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The Basic Law of Hungary and the Rule of Law – Cooperation between Hungary and the Venice Commission

I. Introduction: Why the cooperation has become difficult?

A new constitution called Basic Law of Hungary[1] (Hungarian: Magyarország Alaptörvénye) was adopted in 2011 and entered into force on January 1, 2012. It can be accepted as a generally known event that the new constitution has led to tensions among Hungary and the Venice Commission or the institutions European Union (EU). The trivial explication of these tensions is that the circumstances of adoption and some regulations of the Basic Law seemed to challenge the rule of law as a fundamental value of the European Union (enacted in Article 2 of the Treaty on European Union [TEU][2]) and of the Council of Europe (CoE)[3]. Some accustomed aspects of the text (like the long and ceremonial preamble called National Avowal[4]; the hermeneutical rule of Article R prescribing that the regulations of the Basic Law should be interpreted in accordance with their purposes, the National Avowal and the achievements of the Hungarian historical constitution; the limitation of powers of the Constitutional Court regarding economical cases) and the quick amendments of the Basic Law were and are being disputed also in Hungary[5]. However, the degree of tension needs some more explanations, hence other regulations of the Basic Law reflect the former achievements of interpretation by the Constitutional Court that should have been welcomed. On the other hand, some amendments of the former Constitution (amended for more than 50 times in 20 years) had completely reshaped the division of powers between the Parliament and the Executive without any reaction of the EU or CoE institutions.

If we project the events on the background of the recent history of Hungary, the EU and the Venice Commission (with retrospection not longer than about 30 years), it can be concluded that the preparation and adoption of the Basic Law met important moments of development of the concept of the rule of law. This special circumstance had sharpened the position of the interested institutions. The institutional histories of the concept of rule of law cannot be analysed in their profundity in a short article, but the milestones can be identified.

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1 The official translation to English is *Fundamental Law of Hungary*. For arguments in favour of *basic* against *fundamental* see: Preface, in *A. Zs. Varga*/*A. Patyi*/*B. Schanda* (eds.), The Basic (Fundamental) Law of Hungary. A Commentary of the New Hungarian Constitution, Dublin, Clarus Press, 2015, p. ix.

2 *T. Konstadinies*, The Rule of Law in the European Union. The Internal Dimension, Portland/Oregon 2017, p. 3, 15.

3 *J. Polakiewicz/J. Sandvig*, The Council of Europe and the Rule of Law, in W. Schroeder (ed.), Strenghtening the Rule of Law in Europe. From a Common Concept to Mechanisms of Implementation, Portland/Oregon 2016, p. 115–121.

4 *F. Hörcher,* The National Avowal: An Interpretation of the Preamble, from the Perspective of the History of Political Thought, in *Varga*/*Patyi*/*Schanda*, see fn 1, p. 35–56.

5 *T. Drinóczi*, Constitutional Politics in Contemporary Hungary, Vienna Journal on International Constitutional Law 2016/10, p. 63–98. *Z. Szente/F. Mandák/Zs. Fejes* (eds.), Challenges and Pitfalls in the Recent Hungarian Constitutional Development. Discussing the New Fundamental Law of Hungary, Paris 2015.

II. A short overview of the recent history of the Hungarian constitutionalism

1. The long standing interim character of the former Constitution

The first milestone of the actual constitutionalism in Hungary was the transition itself. On October 23, 1989, the Hungarian Parliament accepted an interim Constitution (formally as a comprehensive revision of the former Bolshevik constitution). It was consciously interim, as its preamble stated that it would be in force until the adoption of a new constitution. Article 2 of the interim Constitution declared that Hungary is an independent, democratic state under the rule of law. The declaration had been unprecedented in Hungary. Also, on political considerations, it was an answer (a reaction) to the state establishment and the concept of law of the former period ruled by ideology. The "ancient" (quote from *István Kukorelli*[6]) Parliament had adopted the interim Constitution, but the real founder was the National Round Table composed by the former Communist party (the *Hungarian Socialist Party of Workers – Magyar Szocialista Munkáspárt*, *MSZMP*), the new democratic movements forming a block as Opposition Round Table and the third side, the so-called non-aligned organizations. The spirit of the interim Constitution was given by the Opposition Round Table[7]. After long negotiations the National Round Table replaced the top of the legal system, the constitution, and they created the rule of law formula as a cornerstone of the interim Constitution. But the legal system under the interim Constitution in fact remained unchanged. It was in this condition, waiting for the free elections, for constituting the new Parliament and the new executive, for the operation of these, primarily, within the framework of the Constitution already considered to be as one 'under the rule of law'.

No one could be in doubt about the existence of the implacable controversy between the Constitution and the inherited legal system. These were controversies for the solution of which the constitution institutionalized a strong Constitutional Court, in power to annul statutes. It was by the time when legislation and execution were still under the rule of the *Hungarian Socialist Workers' Party* (*MSZMP*). The actual situation and the constitutional empowerment both demanded that the Constitutional Court, by using their means, should speed up "clearing the law"; once an initiative reaches them, they should apply the order securing the primacy of the Constitution, if needed, even pre-empting the Parliament in action, or even the first free elections. The period from 1989–1990 was not a time to provide clear answers for the know-how.

The interim character of the Constitution became practically forgotten hence the Hungarian Parliament was not able to adopt a new one. After an unsuccessful attempt of 1996–1997 that had led to a formal draft (based on a concept examined that time by the Venice Commission[8]), and another unsuccessful attempt to change at least the preamble and the numbering of the interim Constitution from Act XX of 1949 to a new Act of 2000, the political parties and the academic world seemed as though they were settling down the dream of a new constitution.

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6 *I. Kukorelli*, Közjogi tűnődések (Public Law Issues), Budapest 1999, p. 11–18.

7 *L. Bruszt*, 1989: Magyarország tárgyalásos forradalma (1989: The negotiated revolution of Hungary), in S. Kurtán/S. Péter/L. Vass (eds.), Magyarország Politikai Évkönyve 1990 (Political Yearbook of Hungary 1990), Budapest 1990, p. 160–166.

8 Opinion on the Regulatory Concept of the Constitution of the Hungarian Republic. Adopted at the Commission's 25th Plenary Meeting, Venice, 24–25 November 1995, CDL(1995)073e-rev, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(1995)073rev-e, 30.10.2017.

2. The rule-of-law-clause of the interim Constitution

As it was mentioned above, the most important regulation of the interim Constitution from a political point of view was the declaration of rule of law. The text of Article 2 became a cornerstone also for the legal approach. During the transition period the concept of rule of law had not been reflected and the legal literature had not put forward a theoretical requirement pursuant to which that rule of law concept was to be declared in the interim Constitution. This, on the other hand, infers that declaring the rule of law in the self-determination of the state was not a public law prerequisite – that time constitutions usually did not have such a declaration. Public law requirements were not fulfilled by the declaration itself, but by the content of rule of law appearing and taking effect in detailed normative provisions. Hungary was again a state under rule of law, not because of declaring to be one, but because of the fact that the interim Constitution contained detailed and specific regulations that reflected this value.

Let us therefore risk the conclusion that the declaration of a rule of law under Article 2 Section 1 of the interim Constitution had no relevance that time in public law; the relevance was exclusively of political character. The date of the formal turning point in public law marking the transition was October 23, 1989; before this, according to the self-determination of the People's Republic Constitution Article 2 Section 1: "The Hungarian People's Republic is a socialist state." This was refined by the Parliament in the formula already referred to pursuant to National Roundtable Talks dominated by the communist party[9]:

> The Hungarian Republic is a democratic state under rule of law in which the values of civil democracy and those of the democratic socialism equally prevail.

Following the free elections marking the political turning point of the transition and the new constitutional amendment as enacted by the new, multi-party Parliament, after 25 June 1990 it was abridged to "an independent, democratic state under rule of law". Thus the declaration of rule of law served only as a symbol of change of the ideological background.

3. Interpretation of the rule-of-law clause by the Constitutional Court

However, at that time it was a legally relevant issue which the Constitutional Court needed to assess and to give certain interpretation to. The Constitution existed, it was not the Constitutional Court who had drafted it; however, it was them to interpret the Constitution. Essentially, it was a pending an underlying decision of the Constitutional Court (maybe unuttered) how to handle Article 2: whether the Constitutional Court considers the Constitution as a text which is binding legally or as a political declaration only. Naturally, our approach aims to demonstrate that this was not a decision requiring actual consideration. The sheer existence of the Constitutional Court, let alone its task: to safeguard the legal efficiency of the Constitution as a legal statute, made it obvious that the Constitution is a norm. But how to fill the content of rule of law, what is allowed to do and what shall be done? Such information was not available by any live, domestic model.

There was a long way from the classical phrasing to the present concept of rule of law; however, it is practical to recall the terminology applied by the Constitutional Court.

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[9] *M. Bihari*, Alkotmányozás a rendszerváltásban (Constitution-making during the transition), in: B. Hajas/B. Schanda (eds.), Formatori Iuris Publici. Studia in honorem Geisae Kilényi septuagenarii, Budapest PPKE JÁK – Szent István Társulat, Budapest 2006, p. 69–92.

Even these few decisions indicate that the declaration of rule of law was interpreted by the Constitutional Court broadly at their discretion. As a starting point, we can state that the method of declaring rule of law in the constitution, i. e. the general self-definition of the state abstracted from any other law, had influenced the interpretation of the interim Constitution (also affecting the Basic Law due to lifting of the text).

The Constitutional Court took the decision that a loophole is impossible to exist in a state governed by rule of law; i. e. every single detail of state power shall be laid on constitutional norms[10]. The Constitutional Court albeit drew conclusions which are indisputable in any approach of the rule of law concept: declaring rule of law as a fundamental constitutional value[11] entails consequences. Thus, a fundamental criterion was that

> […] public authorities exercise their activity among institutional frameworks and in operational order established by law, respecting the legal limitations available and predictable for citizens […][12].

Beyond enshrining the abstract meaning of rule of law in a decision, the Constitutional Court likewise assessed the content of the concept in several of its decisions. They reached the conclusion that:

> Declaration of rule of law in Hungary […] can be comprehended only as in a formal sense, and in substantive matters it has further references to other, specified constitutional rights. The principle of rule of law may be directly called up only if there is no other specific right regulated within the Constitution[13].

In fact, the wording of the Constitutional Court is quite uncertain because, firstly, it elevates the rule of law above other (substantive) provisions ('formal' rule of law). Secondly, rule of law is assumed to be a subsidiary rule (further reference to nominated rights).Thirdly, it is presumed as a mysterious (secret) substantive rule from which (in the absence of other provisions) individual constitutional rights can also be deduced. In a different decision, this multi-fold character is further enhanced (true for normative acts only). Further principles filling the rule of law quality shall always be assessed in harmony with other actual provisions of the Constitution (now of the Basic Law); nevertheless, the principle of rule of law

> is not a mere auxiliary rule, nor a mere declaration, but an independent constitutional value, the violation of which is itself a ground for declaring a law unconstitutional[14].

The above examples have shown how the declaration under Article 2 of the interim Constitution has provided grounds for deducing a wide range of criteria in the most varied spectrum of the legislative and judicial branch and even those regarding the status of certain institutions. It is particularly visible how, from the principle of rule of law, the Constitutional Court emphasized the relevance of legal certainty, elevating that to be the source of the most various constitutional requirements under various qualifiers.

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[10] Decision 48/1991. (IX. 26.) AB. This interpretation became generally accepted in Hungary: L. *Csink/J. Fröhlich*, Egy alkotmány margójára: Alkotmányelméleti és értelmezési kérdések az Alaptörvényről (On the Margin of a Constitution: Questions of Constitutional Theory and of Interpretation Concerning the Basic Law), Budapest 2012, p. 42–53.

[11] Decicion 11/1992. (III. 5.) AB.

[12] Decicion 56/1991. (XI. 8.) AB.

[13] Decicion 31/1990. (XII. 18.) AB.

[14] Decicion 11/1992. (III. 5.) AB.

Thus, it was legal certainty the key element to open any legal dogmatic lock: the Constitutional Court could deduce almost anything from this principle, and its individual decisions enlarging the concept enhanced more and more this discretion. From here on, the Constitutional Court has been entitled to do anything.

4. The political crisis and the Basic Act

The last cornerstone was the political crisis of 2006. Prime minister *Ferenc Gyurcsány* had won the elections in April and formed a ruling cabinet based on the parliamentarian majority of the *Hungarian Socialist Party* (MSZP) and the *Alliance of Free Democrats*. In September, one of his speeches to the parliamentary faction of socialists in May became public. In the speech the prime minister declared that he had lied before the elections, and the government had to proceed just contrary to the election promises. The social reaction was immense what resulted in a long political crisis and street turmoils. But the cabinet resisted, and the prime minister was recalled only in 2009, one year before the next elections.

The emerging gap between the formal constitutionalism (formal legality) and social dissatisfaction (real lack of legitimacy) led to the stated or intrinsic conviction of the "system" that could not re-establish the harmony between legality and legitimacy. During the two turns of elections in April 2010 the opposition party of *Alliance of Young Democrats* (FIDESZ) together with the *Cristian Democrat People's Party* (KDNP) suggested that depending of the results they are ready to introduce strong constitutional reforms ("Great victory – great changes"). In the second turn the FIDESZ-KDNP candidates won 173 individual mandates of 176 (more than 98 %) and their list got more than 46 % of votes in the proportional part of elections that resulted in a comfortable two-thirds majority in the Parliament (262 seats of 386).With this majority, the Parliament could start the proceedings for a new Constitution.

As a first step a large ad-hoc committee was set up for preparation of the concept by the decision 47/2010. (IV. 29.) OGY of the Parliament. Its composition followed the structure of the Parliament: it was composed by 45 MPs, 26 of *FIDESZ*, four of *KDNP*, seven of *MSzP*, six of the right-oriented *Jobbik*, and two of a new party called "*Politics May Be Different*" (*LMP*)[15]. The committee created six working groups on the different topics of the new constitution and another group for finalising and requested opinions from state institutions, national minorities' representatives, alliances of local authorities, the National Academy of Science and universities, 25 NGOs and churches (5-5 of them proposed by the different parliamentary factions). During autumn 2010, the opposition parties refused to attend the workings of the ad-hoc committee, but their statements were known from the reports of the working groups presented and made public at the end of October 2010. Opinions and suggestions of the requested bodies were also made public[16]. At the end of 2010, the committee submitted to the Parliament its draft on Regulatory Principles of the Constitution of Hungary, which was adopted as a working document by decision 9/2011. (III. 9.) OGY[17] of the Parliament.

The new constitution called Basic Law of Hungary was ready-made by Easter of 2011. The regulatory principles were taken into consideration (many parts of its text can be recognised), but the draft of the Basic Law was different in structure. The formal

[15] https://mkogy.jogtar.hu/?page=show&docid=a10h0047.OGY, 30.10.2017.

[16] All texts are available on the homepage of the Parliament, http://www.parament.hu/internet/plsql/ogy_ biz.keret_frissit?p_ckl=39&p_biz=I005, 30.10.2017.

[17] https://mkogy.jogtar.hu/?page=show&docid=A11H0009.OGY, 30.10.2017.

validity of the Basic Law could not be questioned as it was adopted by the Hungarian Parliament, a constituent power of our country within the context of both the former and the new constitution. The procedural law-making rules of the old constitution were respected meticulously, the text was signed by the Speaker of the Parliament and the President of Hungary, and it was published in the Official Gazette of Hungary. However, no sooner had the ink on the Presidential signature on the Basic Law dried when a long debate started challenging this new constitution. The opposition parties were and have not yet been pleased with its text. Different international bodies such as the European Parliament or the Venice Commission and a number of non-Hungarian academics formulated certain objections. These objections regarded the connection of the new text to the Historical Constitution of the former Hungarian Kingdom, the regulation pertaining to the rights of the human foetus, the rules regarding marriage and family, the new organisation and administration of the judiciary, etc. But one regulation remained the same: Article B) declared that Hungary is an independent, democratic state under the rule of law.

5. The Transitional Rules of the Basic Law

The Transition Rules had been adopted a few days before the Basic Law entered into force (January 1, 2012) by the Hungarian Parliament as a constituent power of Hungary. The creation of the Transition Rules was allowed by the 3rd closing provision of the Basic Law ("Parliament shall adopt the transition rules related to this Basic Law in a special procedure defined under point 2"[18]). Transitional rules were necessary in order to make some continuity among the interim Constitution and the Basic Law. However, a controversial situation originated in the fact that the Parliament had adopted new substantial and not only transitional regulations within the Transitional Rules whereas Section (2) of Article 31 of the Transitional Rules stated that the Transitional Rules were part of the Basic Law.

There was no similar provision in the original text of the Basic Law: it prescribed only the adoption of Transitional Rules without any declaration of "being part". After the first debates on the nature of Transitional Rules, the Parliament amended the Basic Law (First Amendment on June 18, 2012). In conformity with Article 'S' of the Basic Law (regulating the adoption of a new Constitution and amendment of the Basic Law), the modification by the First Amendment was built in the text of the Basic Law ("incorporation") as a new, 5th closing provision saying that: "The Transitional Rules of the Basic Law adopted (on December 31, 2011) in conformity with the 3rd closing provision, are part of the Basic Law". The last sentence of the Basic Law, the "Postamble" remained unchanged:

> We, the Members of the Parliament elected on April 25, 2010, being aware of our responsibility before God and man, and in exercise of our constitutional power, hereby adopt this to be the first unified Fundamental Law of Hungary.

Due to the First Amendment mentioned above, the Basic Law and its Transitional Rules took the shape of a "catamaran". The "Postamble" stated that the Basic Law is unified, but after the First Amendment the 5th closing provision stated that the Transitional Rules are "part of" the Basic Law, and Article 31 of the Transitional Rules stated the same. The Transitional Rules were not incorporated into the text of the Basic Law; these were two

[18] The reason for referencing "point 2" is that the Basic Law and the Transitional Rules were adopted when the interim Constitution was in force. Point 2 (or the 2nd closing provision) stipulated respecting the procedural rules of the interim Constitution.

separate texts of the Hungarian legal order, while Article 'R' of the Basic Law rules that the Basic Law "shall be the foundation of the legal system in Hungary".

The Constitutional Court examined the legal nature of Transitional Rules on a request of the Commissioner for Fundamental Rights and "found" that the new substantive regulations of the Transitional Rules are not in conformity with the Basic Law. Consequently, (with some exceptions) the Court nullified them with retroactive effect from the December 31, 2011[19]. The most important arguments of the Constitutional Court were that although the Hungarian Parliament had adopted the Transitional Rules in its capacity of constituent power, and although the First Amendment declares that the Transitional Rules are part of the Basic Law, the Transitional Rules "containing" the new substantive regulations cannot be accepted as sources of Hungarian legal order, because the "Postamble" states that the Basic Law is unified, consequently it cannot have such an "external" substantive part as the Transitional Rules. The arguments of the Constitutional Court are correct, light and comprehensible. There is no doubt that this decision serves the protection of the rule of law. Nevertheless, based on similarly correct, light and comprehensible counter-arguments (some of which have appeared as part of the official justification, while others have been attached as particular parallel views and dissenting opinions of some justices), the decision of the Constitutional Court could have been the opposite: the Transitional Rules could have been accepted as separate (non-incorporated) part of the Basic Law; hence the Hungarian Parliament adopted it in its capacity of constituent power as part of the Basic Law. The struggle among the Parliament and the Court lead to the Fourth Amendment of the Basic Law which introduced some regulations of the annulled Transitional Rules and some other annulled rules of other acts into the Basic Law.

III. The role of the Venice Commission and its concept on rule of law

1. The firs years of activity of the Venice Commission

The Venice Commission, officially known as the European Commission for Democracy through Law, was established on May 10, 1990, by the Committee of Ministers of the CoE for a period of two years. In adoption of the so-called Partial Agreement, ministers of 18 member states took part. The Venice Commission, composed of individual members appointed by the governments of the member states, has designed the co-operation between the member states of the CoE and other Central and Eastern European states (not members at that moment) including first and foremost mutual knowledge and approximation of the legal systems of the states concerned, understanding of differing legal cultures and resolving and improving the functioning of the democratic institutions. In its work, the Commission was to give priority to constitutional, legislative and administrative principles and methods for the effectiveness and the rule of law of democratic institutions, the protection of fundamental rights, public participation of citizens, and the protection of self-governments[20].

The founding document was revised by the Committee of Ministers in 1992, as a result of which the activities of the Venice Commission continued for an indefinite period. The present Statute was adopted on February 21, 2002[21]. In the meantime the number of

[19] Decision 45/2012. (XII. 29.) AB, http://hunconcourt.hu/letoltesek/en_0045_2012.pdf, 30.10.2017.

[20] Resolution (90) 6 on a Partial Agreement establishing the European Commission for Democracy through Law (adopted by the Committee of Ministers on May 10, 1990, at its 85th Session).

[21] CDL (2002) 27, Resolution Res (2002) 3 Adopting the Revised Statute of the European Commission for Democracy Through Law.

member states of the Commission was increased. Among the members of the CoE we find Brazil, Chile, Israel, South Korea, Mexico, Morocco, Peru, Tunisia, and the United States of America. There are also associated members such as Belarus, and observer members such as Argentina, Canada, the Holy See, Japan and Uruguay, as well as a special status participant in the European Union, the Palestinian Authority and South Africa[22].

In the first years of its activity, the Venice Commission published one opinion regarding Hungary[23], and the situation is the same for Central Europe and the Baltic States (no opinion for the Czech Republic or for Poland, eight opinions for Romania, two opinions for the Slovak Republic, two opinions for Estonia, three opinions for Latvia, one opinion for Lithuania). A more active role is remarkable regarding the former Yugoslavia and other Balkan States (23 opinions for Albania, more than 40 for Bosnia and Herzegovina, 16 for Bulgaria, 14 for Croatia, nine for Montenegro, 17 for Serbia, one for Slovenia, 12 for the FYR Macedonia)[24]. The differences are most surprising if the working methods of the Commission are taken into consideration.

2. Working methods of the Venice Commission

The opinions of the Commission, which had become increasingly prestigious, symbolised by the number of its members, are unavoidable, as we have seen in the case of Hungary in recent years[25]. In order to understand its weight, it is necessary to glance at the rules of its operation. According to Article 3 of the current Statute, the Commission may only formulate an opinion on a request from the Committee of Ministers of the CoE, the Parliamentary Assembly, the Congress of European Local and Regional Authorities, the Secretary General, a Member State or an international organization that is a member of the Commission. The opinion is legally non-binding. The latter circumstance, a "soft" opinion without legal force, cannot mean that it can be ignored for two reasons. Due to the prestige of the institution, its criticism is unpleasant for the member state in case. The Commission appears as a quasi-court to the applicant (even if the latter itself requests the opinion), there is no other body to supervise the opinion once published.

The consistency of "case-law" of the Commission was facilitated by the opportunity granted by Article 3 of the Statute. It empowers the Commission to act even in lack of request. Without infringing the powers of other bodies of the CoE, the Commission may on its own initiative, carry out research and, if it is justified, draw up studies, drafting directives, legislative and international agreements that the legislative bodies of the CoE may discuss and accept. The Commission also co-operates with the constitutional courts and courts with similar competencies of the member states and, for this purpose, may establish joint consultations with its members and representatives of the constitutional courts. The texts to be drawn up on the own initiative of the Commission should be highlighted.

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22 http://www.venice.coe.int/WebForms/members/countries.aspx?lang=EN, 30.10.2017.

23 CDL (1995)073e-rev, fn 7.

24 http://www.venice.coe.int/WebForms/documents/by_opinion.aspx?lang=EN, 30.10.2017.

25 E. g. the commentary of the Basic Law already mentioned compares the constitutional texts with the opinions of the Venice Commission, *Varga*/*Patyi*/*Schanda*, fn 1. See also *L. Trócsányi,* The Dilemmas of Drafting the Hungarian Fundamental Law, Passau 2016.

They are usually summarized as a compendium of the ad-hoc opinions (such as summaries regarding the judiciary[26], amendments to the constitution[27], the constitutional courts[28] or the ombudspersons[29]). A combination of these and ad-hoc opinions are special reports or summaries (such as on the independence of the judiciary[30], the composition of the constitutional courts[31], the stability of the electoral system[32], the external voting[33]). Both types of equipment are appropriate to compile the Commission's ad-hoc opinions into a coherent system to form a strong basis for subsequent opinions.

This activity is very effective: since the outcomes of the action are in principle soft, for the state concerned they are not mandatory, the foundations of the opinions can be freely amended by the Commission. In practice, this appears as the elaboration of own case law. It is undeniable that the Commission respects the mandatory instruments (international conventions, case law of the European Court of Human Rights, ECtHR) or at least formally established legal instruments (the recommendations of the Committee of Ministers or of the Parliamentary Assembly), but beyond these limits it may act freely. A single fixed, although informal influencing factor is the jurisdiction of national constitutional courts[34].

3. The report on the Rule of Law

The turning point of the activity of the Venice Commission was 2011, when its Report on the Rule of Law was adopted and published[35]. The immediate background for the report was a resolution of 2007 of the Parliamentary Assembly on the principle of the rule of law[36], and an overview of legality discussed in 2008 by the Committee of Ministers of the CoE[37]. The resolution of the Parliamentary Assembly (Resolution) is short and concise. It emphasizes that the rule of law is one of the core values of the CoE, but it is fed by several sources and has a different meaning in each language, but at the same time its desirable content is not formal validity, but the actual rule of law – "formalistic interpretation of the terms". It therefore considers a more precise definition of the concept of the rule of law necessary, which takes into account the practice of the ECtHR, in which process the Venice Commission should be involved.

The overview of the Committee of Ministers (Overview) is the direct opposite of the Resolution: it is extensive, detailed, analytical, and unusual from government politicians

[26] CDL-JD (2008)001, Draft Vademecum on the Judiciary.

[27] CDL-DEM (2008)001, Draft Vademecum of Venice Commission Opinions and Reports Concerning Constitutional Provisions for Amending the Constitution.

[28] CDL (2011)048, Compilation of Venice Commission Opinions and Reports on Constitutional Justice.

[29] CDL (2011)079, Compilation on the Ombudsman Institution.

[30] CDL-AD (2010)004, Report on the Independence of the Judicial System: Part I: The Independence of Judges és CDL-AD (2010)040, Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service.

[31] CDL-STD (1997)020, The Composition of Constitutional Courts.

[32] CDL-AD (2005)043, Interpretative Declaration on the Stability of the Electoral Law.

[33] CDL-AD (2011)022, Report on Out-of-country Voting.

[34] *B. Pokol*, Der juristokratische Staat (Entstehung, Aspekte, Verzerrungen und Möglichkeiten zur Sublimierung), PLWP Nr. 2017/13, http://plwp.eu/legfrissebb/204-2017-13, 30.10.2017, and *B. Pokol:* The Juristocratic State, Budapest 2017, p. 17-23.

[35] CDL-AD (2011)003rev, Report on the Rule of Law.

[36] Parliamentary Assembly, Resolution 1594 (2007), The principle of the Rule of Law.

[37] Ministers' Deputies, CM (2008)170, The Council of Europe and the Rule of Law – An overview.

to deal with such a depth analysis. The Overview is above all important because it sets the relationship of the rule of law to the other pillars of the CoE: democracy and human rights. It states that the three pillars, which partially overlap each other, have a kind of common set. This common set is first and foremost the equality of the individuals, the non-discrimination, while the principle of fairness is the right of the rule of law and human rights, the expression of opinion and assembly are the common value of democracy and human rights. There are also values that are only one pillar as the right to free movement (Sections 25–26). This relationship expresses the interdependence of the three pillars:

> There can be no democracy without the rule of law and respect for human rights; there can be no rule of law without democracy and respect for human rights, and no respect for human rights without democracy and the rule of law (Section 27).

The report of the Venice Commission on the Rule of Law (Report) was based on this background. Here, the position of the Report regarding the content (substantive meaning) of the rule of law should be mentioned. It states that the rule of law is an essential component of democratic societies; it requires that the decision makers treat everyone equally, respectfully and rationally, respect the law and make possible free access to independent and impartial courts that decide in a fair trial. The rule of law thus understood concerns regarding the relationship between the state and individuals, but – this is a novel formulation compared to the history of the Report – it also concerns the effects of globalization and state deregulation, as well as the private, international and supranational public actors on individuals. Regarding the latter, the validity of the rule of law is also considered to be extended by the Report (Sections 15–16).

The central finding of the Report is the definition of the rule of law derived from *Tom Bingham*:

> Every private or public person and authority within a State must be subordinated to, and should be, as a beneficiary of the law, which is publicly accepted with a view to the future and which is used by the courts in public proceedings[38] (Article 36).

Based on *Bingham's* definition, the Report observes as conceptual components of the rule of law: certainty of law, which includes its perception, clarity and predictability, the assurance of subjective rights based on law (rules) and non-discretionary decisions, equality before law, the lawful, fair and rational exercise of state power, the protection of human rights, the resolution of disputes by fair trial and the respect of states' obligations under international and domestic law.

By the Report the Venice Commission created its strong instrument appropriate to push any member state in the direction conceived by the Commission to be right and correct. The instrumentalisation was completed by a technical questionnaire that made it even more effective, the Rule of Law Checklist[39].

IV. Link between the European Union and the Venice Commission

1. Rule of law in the TEU

The EU and the CoE are different entities with different institutions. However, the concept of rule of law served as a promoter of co-ordinated procedures. The key moment

[38] Original quote, see: *T. Bingham,* The Rule of Law, London 2010, p. 8. The Report also refers to *K. Tuori,* The Rule of Law and the Rechtsstaat, Ratio and Voluntas, Ashgate 2011, and *E. O. Wennerström*, The Rule of Law and the European Union, Uppsala 2007.

[39] CDL-AD (2016)007-e, Rule of Law Checklist.

was the adoption and entering into force of the TEU. The principle of the rule of law, this paradigmatic principle of multi-source and multi-component, has become a normative rule not only in Hungary, but also in other countries, and finally in the European Union. The document of the European Union's constitutional experiment, the Treaty of October 29, 2004, on the establishment of a Constitution for Europe[40], Part I, Article 2, provided for the values of the Union:

> 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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Although the European Constitution has failed in the French and Dutch referendums, many of its elements – as an indispensable reform of the Union – have been taken over by the Treaty of Lisbon in 2007 and, after its entry into force, incorporated into the TEU. The article on the value of the Union has become unchanged as Article 2 of the TEU, mentioned in the introductory chapter and partially analyzed, and has become binding since December 1, 2009. We can say that the rule of law has become a normative concept for the European Union.

Due to the differences in terms of use, it seems appropriate to mention that the different terms (all of them official): e. g. rule of law, Rechtsstaatlichkeit, État de droit (and jogállam in Hungarian) are more than a linguistic feature. The instability of terms opens up space for arbitrary interpretations (now we can generously consider that the European Union is certainly not a state at this moment, but in many languages it is based on the value of Rechtsstaat). The TEU, therefore, stipulates without any conceptualization that one of the basic values is the rule of law or Rechtsstaatlichkeit or État de droit or jogállam. As a result of Article 2, the same thing happened for the Union as it was in Article 2 of the interim Constitution of Hungary: the raising of the principle of rule of law to normative rank opens a gate that would probably never be closed: a tool for the EU bodies that can be used without restrictions.

The first attempt (to use Article 7, which sanctions the violation of the principle of rule of law) had failed. The so-called *Tavares Report* accusing Hungary of human rights violations[41] can in fact be perceived as an applicability test of the rule-of-law whip: it mentions the concept of the rule of law 39 times. However, the application of Article 7 to condemn Hungary for the violation of the principle of rule of law did not seriously arise.

2. The new framework for strengthening the rule of law

There was no need to wait much for the softer (-looking) and therefore easy-to-use tool. The European Commission, at the invitation of the Council and Parliament, developed a tool for the new EU framework for strengthening the rule of law[42] by 2014, which in fact is partly political and partly legal. One of the key features of the "framework" is that it excepts the rule of law from other values of Article 2 and gives priority to its protection whenever "threats to the rule of law" occur which are of systematic nature (point 4.1).

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[40] Published in the Official Journal of the European Union of December 16, 2004 (Series C, No 310), Luxembourg, Office for Official Publications of the European Communities, 2005.

[41] Report of the European Parliament Committee on Civil Liberties, Justice and Home Affairs on the Status of Fundamental Rights adopted by Parliament on June 24, 2013, A7-0229 / 2013: Hungarian Standards and Practices.

[42] Communication from the Commission to the European Parliament and the Council. A new EU framework for strengthening the rule of law, COM (2014)158 final.

This wording undoubtedly demonstrates how easy it is to formulate an accusation of the violation of the uncertain content of the rule of law, yet it is worth taking a look at the examples of offensive situations:

> The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress. The Framework will be activated when national "rule of law safeguards" do not seem capable of effectively addressing those threats.

If there is any doubt about the arbitrary applicability, it is certainly a justification for the referral to the constitutional courts: there is no EU provision requiring such an institution, but if it is a constitutional court in a Member State, it cannot be "threatened" by new legislation either. It is recalled that, due to the primacy of EU law, the constitutions of the Member States do not enjoy a distinct situation on the part of the Union, and consequently, any change in constitutional courts, either by amending the constitution or by adopting a new constitution, can trigger the use of the "framework". The application of the "framework" therefore is in fact a tool of norm-control procedure against the constitution of a Member State.

3. The new framework as link between EU and the Venice Commission

Returning to the European Commission's Communication on the establishment of a "framework" for the rule of law, it contains another surprise:

> The Commission will, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission, and will coordinate its analysis with them in all cases where the matter is also under their consideration and analysis.

In other words, the question of whether a Member State violates the rule of law is not necessarily answered by the European Commission, but it may take over the findings of the CoE constitutional advisory body based on an informal procedure. It should be noted that the Communication also referred to the Venice Commission when it tried to clarify the concept of rule of law. Recognizing that the perception of rule of law may be different "at national level", the case law of the ECJ, of the ECtHR and the "Council documents prepared by the Council of Europe, in particular those of the Venice Commission", define "the substantive meaning of the rule of law".

The definition accepted by the European Commission in the Communication is almost letter by letter similar to that of the Venice Commission. With this non-legislative Communication, the European Commission, a body of the supranational EU that holds some characteristics of a state, has linked its rule-of-law-protection mechanism to the interpretation of a pan-European international organization based on a much wider membership (47 CoE member states[43]), the constitutional advisory body of the CoE, to the soft case-law of the Venice Commission. This solution is surprising (if we remember that the EU is not so hasty in accepting the ECtHR jurisdiction[44]), but it cannot be said to be either casual or antecedent. It is no coincidence, since all the member states of the Union are members of the Council of Europe.

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[43] http://www.coe.int/en/web/portal/47-members-states, 31.10.2017.

[44] *M. Finck*, The Court of Justice of the European Union Strikes Down EU Accession to the European Convention on Human Rights: What Does the Decision Mean?, in: I-CONnect, December 28, 2014, http://www.iconnectblog.com/2014/12/the-court-of-justice-of-the-european-union-strikes-down-eu-accession-to-the-european-convention-on-human-rights-what-does-the-decision-mean/, 14.03.2015.

As a result, we are witnessing the emergence of an unprecedented institutional linkage, which makes applicable the normative formulation of the rule of law paradigm, extracted from fundamental values in a free interpretation against any member state. Member states that are involved in suspected "systemic" threat are thus faced with a multi-faceted defense, in which the "accusers" are co-ordinated. The "systemic" concept, as we recall, was published in the European Commission's "Framework" Communication. It is necessary to emphasize this fact because it allows arbitrary "accusations": it is not necessary that there was a large number of serious individual injuries committed by authorities of a member state, and considered so by national or international courts. It is enough if the soft opinion of the Venice Commission based on its informal inquiry on a political request suggests such a systematic threat.

The free interpretation opens space to bypass the declaration of Section 2 Article 4 of the TEU stating that "The Union shall respect the equality of Member States before the Treaties", hence the Venice Commission has no limitation. Just contrary, Member States are vulnerable due to formal differentiation between "old" and "new" democracies. For example, one of the examples of constitutional rules pertaining to the judiciary is firmly affirming that "old democracies" may have rules that are "unacceptable" for "new democracies":

> In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges[45].

V. Cooperation between Hungary and the Venice Commission after 2010

1. New opinions and the monitoring of Hungary

The interest of the Venice Commission on Hungarian constitutionalism has spectacularly increased after 2010. The only opinion[46] of the first two decades of its activity from 2011 was followed by more than a dozen. The first, Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary[47] in 2011 was adopted on the request of the Deputy Prime-Minister and Minister of Public Administration and Justice of Hungary. The three questions concerned the incorporation of the Charter of Fundamental Rights into the new Basic Law, the preliminary review process of the Constitutional Court and the actio popularis complaints to the Constitutional Court. The answers given by the Venice Commission were taken into account in the new constitutional text.

The next opinions were requested mostly by the Parliamentary Assembly (or its Monitoring Committee), some of them by the Secretary General of CoE, and only two of them by the Minister of Foreign Affairs of Hungary. Opinions on the new Constitution of Hungary, on the Act on the Elections of Members of Parliament, on the Act on Legal Status and Remuneration of Judges and the Act on the Organisation and Administration of Courts of Hungary, on the right to freedom of conscience and religion and the legal

[45] CDL-PI (2015)001, Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges, section 2.2.3.1., based on CDL-AD (2007)028, Report on Judicial Appointments by the Venice Commission, §§ 2–3, 59 and 12–17.

[46] CDL (1995)021 Opinion on the regulatory concept of the Constitution of the Republic of Hungary.

[47] CDL-AD (2011)001.

status of churches, denominations and religious communities, on the Constitutional Court, on the Prosecution Service, on the rights of nationalities, on informational self-determination and freedom of information, on the Fourth Amendment to the Basic Law[48] were examining almost any of the important aspects of the Basic law and the Hungarian constitutional order. The opinions did not meet exultation from the part of Hungarian authorities, but they were not rejected. More or less the opinions were accepted by the Hungarian Parliament, and the results are reflected by the text of the Basic Law or other acts[49].

One of the opinions should be highlighted. As an answer from the constituent power (the Parliament) to the Constitutional Court ruling on Transitional Rules of the Basic Law in March 2013 the Fourth Amendment was adopted. The Secretary General of the Council of Europe requested an opinion of the Venice Commission on the compatibility of the Fourth Amendment with CoE standards. The opinion was extremely critical regarding the rules on responsibility of the former contributors of the communist past, recognition of churches, freedom of speech, powers of the President of the National Judicial Office. The most detailed and critical conclusion concerned the new rule introduced by the Fourth Amendment that prohibited the Constitutional Court to base new decisions on its case law earlier than the Basic Law and the existing limitation of its powers regarding budgetary questions. The Venice Commission found that the prohibition seriously affects the role of the Constitutional Court of Hungary[50].

The majority of suggestions of the Opinion were accepted by Hungary, thus the Fifth Amendment of September 2013 removed many of the changes established by the Fourth Amendment. This will of co-operation was recognized by the Parliamentary Assembly which decided in 2015 to finish the monitoring procedure launched in 2013:

> […] the Assembly welcomes the measures taken by the Hungarian authorities and their ongoing co-operation with the Secretary General of the Council of Europe, and encourages them to continue the open and constructive dialogue with the different Council of Europe interlocutors and other international organisations. It therefore resolves to ask the Hungarian authorities to endeavour to solve the outstanding issues, but that special examination of these matters by the Assembly should now be concluded[51].

After 2015, the opinions of the Venice Commission concerned special new regulations (on media services[52], on funding of NGOs[53], on foreign universities[54]). Some of the suggestions were accepted by the Hungarian authorities, others were taken over and carried on by the European Commission. Even if this situation confirms the mentioned institutional linkage mentioned above, the cases are pending, thus they cannot be examined yet.

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48 CDL-AD (2011)016, CDL-AD(2012)012, CDL-AD(2012)001, CDL-AD(2012)020, CDL-AD (2012)004, CDL-AD (2012)009, CDL-AD (2012)008, CDL-AD (2012)011, CDL-AD (20112)023, CDL-AD (2013)012.

49 The process is described in details in *Trócsányi*, fn. 25.

50 CDL-AD (2013)012, para 144.

51 Resolution 2064 (2015) – Situation in Hungary following the adoption of Assembly Resolution 1941 (2013), Section 3.

52 CDL-AD (2015)015.

53 CDL-AD (2017)015.

54 CDL-AD (2017)022.

2. Unsolved cases and their overrun by the Constitutional Court

One of the unsolved matters was concerning the limitation of the powers of the Constitutional Court and the prohibition of automatic reference to its earlier case law. In practice, neither of the two limitations could deprive the Court in its activity. As regards the budgetary limitation, Section 4 of Article 37 of the Basic Law has the following formula:

> As long as the state debt exceeds half of the gross domestic product, the Constitutional Court – in its authority defined in Article 24 paragraph (2) items b)–e) – shall review the constitutional conformity of the Act on the central budget, its implementation, the statutes on central taxes, stamp and customs duties, contributions, as well as statutes concerning uniform requirement for local taxes only in connection with the right to life and human dignity, the right to protection of personal data, the right to freedom of thought, conscience and religion, or the rights concerning Hungarian citizenship, and shall only annul them in the cases above. The Constitutional Court shall annul the statutes in these domains without any restrictions if the rules of procedure in the Basic Law concerning the adoption and promulgation of the statutes were not realised.

The Court has been given interpretation to the limitation in a narrow way (restricted it strictly on acts mentioned in the text), while the exceptions (the fundamental rights enlisted in the text) are interpreted in an extended way. Consequently, in 2013, it annulled the acts on different rules of pensions based on the violation of human dignity[55]. In another case, the Court ruled that the limitation concerns only the acts (as norms), but not their interpretation by ordinary courts. Thus, the limitation did not stop the Court to supervise and annul a uniformity decision of the Kúria (the supreme ordinary court in Hungary) concerning the interpretation of a tax law[56].

As regards reference to the earlier case law[57], the Constitutional Court was aware that interpretations of a former text cannot be automatically applied to the new texts of the Basic Law, but in one of its decisions in 2013 it found a formula that practically gave solution for their application:

> The Constitutional Court in the case of constitutional issues to be examined in recent cases may use the arguments, principles of law and constitutionality of the earlier case law if the content of a given regulation of the Basic Law is in content consonant with the Constitution, if its contextuality with the Basic Law as a whole and if the rules of interpretation of the Basic Law does not exclude the application, and if it is necessary to include them in the reasoning of the decision to be taken[58].

Thus the earlier decisions were and are taken into account daily, even if – as the new case law is increasing – such an approach is becoming less necessary.

VI. Conclusion: deeper causes of disputes and a new potential controversy

1. Coincidence of changes in interpretation of rule of law

If the developments of the EU, the Venice Commission and the Hungarian constitutionalism are examined in their projection to each other, it can be seen immediately that the new Basic Law was prepared and adopted in a period of time (2010–2011) when the concept of rule of law and its international (or supranational) context got into the focus

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55 Decision 23/2013. (IX. 25.) AB.

56 Decision 2/2016. (II. 8.) AB.

57 *T. Drinóczi*, Temporal effects of decisions of the Hungarian Constitutional Court, in P. Popelier/S. Verstraelen/D. Vanheule/B. Vanlerberghe (eds.), The Effects of Judicial Decisions in Time, Mortsel 2014, p. 87–106.

58 Decision 13/2013. (VI.17) AB, Justification [30] – [32].

of interest. The TEU added the rule of law to the fundamental values of the EU – firstly in the history of the Union. Due to this legal phenomenon, an inevitable need has arisen for the interpretation of rule of law as a normative principle – an interpretation that could serve as a universal principle in the co-operation among the EU and its member states. One of the answers to this need for interpretation was given by the Venice Commission, the advisory body of the CoE in constitutional matters, which had a two-decade long expertise in the endeavour of harmonising different legislations. The Report on Rule of Law perfectly filled the temporary hermeneutical vacuity around Article 2 of the TEU.

Hungary's Basic Law was dropped into this international euphoria of constitutional interpretation. The moment was neither the time for constitutional specialities nor for national identities. There are some additional circumstances that have made the situation of Hungary even more difficult.

– After the transition practically all of the affected states of Central Europe adopted their new constitutions. Their content with all of their regulations based on national identities were accepted without sharp international debates. Neither the EU (European Communities then) nor the Venice Commission (which in its first years of activity had focused on mutual understanding of legal solutions) deemed it necessary to slow the process of constitutional law making. Hungary missed this opportunity.

– As it was pointed out above, the interim Constitution was prepared for a definite, and what more, a very short time: until the first free elections (after 40 years of suppression) in 1990. Consequently, it missed any local (national, historical, cultural) reference. It was a mere formal instrument of government with temporary warranty, even if it was in force for a longer time. Due to this aspect in 2010–2011, it would have been more coherent with the new international style of interpretation of the concept of rule of law.

– The case law of the Hungarian Constitutional Court (with the interim Constitution as reference) had strengthened this effect. Its conception of interpretation of rule of law as formal and processual legality (and not a substantive notion) had fostered the elimination of every reminiscence of the former totalitarian practice; thus, it was helpful in the first years of the transition. But what was useful then, engraved the acceptance of the new Basic Law.

– The adoption of the Basic Law trailed the drafting and adoption of new cardinal laws in a very short time – practically less than a year. On the one hand, nobody could have had the dream that such an urgent legislation would avoid serious mistakes. On the other hand, there was no time to communicate the new regulations to the domestic and international academic world in details. Due to this hurry and due to the "loneliness" of the Hungarian language the critical interpretations were more articulated than normally required when a new constitution is adopted.

These circumstances made the dialogue and co-operation among Hungary and the international community difficult, but difficulty did not mean impossibility. After shorter or longer struggles and disputes, the Hungarian Parliament accepted the inevitable changes and amended the Basic Law or other acts in a direction expected by the EU or the Venice Commission. This process was recognised by the Parliamentary Assembly, and it is reflected in the co-operation with the EU institutions. Some questions remained under debate, and recent laws launched new debates, but there are adequate fora to keep the differences of positions between legal boundaries, even if the political echoes are sharp-edged.

2. New challenges: universality of rule of law and constitutional identities

However, the dispute between universalist and local (or sovereignist) approaches of constitutions or of the principle of rule of law did not come to an end. The experience of

the last years shows that international co-operation in protection of the universal concept of rule of law is more and more emphasised, and the international institutions, constitutional and supranational courts have strong positions even against legislations of the member states. These effects were facilitated by the TEU, the Venice Commission and by the linkage between the European Commission and the Venice Commission.

But in the same time constitutional specialities were not left unreflected. The ECJ in Internationale Handelsgesellschaft[59] used the new term of "constitutional traditions common to the member states" with a focus on the common and homogenous protection of human rights. As the danger of overcoming the constitutional judicature of the member states was quite clear and present, the answer came without delay. The German Bundesverfassungsgericht reacted in 1974 with "Solange I" based on the Grundgesetz, namely on its eternity clauses stated that community law, consequently the common constitutional traditions protected by the ECJ does not have priority over the protection granted by the Grundgesetz and protected by the German courts. In this way, the "Solange I" decision tried to go against the international common traditions by highlighting the role of national constitutions. The quiet battle was going on for decades. The "Solange II", "Solange III" decisions, and many other cases, were the nodes of this tug of war. Finally, The Treaty on European Union tried to give a peaceful equilibrium.

Articles 2 and 6 of the TEU identify common values of the member states, but at the same time Article 4 rules that the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. This means that common traditions as international or supranational values will be protected later on by the ECJ which perhaps will maintain the primacy of the EU law against national constitutions. But on the other hand, just the TEU gives a strong background for the standpoint that the common European constitutional heritage must not be opposed to national constitutional identity and vice versa. The two sets of values should be equilibrated.

This means that constitutional identity of the different nations cannot be dissolved in an artificially constructed common formula. The common values contain what is common, and the national values cover what is not common. But values that are not common are also values, and these values also need legal protection. If constitutional identity disappears, the common part also loses its importance; it will be reduced to a mere formal order. From an institutional aspect this means that if the common European heritage is developed and protected by international and supranational courts, the ECJ and the ECtHR, the equilibrium needs a similar court protection. This protection is vested in the constitutional courts of the member states of the EU. Thus, the constitutional courts may have different tasks, but their primary mission is the protection of their own constitutional identity. This is not only a national but – if we accept the regulation of the TEU – also a European mission.

The path was shown by the German Bundesverfassungsgericht in its "Solange" decisions, and many of the constitutional courts made their contribution to fulfil this mission. The Hungarian Constitutional Court treaded on this path by its decision 22/2016. (XII. 5.) AB. The Court stated that it "interprets the concept of constitutional identity as Hungary's self-identity".

> The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today […] These are, among others, the achievements of our historical constitution, the Fundamental Law and thus the whole Hungarian legal system are based upon. […] The Constitutional

[59] Case 11-70.

> Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State"[60].

It is beyond any doubt that there will be long debates regarding the co-interpretation of the universal principle of the rule of law and national constitutional identities. Among the EU institutions and member states there is a common ground of interpretation, the TEU. Among member states and the Venice Commission the common ground is, however, less clear.

[60] http://public.mkab.hu/dev/dontesek.nsf/0/1361AFA3CEA26B84C1257F10005DD958?OpenDocument, 4.11.2017; *Tímea Drinóczi*, Hungarian Constitutional Court: The Limits of EU Law in the Hungarian Legal System, Vienna Journal On International Constitutional Law 1, 1|2017, pp. 139–151.