id.*, p. 142.

9 *See* the Preface of T. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law,* Oxford University Press, Oxford, 2001.

10 *See* Weinrib, 2006.

11 *See* Z. Al-Ali & A. K. Thiruvengadam, 'The Competing Effect of National Uniqueness and Comparative Influences on Constitutional Practice', *in* M. Tushnet, T. Fleiner & Ch. Saunders (Eds.), *Routledge Handbook of Constitutional Law*, Routledge, London, 2013, p. 429.

12 *Id.*, p. 431.

in constitutional institutions and principles, this analysis equally shows that there is a great divergence and difference in the details of the constitutional systems of different countries. This is also the conclusion of scholars who have closely studied significant recent constitutional developments, such as the drafting of Bill of Rights that occurred in Canada, South Africa and Northern Ireland.[13] All these support the proposition that "globalization does not entail uniformity".[14] The comparative research on the use of foreign precedents by constitutional judges of 16 countries shows that the practice of citations, more than contributing to the enhancement of 'legal cosmopolitanism', actually promotes the creation of a 'closed circle', from which most of the non-English speaking countries are left out.[15] This finding shows assonance with the one, according to which "the evolution of global constitutionalism is characterized by a combination of infra-group convergence and inter-group divergence".[16]
In contrast with this assessment, other scholars are more cautious, emphasizing the difficulties in changing constitutional culture,[17] or saying that the direction in which constitutional identity might evolve trough engagement with foreign law might be at stake.[18] Others argue against the existence of convergence,[19] or at least talk about a dual tendency of globalization and 'balkanization'. Michel Rosenfeld observes that paradoxically, while the world becomes bound together, ideas migrate; at the same time it also becomes violently split and divided due to ethnic-based nationalistic identity politics and religious fundamentalism.[20] Some scientists even raise doubts whether a convergence would be a good thing at all, since significant variations necessarily continue to distinguish different liberal constitutions.[21]
Rosalind Dixon and Eric A. Posner describe four paths to constitutional convergence.[22] The first one is represented by superstructure theories, which argue that constitutions reflect deeper forces – technological, demographic, economic – and therefore constitutions converge across countries just when those factors converge.[23] This means that

13 *See* A. Smith, 'Internationalization and Constitutional Borrowing in Bill of Rights', *International and Comparative Law Quarterly*, Vol. 60, 2011, pp. 867-893.
14 *See* Tushnet, 2009, p. 987.
15 *See* Groppi & Ponthoreau, 2013c, p. 429.
16 *Cf.* D.S. Law & M. Versteeg, 'The Evolution and Ideology of Global Constitutionalism, *California Law Review,* Vol. 99, 2011, p. 1163.
17 *See* V. Perju, 'Constitutional Transplants, Borrowing, and Migrations', *in* M. Rosenfeld & A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, pp. 1323-1326.
18 *See* Jacobsohn, 2011, p. 138.
19 *Cf.* Rosenfeld & Sajó, 2006.
20 *See* M. Rosenfeld, *Law, Justice, Democracy, and the Clash of Cultures. A Pluralist Account*, Cambridge University Press, Cambridge, 2011, pp. 2-3.
21 *See* J. Goldsworthy, 'Questioning the Migration of Constitutional Ideas. Rights, Constitutionalism and the Limits of Convergence', *in* S. Choudhry (Ed.), *Migration of Constitutional Ideas*, Cambridge University Press, Cambridge, 2006b.
22 *See* Dixon & Posner, 2011.
23 The scholars representing this theory are writing in economic and political science literature, treating constitutions as endogenous, like the work of D. Acemoglu & J.A. Robinson, *Economic Origins of Dictatorship and Democracy*, Cambridge University Press, New York, 2006. Cited by Dixon & Posner, *id.*, p. 408.

constitutional borrowing is not within the direct control of constitution-makers, while the other three mechanisms assume that decision-makers do control constitutional change. One of them are the learning theories, which argue that judges, political actors who produce constitutional norms copy what they see in other legal orders, mostly using of course the more successful or older counties' solutions, as it happened with the post-communist countries, like Hungary after the transitions in 1989-1990, using many German constitutional approaches. The next theory is the coercion one, which argues that countries try to compel other countries to use their constitutional norms. From a different point view one can state that the countries of East-Central Europe after becoming democratic, believed that they have no choice but to adopt liberal democratic constitutions, if they were have a chance at attracting global trade and investment. The last, the competition theories argue that countries change their norms to attract migration, or trade, and this should also lead to constitutional convergence. Assessing these theories, Dixon and Posner conclude that probably the best case for constitutional convergence comes from the superstructure approach.[24]

Another interesting but also still open question of the use of comparative constitutional law is, how far can international law be the source of migration of ideas. The real question behind this is, whether the current international law is really able to serve the aims of transnational constitutionalism. In some field it definitely does not. As Kim Lane Scheppele proved in the case of post-9/11 war on terror international law can be a source of anti-constitutional ideas.[25] Therefore the even more challenging perspective of the extensive use of comparative constitutional law, when and how this conceptual lens of constitutionalism will migrate to international law. Globalization of international law is undoubtedly reinforced by a trend that is apparent in the interpretative work of several international bodies regarding a growing spectrum of international legal norms. For example, in its interpretation of some provisions of the European Convention, the European Court of Human Rights often uses global and different regional international treaties. Julian Arato pointed out that when the Court was interpreting Article 11 of the Convention on the right to association in its *Demir & Baykara v. Turkey* decision, in 2008, it concluded that due to practice of the International Covenant on Civil and Political Rights, the many ILO instruments, the European Social Charter and the Charter of Fundamental Rights of the EU, it had become a right to form and to join trade unions and to bargain for civil servants in local governments, despite the possibilities of limitation provided by paragraph (2) of Article 11.[26]

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24 *Cf. id.,* p. 421.

25 *See* K.L. Scheppele, 'The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency', *in* S. Choudhry (Ed.), *Migration of Constitutional Ideas*, Cambridge University Press, Cambridge, 2006.

26 *See* J. Arato, 'Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law', *Brooklyn Journal of International Law,* Vol. 37, 2012, pp. 349-388.

It is for sure not per definitionem impossible to conceptualize constitutional law beyond the nation and the state. The term 'global constitutionalism' was first used by Richard Falk,[27] and later on this basis Anne Peters conceived international or global constitutionalism as a legal argument which recommends and strengthens efforts to compensate for ongoing deconstitutionalization on the democratic level.[28]

No doubt, a comprehensive constitutional document for the international community is still lacking. But jus cogens is a specific, superior body of norms, which trumps conflicting international treaties and customary law. Jus cogens has therefore been qualified as constitutional law in a formal sense. Besides this many argue that bellow jus cogens the UN Charter is the constitutional document of international law.[29] Consequently a hierarchy of norms within international law exist, which is at least as important as the external hierarchy, that is, the supremacy of all international law in relation to domestic law.

The adoption of the Universal Declaration of Human Rights in 1948 on the other hand was the first step to make human rights binding in the sense of a juridical commitment. The second step was commenced in 1966 with the adoption of the two comprehensive treaty instruments for the protection of human rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Because these two treaties are by now widely accepted,[30] they constitute a framework, which might even be said to have become binding on non-signatory states. That is why some experts even argue that the world is now already endowed with a Bill of Human Rights against which the legitimacy of any government will be measured.[31] But the next question is, how human rights, in addition to being binding on governments, can also be enforceable in international law through appropriate procedures and mechanisms. As we know from the scepticism of many, including Hart concerning the proper legal character of international law that here states often prefer to settle their disputes via diplomatic channels, avoiding formalized procedures before international tribunals or other bodies. That is why it was a great step forward when in the field of human rights it was decided to create procedures which the individual can initiate, in most cases his or her own state.

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27 *Cf.* R. Falk, 'The Pathways of Global Constitutionalism', *in* R. Falk *et al.* (Eds), *The Constitutional Foundation of World Peace,* State University of New York Press, Albany, 1993, p. 13.

28 *See* A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', *Leiden Journal of International Law*, Vol. 19, 2006, pp. 579-610. In order to reflect on the relevance of constitutional knowledge in international law and international organizations, considerations of an International Constitutional Law (ICL) approach is made. *See* K. Lachmayer, 'The International Constitutional Law Approach', *Vienna Online Journal on International Constitutional Law*, Vol. 1, 2007, pp. 91-99, available at <www.icl-journal.com>.

29 *See* for instance B. Fassbender, 'The United Nations Charter as Constitution of the International Community', *Columbia Journal of Transnational Law*, Vol. 36, 1998, p. 529.

30 In September 2008 the ICCPR had 162 and the ICESCR had 159 states parties.

31 *See* Tomuschat, 2008, p. 4.

The most successful institution in this regard is the application, which individuals under the jurisdiction of any of the 47 states parties to the European Convention on Human Rights (ECHR) with a population exceeding 800 million people can bring to the European Court of Human Rights (ECtHR).[32] The fact that ECHR maps onto rights found in national systems undergirds the notion of a multi-level constitutionalism.[33] The ECtHR regards the ECHR as a type of transnational constitution.[34] Some scholars even argue that the Court is the single most active and important rights-protecting body in the world, which routinely succeeds in raising national standards of rights protection, and it has been crucial to the success of transitions to constitutional democracy in post-authoritarian states, therefore the European Convention on Human Rights is rapidly evolving into a cosmopolitan legal order, a legal system in which fundamental rights are enforced by a 'decentralized sovereign'.[35] This cosmopolitan legal order in Europe is comprised of three interlocking elements: (a) individuals are able to plead fundamental rights, including the Convention, before national courts, (b) national systems of rights protection are formally linked to realm of rights adjudication beyond the state: every individual, regardless of citizenship, possesses and unfettered right to petition the ECtHR, once national remedies have been exhausted, (c) the ECHR comprises an autonomous source of rights doctrine.[36] According this assessment the Court has transcended rights minimalism while maintaining a meaningful commitment to principles of national diversity and regime subsidiarity through providing margin of appreciation for member states in issues, in which there is no European consensus yet.[37] More sceptical evaluations question whether human rights always trump national sovereignty, when it would be necessary in the sake of universalistic claim of right. For instance concerning *A, B and C v. Ireland*,[38] the landmark case on the right to privacy under Article 8 ECHR, in which the Court held there is no right for women to an abortion, one can ask, whether such ethical, moral issues can be basis of the margin of appreciation.[39]

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32 In 2012, the Court registered 65,201 applications, and due to the huge number of pending cases, 82,201 applications were declared inadmissible. The Court rendered 1,678 judgments. Statistics reported on the Court's website: <www.echr.coe.int/NR/rdonlyres/9113BE4E-6682-41D4-9F8B-0B29950C8BD4/0/Analysis_Statistics_2012_ENG.pdf>.

33 *See* M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', *in* J. Dunhoff & J. Trachtmann (Ed.), *Ruling the World: Constitutionalism, International Law, and Global Governance,* Cambridge University Press, Cambridge, 2009, pp. 303-310.

34 In *Loizidou v. Turkey*, Appl. No. 15318/89, Judgement of 23 March 1995, the Court itself called the ECHR 'a constitutional document' of European public law.

35 *See* A. Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralsim and Rights Adjudication in Europe', *Journal of Global Constitutionalism*, Vol. 1, 2012, p. 62.

36 *Id.*, p. 63.

37 *Id.*, p. 54.

38 Appl. No. 25579/05. Judgment of 16 December 2010.

39 *See* the John Marshall Harlan '20 Lectures in Constitutional Adjudication by András Sajó, Judge at the European Court of Human Rights, Drought in the Human Rights Garden. Consensus and Populist Sovereignty', 26 February 2013, Princeton University, Law and Public Affairs Program.

But also decision related to different approaches of church-state relations are able protect freedom of religion provided by Article 9 of the Convention. For instance in the Turkish case of Leyla Şahin, who was a fifth year female medical student at the faculty of medicine of the University of Istanbul, which prohibited her from taking exams or attending lectures while wearing her head scarf, the Court upheld the ban, stating that "in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected".[40] The Court granted Turkey a relatively wide margin of appreciation concerning the necessity of the ban, by stating, that "upholding the principle of secularism [...] may be considered necessary to protect the democratic system in Turkey."[41] The Court noted a particular significance that the Constitution of Turkey attaches to the principle of secularism: "this principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle will not necessarily be accepted as covered by the freedom to manifest religion".[42] Judge Tulkens, in her dissenting judgment argues against the majority's characterization of head scarf ban as a measure against extremist political movements: "Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and 'extremists' who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views." The Şahin decision of the Court can be discussed in terms of "militant secularism".[43] Militant secularism, in other words, is an acceptable form of militant democracy.[44] Similarly in the French *Dogru* case at issue was a decision by a state secondary school in France in 1999 to expel an 11 years old Muslim girl for refusing to remove her headscarf during physical education classes. The school's rule stated that "discreet signs manifesting the pupil's [...] religious convictions shall be accepted in the establishment" but that all pupils must attend physical education classes in "sports clothes", but school permitted the students to wear headscarves when not in physical education classes. Dogru went to the European Court of Human Rights, and after noting that the school's rule was consistent with the jurisprudence of the Conseil d'Etat and government policy, the Court held that

40 *Şahin v. Turkey,* Appl. No. 44774/98 (2005), para. 97.

41 *Id.*, para. 46.

42 *Id.*, para. 114.

43 *See* A. Pedain, 'Do Headscarves Bite?', *Cambridge Law Journal*, Vol. 63, 2004, p. 540.

44 *See* P. Macklem, 'Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe', Paper for Workshop on Militant Democracy held at the Center for Human Values at Princeton University in April 2010. Electronic copy available at: <http://ssrn.com/abstract=1660649>.

it did not amount to a violation of Article 9 of the Convention.[45] The Court introduces its reasons by sombrely noting that "in France, the exercise of religious freedom in public society, and more particularly the issue of wearing religious signs at school, is directly linked to the principle of secularism on which the French Republic was founded."[46] "The concept of secularism," the Court notes, arose "out of a long French tradition," and was enshrined in the 1905 Law on the Separation of Church and State, "which marked the end of a long conflict between the republicans, born of the French Revolution, and the Catholic Church." France's "secular pact," according to the Court, authorizes religious pluralism, requires state neutrality toward religions, and obligates citizens of faith to "respect the public arena that is shared by all."

Given the different approaches within Europe, the European Court of Human Rights not ignoring the local context of each of every case is constantly faces with the contradiction between universalism and particularism, but as the decisions of Leyla Sahin and Dogru shows is rather ready to uphold restrictions on wearing religious symbols in public schools in respect to both teachers and students. By doing this, the judges appear to attach a series of negative stereotypes — sexual inequality, proselytism and religious fundamentalism — which are based neither on an in depth theoretical discussion of this complex and multi-faceted symbol nor on the circumstances of the cases at issue. In the headscarf matter the Court merely presumed — and never actually demonstrated — the connection between the Islamic practice of veiling and the violation of those fundamental principles. Of course the judges in Strasbourg can always argue that the countries of Europe have not been, as yet capable to agree to a common approach, but probably also the Court would be able to contribute to the enforcement of such kind of European consensus by shrinking the scope of margin of appreciation.

Besides its important role to build up a European standard of human rights through its judgments in individual cases, the Court may issue 'pilot judgments' as well, rulings that 'require' a state to change its laws so as to avoid chronically reproducing the same violation.[47] This competence of the Court to issue 'pilot rulings' makes the Court's functions as a transnational 'constitutional' court starkly visible.[48] The latest development in this direction is Protocol 16 of the European Convention on Human Rights, which was opened for signature in early October 2013. The Protocol aims to strengthen the national

45 *Dogru v. France*, Appl. No. 27058/05 (2008).

46 *Id.*, para. 17.

47 In February 2011, the Court which is authorized to write its own procedures, inserted a new Rule 61 to the Rules of the Court. Paragraph 3 of Rule 61 states: "The Court shall in its pilot judgments identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting State concerned is required to take at the domestic level by virtue of the operative provisions of the judgement."

48 *See* W. Sadurski, 'Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments', *Human Rights Law Review*, Vol. 9, No. 3, 2009, pp. 397-453.

implementation of the Convention by increasing interaction ('judicial dialogue') between the European Court in Strasbourg and domestic courts. Contrary to many of the earlier reform protocols, the entry into force of this addition to the Convention may come relatively soon, since it required ten ratifications (rather than ratifications by all state parties to the Convention). In that sense, it is an opt-in addition to the Convention, applying only to those state parties willing to ratify this Protocol.

Besides the most active Strasbourg Court time-to-time also other international courts dare to go this direction. For instance the International Criminal Tribunal for the former Yugoslavia (ICTY) has in the *Tadič* case, analysed the Security Council's powers in a constitutionalist perspective.[49] In some cases also the International Court of Justice (ICJ) developed its role as an 'international constitutional court' by reviewing the Security Council. Even the European Court of Justice (ECJ) in its Kadi judgment[50] overruled the judgments of the Court of First Instance (CFI) and annulled Council Regulation 881/2002, which had imposed restrictive measures against persons and entities associated with Osama bin Laden, the Al-Qaeda network, and the Taliban — because it found a breach of fundamental rights of the European Union (EU). The case is special due to the adoption of the annulled regulation by the Council of the EU pursuant to resolutions of the UN Security Council. Even though the ECJ emphasized that it had no authority to call into question the lawfulness of UN Security Council resolutions, this judgment leaves a wide range of interpretations regarding the interplay between international law and EU law.

Of course it is hard to foresee, what this kind of cosmopolitan liberalism will bring for the future of international human rights. But it is clear by now that for instance human rights are not only rights against states, but they can be held against international organizations, and other international agents, and almost always they will also be against individuals and other domestic institutions as well.[51] Cosmopolitan liberals are also more or less wholly in favour of the of universal jurisdiction — the idea that certain crimes can be prosecuted anywhere, regardless of where the alleged offence was committed — and the hold of individuals (including national political leaders) personally responsible for breaches of the newly emerging body of international criminal law, because they argue that that it is not in the power of national polities to forgive crimes against humanity.[52] But there are also proposals for a "World Court of Human Rights",[53] and suggestions formulated for joint regional constitutional principles and values, first of all in Europe, even before the Charter

49 *Prosecutor v. Tadič*, Case No. IT-94-I-AR72.

50 *Yassin Abdullah Kadi and Al Barakaat International Foundation v. the Council and the Commission*, *C-402/05.P. és C-415/05.P.* Judgement of 3 September 2008.

51 *See* J. Raz, 'Human Rights without Foundations'*, Oxford Legal Studies Research Paper,* No. 14, 2007, p. 12.

52 *See* C. Brown, 'Liberalism and the Globalization of Ethics'*, in* W.M. Sullivan & W. Kymlicka (Eds.), *The Globalization of Ethics*, Cambridge University Press, Cambridge, 2007, pp. 169-170.

53 *See* M. Nowak, 'The Need for a World Court of Human Rights'*, Human Rights Law Review*, Vol. 7, No. 1, 2007, pp. 251-259.

of Fundamental Rights and the Constitutional Treaty of the European Union.[54] Sometimes the international situation may degenerate to such a degree that all the hopes of the population concerned may be places in the international community.[55]

Exactly this is the situation, which was indicated by Immanuel Kant in 1793, in which the effective and enduring legal assurance of peace and freedom requires transnational institutions vested with public power over constituent states.[56] Kant insisted that states, like individuals, could achieve peace and freedom only by subjecting themselves to 'universally valid public rights' which he associated with a 'constitution' codified or not: "Public Right is [...] a system of laws for a people, that is, a multitude of human beings, or for a multitude of peoples, which because they affect 1 another, need a rightful condition under [...] a *constitution* [...] so that they may enjoy what is laid down as Right" [emphasis in original].[57] This cosmopolitan constitution is a set of "normative and juridical principles of [...] cosmopolitan Right".[58]

Certain views of Jürgen Habermas are not far from the cosmopolitan Right principle of Kant. Habermas believes that the constitutionalization o f international law to strengthen the political federation of the European Union was a major step towards a future political global society.[59] Habermas never accepted the counterargument presented by Dieter Grimm, former judge of the Federal Constitutional Court of Germany, arguing that the lack of the European demos could be sufficient reason for the lack of a constitution.[60] In Habermas' recent works, he presents the view that even "executive federalism"[61] is not radical enough,

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54 *Cf.* J.A. Frowein, 'Die Herausbildung europäischer Verfassungsprinzipien', *in* A. Kaufmann, E.-J. Mestmäcker & H.F. Sacher (Eds.), *Rechtsstaat und Menschenwürde. Festschrift für Werner Maihofer zum 70. Geburtstag*, Vittorio Klostermann, Frankfurt am Main, 1988, pp. 149-158; Ch. Grabenwarter, 'Auf dem Weg in die Grundrechtegemeinschaft?', *Europäische Grundrechte Zeitschrift*, 2004, pp. 563-570.

55 *See* Tomuschat, 2008, p. 389.

56 *See* I. Kant, 'Zum ewigen Frieden: Ein philosophischer Entwurf', *in* K. Vorlaender (Ed.), *Kleinere Schriften zur Geschichtsphilospophie, Ethik und Politik*, Felix Meiner, Hamburg, 1964, p. 112.

57 I. Kant, *The Metaphisycs of Moral,* Cambridge University Press, Cambridge, 1996, p. 89.

58 *See* G.W. Brown, 'Kantian Cosmopolitan Law and the Idea of a Cosmopolitan Constitution', *History of Political Thought,* Vol. 27, No. 4, 2006, p. 674.

59 *See* J. Habermas, 'Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts – Ein Essay zur Verfassung Europas', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* Vol. 1, 2012, pp. 1-44. During the heap of the euro-crisis, in the summer of 2012, Habermas and his historian and economist co-authors called yet again for greater political integration of the Euro-zone countries. To advance this issue, they made recommendations for the German government to call upon a new constitutional convent. *See* P. Bofinger, J. Habermas and J. Nida-Rümelin, 'Eispruch gegen die Fassadendemokratie', *Frankfurter Allgemeine Zeitung,* 3 August 2012.

60 D. Grimm, *Braucht Europa eine Verfassung?,* Carl Friedrich von Siemens Stiftung, München, 1995; and J. Habermas, 'Braucht Europa eine Verfassung? Eine Bemerkung zu Dieter Grimm', *in* J. Habermas, *Die Einbeziehung des Anderen. Studien zur politischen Theorie,* Suhrkamp, Frankfurt am Main, 1995, pp. 185-191.

61 "Executive federalism" is usually understood as a federal system where federal law is executed in a decentralized way on state level. In his critique Habermas is referring to the concepts used by Stefan Oeter. *See* also S. Oeter, ' Federalism and Democracy', *in* A. von Bogdandy & J. Bast (Eds.), *Principles of European Constitutional Law*, Hart Publishing, Oxford, 2010, p. 55. For detailed analysis of the "executive federalism" of the US, German and European Union constitutional systems *see* R. Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union', *Common Market Law Review,* Vol. 47, 2010, pp. 1385-1427.

and proposes the idea of a transnational democracy to be based on a shared sovereignty of citizens and states of Europe. Not far from this ideal is the European Union, newly based on the principles of the Lisbon Treaty.[62] Habermas envisages the global international community as a cosmopolitan one, which gains its legitimacy from the nation states, from global and regional entities, like the European Union and their citizenry. By global entity Habermas does not mean the current UN (whose function he envisions to be altered to the service of world peace and international human rights), but to a world parliament, which represents both the states and the cosmopolitan community of world citizens.[63]

The reality of a world parliament, a world court and even a worldwide constitutional review are not in line with the current structure and function of the UN and its role in the protection of international human rights.[64] This is why the author of this book believes that for globalization of constitutionalism and human rights to become a near future reality, it is of the utmost importance that national courts and judges, in their interpretation of rights and laws, have the possibility of going beyond their given frames of the legal system of their nation state. This purpose can be served by the opportunity of making use of comparative foreign and international laws in national constitutional interpretations,[65] and also, the direct use of international human rights by domestic courts.

For these reasons we can also say that the constitutional interpretation through comparative reference to international (and foreign) law is a part of the modern embodiment of Kant's concept of international law, which was premised on a functional notion of ensuring a perpetual global state of peace.

But national constitutions remain essential for supra-constitutional law. This dependency on domestic 'sovereignty' to enforce norms that attempts to transcend sovereignty is the 'paradox of cosmopolitism'.[66] As we have seen, state practice does not demonstrate general approval of international supremacy over the domestic constitution. Moreover, arguments that supranational law prevails over domestic constitutional law are commonly based on the national constitutions themselves. Even in the discussed Swiss case,

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62 *See* J. Habermas, 'Vorwort', *in Zur Verfassung Europas. Ein Essay*, Suhrkamp, Berlin, 2011b, pp. 8-9.

63 *Cf.* Habermas, 2012, p. 44.

64 As indicated in the introduction of this book, annual reports prepared by the European Council on Foreign Relations between 2008-2011 point out that in different UN institutions, like the General Assembly, the Security Council and the Human Right Council, the number of countries supporting the EU on human rights issues has been decreasing since the 1990s. In contrast to this decrease, the number of those supporting the illiberal views of the Chinese and Russian governments has been increasing. For the 2008 report *see* R. Gowan & F. Brantner, *Is the EU a Global Force for Human Rights? An Audit of European Power at the UN*, <http://ecfr.eu>.

65 Rex D. Glensy calls the use of international law in constitutional interpretation a modern appearance of Kantian international law concept. *See* R.D. Glensy, 'Constitutional Interpretation through a Global Lens', *Missouri Law Review,* Vol. 75, No. 4, 2010, p. 1181.

66 *See* G.J. Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law*, Polity Press, Cambridge, 2007, p. 46.

where the Federal Assembly recognized *ius cogens* as an implicit limitation on constitutional amendments, the reasoning was based upon the principle of Rechtsstaat, which constitutes a basic principle of the domestic constitutional order. This means that however international human rights and jus cogens as parts of international and regional laws, require some domestic anchoring. In other words, the 'supra-constitutional' standards as 'higher norms' are not so much 'external', coming directly from international and supranational documents, or from natural law, but rather 'internal', based on the principles enshrined in the national constitutions.[67] The reason for this is that 'external supra-constitutitionality' of international human rights law and jus cogens principles without internal constitutional provision cannot be directly enforced within a domestic legal system. National judges, when facing 'mixed loyalties' usually choose the national constitutional law over international law. Therefore the better approach to enforce international law is to use explicit or implicit 'supra-constitutional' limitations in the national constitutions. In other words, as Anne-Marie Slaughter and William Burke-White claims, "the future of international law is domestic".[68] National courts, and not exclusively constitutional courts have been given or have assumed the power to review acts of the legislative and the executive branches enforcing constitutional standards of international law.[69]

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67 For the distinction between 'external supra-constitutionality' – those international or supranational standards with which the constitutional standard must comply – and 'internal supra-constitutionality' those constitutional principles with which the amendment power must comply, *see* L. Favoreau, 'Souveraineté et supraconstitutionnalité', *Pouvoirs*, Vol. 67, 1993, pp. 74-76.

68 A.-M. Slaughter & W. Burke-White, 'The Future of International Law Is Domestic', *Harvard International Law Journal*, Vol. 47, No. 2, 2006, p. 350.

69 A. Nollkaemper, 2011, p. 7. Something similar happened in the landmark case of *The State of the Netherlands v. Hasan Nuhanovic* (12/03324 LZ/TT) decided by the Supreme Court of the Netherlands. In the decision, ruled on 6 September 2013, the Supreme Court affirmed that the Dutch state was responsible for the deaths of three men at Srebrenica. As the press release recounted, "The men had sought refuge in the compound of the Dutch battalion (Dutchbat). Dutchbat decided not to evacuate them along with the battalion and instead sent them away from the compound on 13 July 1995." Outside the compound they were murdered by the Bosnian-Serb army or related paramilitary groups.
The decision cites both the 2002 articles on State Responsibility and the 2011 articles on the Responsibility of International Organizations, and provides a detailed analysis of attribution doctrines in peacekeeping situations. In substance, the decision upholds the Court of Appeal's finding that the Dutch state exercised "effective control" over Dutchbat pursuant to Art. 8 of the Articles on State Responsibility, which it defines as "factual control over specific conduct." Moreover, confirming that Art. 7 of the Articles on the Responsibility of IOs applies (as opposed to Art. 6), the Court found that this was a situation where a state, in this case the Netherlands, placed troops at the disposal of a UN peace mission, and while command and control were transferred to the UN, disciplinary powers and criminal jurisdiction remained vested in the seconding State. The court also found that international law permitted the possibility of dual attribution, potentially leading to shared responsibility. As a result, "the Court of Appeal was able to leave open whether the UN had effective control over Dutchbat's conduct in the early evening of 13 July 1995." On the question of wrongfulness, which is determined by the law of Bosnia and Herzegovina, the Court upheld the Court of Appeals reasoning, adding that if it accepted the state's argument for judicial restraint, there would be virtually no scope for the courts to assess the conduct of a troop contingent on the context of a peace mission.

One can only hope that one-day international case law is going to serve the aims of transnational constitutionalism, and thus claims in favour of a transparent use of foreign case law would soon become outdated.[70] But in the meantime the role of the courts the use of both international and foreign law has crucial significance to help constitutional ideas to migrate across the world.

70 *See* E. Benvenisti, 'Reclaiming Democracy: The Strategic Use of Foreign and International Law by National Court', *The American Journal of International Law*, Vol. 102, 2008, p. 241.

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