

Rights Revolution and Counter-revolution:

Democratic Backsliding and Human Rights in Hungary

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The paper uses Hannah Arendt’s concept of revolution to discuss democratic backsliding and human rights in Hungary since the democratic transition in 1989. The main focus of the paper is, how the democratic backsliding after 2010 in Hungary effected the state of human rights in the country, which is a Member State of the European Union since 2004. To understand the change the introduction describes the democratic transition in 1989-1990, and its achievements in the comprehensive constitutional amendment of 1989, as a revolution in the sense of Arendt’s seminal work ‘On Revolution’, and her recently published essay ‘The Freedom to be Free.’ Part one deals with the constitutional and statutory regulation of human right protection after this ‘rule of law revolution.’ Part two discusses the ‘constitutional counter-revolution’¹ after the 2010 parliamentary election, which resulted in a new ‘illiberal’ constitution, called Fundamental Law and several statutes dismantling the guarantees of human rights. In this part, special attention is paid to the decreased possibilities of state institutions, such as the Constitutional Court, the ordinary judiciary and ombudsmen, as well as civil society organizations to effectively protect fundamental rights. The fourth part assesses the efforts of European institutions to force the Hungarian government to comply

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¹ In chapter 3 about Substantive Rapture with Formal Continuity: Revolutionizing Hungary’s Constitution Through Amendments of their forthcoming book on Constitutional Revolution Gary Jacobsohn and Yaniv Roznai label both the 1989 and the 2011 Hungarian constitutions as revolutionary.

with the human rights standards laid down in the European Convention of Human Rights and in the Treaty of the European Union. The paper concludes that due to the democratic backsliding the constitutional guarantees of human rights ceased to exist in Hungary, and neither internal nor external challenges could prevent this development towards a new authoritarian regime.

I. Introduction: Revolutionary and Counter-Revolutionary Constitution-Making

Revolutionary constitution-making – either in the form of a new document, or as an amendment to the old one - establishes a wholly new system of government, as opposed to a non-revolutionary process, which merely harmonizes the existing order with prevailing power constellations². This distinction goes back to Hannah Arendt's classical work *On Revolution*, where 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."³ 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".⁴ In a recently discovered and published writing, Arendt describes 'the freedom to be free' from misery as a precondition of revolution. Here she quotes Sain-Just: "if you wish to found a republic, you first must pull the people out of a condition of misery, which corrupts them."⁵

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. Ed., Hart Publishing, 2010, 169–204. Möller distinguishes 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.

³ H. Arendt, *On Revolution*, The Viking Press, 1963. 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 (*Ibid*, 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 (*Ibid*, 24).

⁴ See Arendt, *ibid*, 29.

⁵ H. Arendt, 'What Freedom and Revolution Really Means, Thoughts on Poverty, Misery, and the Great Revolutions of History,' *The New England Review*, 2017. See the German translation of this work in a book format H. ARENDT, *Die Freiheit, frei zu sein*, DTV, 2018. 30-31.

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.⁶ 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 *constituent power*” which designates the people as the 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 U.S. 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, ultimately, this promise went 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

⁶ 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, 2009, 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, d) post-war constitutions of both Germany and Italy. See D. Oliver and C. Fusaro, ‘*Changing Constitutions: Comparative Analysis*’, in Dawn Oliver and Carlo Fusaro (Eds.), *How Constitutions Change - A Comparative Study*, Hart Publishing, pp. 381-383.

revision, but as a ‘constitutional revolution, or new founding’.⁷ However, this procedure is called “chaste constitution-making: by some academics.”⁸

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 in a political sense non-revolutionary need not even necessarily 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 1992-1995 in Israel, and indeed, the UK'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.⁹

Taking into account the revolutionary/non-revolutionary dichotomy, we can conclude that the constitution-making in Hungary in 1989 can be substantively characterized as a revolutionary act, since it produced a new political order, even though neither the Round Table, which drafted the comprehensive amendment to the old constitution, nor the communist parliament, which rubber stamped the draft can be considered as a democratic constituent power. On the other hand, even though the 2011 Fundamental Law introduced a new form of government, taking into account Hannah Arendt's definition of revolution, we cannot consider this ‘illiberal’ system as revolutionary, because this new constitution's aim was not 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. procedurally, the 2011 Fundamental Law wasn't a revolutionary act either, since it was enacted on the basis of the constitution-making rules of the 1949/1989 constitution. Because

⁷ 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, 1995, p. 285.

⁸ See A. Bozóki, 'Szemérmes alkotmányozás. Rendszerváltás és jogállami forradalom 1989-ben' ('Chaste Constitution-Making. System Change and Rule of Law Revolution'), in A. Jakab András & A. Körösnéyi (Eds.), *Alkotmányozás Magyarországon és máshol (Constitution-Making in Hungary and Elsewhere)*, MTA TKPTI, Új Mandátum Kiadó, 2012, pp. 202–239.

⁹ See R. Hirschl, *Towards Juristocracy*, Harvard University Press, 2004, pp. 7-10.

of this intention of the government to change the liberal democratic political order, I describe this constitution-making as counter-revolutionary.

I. Human Rights Protection After the 'Rule of Law Revolution'

The constitutional regulation of fundamental rights and their protection in the 1989 Constitution had a distinctive characteristic that obviously could be explained by the legacy of the forty-year long totalitarian regime: it was not only based on the consensus among the coalition parties, but in some cases required the involvement of the opposition, and it significantly strengthens the checks on the governmental powers and guaranteed the fundamental rights. The constitution named those rights, and their institutional guarantees, such as the status of the Constitutional Court, ordinary courts, ombudspersons, the statutory regulation and amendment of which required the two-third majority of MPs, hence the support of at least part of the opposition¹⁰. On the top of the wide range of constitutionally entrenched rights the newly established Constitutional Court had an exceptionally wide jurisdiction even in international comparison. Retrospective norm control could be initiated by anyone, even if they are not affected by the regulation in question. This unique method of the Hungarian Constitutional Court has made the citizens participants in the process of the transformation of the old legal system. Anyone could call the attention of the Court to a potentially unconstitutional law and the Court must have examined any such law called to their attention. Such "popular actions" have led to several decisions by the Constitutional Court influencing decisively the regulation of fundamental human rights. It was in the wake of such civic motions that the death penalty has been abolished.

Additional to this the Constitutional Court developed an activist practice of judicial review of parliamentary legislation, especially in the first nine-year cycle of its jurisprudence, lead by President László Sólyom. In introducing the notion of 'invisible constitution,' Sólyom wrote the following in his concurring opinion to the decision on the death penalty: "The Constitutional Court must continue the work of laying down the theoretical foundations of the

¹⁰ In their original wording of the 1989 constitutional text 'acts with the force of the Constitution' practically called for a two-third majority vote in all questions concerning the structure of the government and fundamental rights. The 'Pact' in 1990 between the biggest governing and opposition party for the sake of governability radically reduced the number of the qualified acts. In exchange of this the biggest opposition party received the right to nominate a 'moderately weak' President of the Republic.

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.”¹¹

Human dignity was also a concept mentioned very vaguely in the text of the transitional constitution, and broadly interpreted by the Constitutional Court. As Catherine Dupré’s book¹² on the import of the concept of human dignity shows, the judges first carefully chose the German as a suitable model, and then instrumentalised it through a very activist interpretation of the Hungarian constitution. On that basis, the Court developed its own, autonomous concept of human dignity. The first sign of this active instrumentalisation was the Decision 8/1990. This decision judged unconstitutional the pre-transition regulation of the Labour Code, which empowered 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, 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 in defense 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 their 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.

¹¹ Decision 23/1990. (X. 31.) AB

¹² C. Dupré, *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity*, Hart Publishing, 2003.

Using the concept of legal security as part of rule of law, the Constitutional Court interdicted the implementation of the first democratic government's 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.*"¹³

III. The State of Fundamental Rights After the 'Illiberal Counter-Revolution'

In the 2010 parliamentary election, the FIDESZ party, with its tiny Christian democratic coalition partner received more than 50 % of the actual votes, and due to the disproportional election system, received two-thirds of the seats in the 2010 parliamentary elections. With this overwhelming majority, they were able to enact a new constitution, the Fundamental Law of 2011 without the votes of the weak opposition parties.

The new constitutional order of the Fundamental Law and the cardinal laws perfectly fulfil PM Orbán's plan of an illiberal state¹⁴: they do not recognize limitation of the government's power, and do not guarantee fundamental rights.

¹³ Decision 11/1992. (III. 5.) AB.

¹⁴ In an interview on Hungarian public radio on July 5, 2013 Prime Minister Viktor Orbán responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim to produce 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, July 5, 2013. Kossuth Rádió. <http://www.kormany.hu/hu/miniszterelnokseg/miniszterelnok/beszedek-publikaciok-interjuk/a-tavares-jelentes-egy-baloldali-akcio>

1. Cardinal Laws and Amendments to the Fundamental Law

Before 1 January 2012, when the new constitution became law, the Hungarian Parliament has 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 went 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.

The constitutional reforms have seriously undermined the independence of the ordinary judiciary through 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,¹⁵ 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 on all new judicial appointments, the decision of the head of the National Judicial Office alone is necessary in order 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 went into effect. This change forced somewhere between 274 judges into early retirement, Those judges included

¹⁵ 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.

six of the 20 court presidents at the county level, four of the five 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.¹⁶ 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.¹⁷ Despite these decisions the fired judges were not reinstated¹⁸.

Many other cardinal laws were passed in the last two weeks before the Fundamental Law entered into force 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-third majority in the end of 2011 - the power to designate legally recognized churches is vested in the Parliament itself. The law has listed fourteen 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 (like tax exemptions and the ability to operate state-subsidized religious schools). As a result, only eighteen 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. Non-traditional and non-mainstream religious communities – which had not faced legal obstacles between 1989 and 2011 – are now facing increasing hardships and discrimination as a result.

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

¹⁶ Decision 33/2012 (VII.17) AB

¹⁷ ECJ, 6 November 2012, Case C—286/12, *Commission v. Hungary*.C-286/12.

¹⁸ See the details of the case in G. Halmai, 'The Early Retirement of the Hungarian Judges', in *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (eds., Fernanda and Davis), Cambridge University Press, 2017.

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”.

In 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 two 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.

2. The Fourth and the Fifth Amendments

On 11 March 2013, the Hungarian Parliament added the Fourth Amendment¹⁹ 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 US 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 the previous year in order to comply with European law are themselves now unconstitutional.

¹⁹ See the ‘official’ English text of the amendment provided by the government here: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF%282013%29014-e>

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 2013²⁰ 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 2011²¹, and then reinserted into the Transitional Provisions one 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 constitution by the Fourth Amendment, and this time it was insulated from Constitutional Court review by the section of the 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 seven of the 15 judges with the votes of their own parliamentary bloc, these judges were still not in a reliable majority within the Court.²² 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. Even though the Constitutional Court argued that the registration of churches by the Parliament does not

²⁰ Decision 6/2013. (III. 1.) *AB*

²¹ Decision 164/2011. (XII. 20.) *AB*

²² 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, seven 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.

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.²³ The Venice Commission had criticized the power of the president of the NJO to move cases²⁴ 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.

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.”²⁵ 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.²⁶ 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.

²³ Decision 166/2011 (XII. 20.) AB

²⁴ 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.

²⁵ Fourth Amendment, Article 8.

²⁶ Decision 38/2012. (XI. 14.) AB

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.²⁷ 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 overruled yet another Constitutional Court decision.

Under the old Constitutional Court jurisprudence, group libel laws were found to be an unconstitutional restriction on free speech.²⁸ The Fourth Amendment entrenched 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 offenses “against the dignity of the Hungarian nation.” Since the Fourth Amendment annulled 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 it is a jarring reversal of something that had been taken for granted in Hungarian constitutional law.

As part of the Fourth Amendment to the Fundamental Law, a new Article U has been adopted, which supplements detailed provisions on the country’s communist past and statute of limitations in the body text of the constitution. This new article, passed after 23 years of solid democracy and a working system of the rule of law, revisits the settlements made during the immediate transition from communist dictatorship to democracy by reopening possible cases against former communist officials. While the law could possibly serve the aim of accountability, in the only case opened so far (the Biszku case)²⁹, it in fact represents victors’

²⁷ Decision 43/2012. (XII. 20.) AB

²⁸ Decision 96/2008. (VII. 3.) AB

²⁹ Béla Biszku, who had played a key role as Minister of Interior between 1957 and 1961 in the reprisals against the participants of the 1956 revolution was charged with crimes, which were subject to the statute of limitations. Therefore, the Parliament enacted a law, called in the media “Lex Biszku”, which translated the definition of crimes against humanity of the Nuremberg Statute into Hungarian and explicitly authorized the Hungarian courts to prosecute them, without defining the contextual elements of crimes against humanity and also criminalizing the violation of common Article 3 of the Geneva Conventions in contravention to the nullum crimen principle. Moreover, the law introduced the category of “communist crimes” and declared that the commission or aiding and abetting of serious crimes such as voluntary manslaughter, assault, torture, unlawful detention and coercive interrogation is not subject to a statute of limitations when committed on behalf, with the consent of, or in the interest of the party state. This provision clearly replicates the one that was found

justice, by weakening the ruling party Fidesz's political rival, the Socialist Party (the successor of the Communist Party).

Article U(1) states that the pre-1989 Communist Party (the Hungarian Socialist Workers' Party) and its satellite organizations that supported the communist ideology were "criminal organizations" whose leaders carry a liability that is "without a statute of limitations." In sections 7 and 8, however, that broad statement is contradicted by provisions that define a mechanism for the interruption and tolling of the statute of limitations for communist-period crimes that had not been prosecuted.

Furthermore, the Fundamental Law includes a very broad and general liability for a number of past acts, including destroying post-WWII Hungarian democracy with the assistance of Soviet military power; the unlawful persecution, internment, and execution of political opponents; the defeat of the 1956 October Revolution; destroying the legal order and private property; creating national debt; "devastating the value of European civilization"; and all criminal acts that were committed with political animus and had not been prosecuted by the criminal justice system for purely political motives.

Article U(2) and U(3) call for the remembrance of the communist past and create a new national committee to document national memory in this regard. New Article U(4) provides that former communist leaders are public persons in respect to their past political actions and as such must tolerate public scrutiny and criticism, except for deliberate lies and untrue statements, as well as disclosure of personal data linked to their functions and actions. New Article U(5) provides grounds for new legislation that reduces the pensions and other benefits of specific leaders of the communist dictatorship. This provision appears to contradict Constitutional Court decision 43/1995, which held that people could not be denied pension payments after they had paid, as they were required to do, into the state pension scheme. But

unconstitutional by the Constitutional Court in 1992. Based on the new law Béla Biszku was the only person convicted for being a member of the interim executive committee of the communist party which set up a special armed force in order to "maintain order" and act with force against civilians if need be. The court acquitted the defendant regarding the most serious charge, and found him guilty only of complicity and two unrelated petty crimes: abuse of ammunition and the denial of the crimes of the communist regime. For these minor crimes, he was sentenced for two years imprisonment suspended for three years. The verdict was still not final, because the prosecution appealed for a heavier judgment, while the defendant asked for total acquittal, but after the verdict was made public the defendant died.

that decision, together with all others made prior to the coming into force of the Fundamental Law, has been annulled by the Fourth Amendment.

Article U(6) through (8) relate to the tolling and interruption of the statute of limitations for specific serious crimes that Article U(1) seems to say are not time barred. There is as of yet no law that defines which crimes are serious enough to justify removal of all time limitations on prosecutions and which are subject to the newly reset clock for prosecutions. These provisions contradict the Constitutional Court's declaration in its decision 11/1992 that this sort of extension of the statute of limitations is unconstitutional. Yet, Article U(9) bars compensating victims of the communist period, by ruling out passage of any new laws that might provide compensation to individuals for harms caused to them during the period that will be reexamined through cases. To reverse course after 23 years puts those who may be prosecuted long after the fact at a very distinct disadvantage. More than two decades is a very long period of time after which to question the legal framework of the statute of limitations for the types of criminal acts in question. Such provisions may not run afoul of the time-honored doctrine of *nullum crimen sine lege*, but they may nonetheless constitute violations of rights to due process of law.

Due to 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 left in place provisions that undermine the rule of law and weaken human rights protection. The Hungarian Parliament, with a majority of its members from the governing party, adopted the Fifth Amendment on 16 September 2013.³⁰ Hungary's reasoning stated 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 –

³⁰ 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: <http://www.hrw.org/news/2013/09/17/hungary-constitutional-change-falls-short>, and the joint opinion of three Hungarian NGOs: <http://helsinki.hu/otodik-alaptoervenymodositas-nem-akarsnak-nyoges-a-vege>

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 emphasized 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 did 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 added 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 5 years.
- d) The amendment created a chance for the merger of the central bank (MNB) and the financial watchdog institution (PSZÁF).
- e) Although the amendment elevated some provisions of a self-governing supervisory body, the National Judicial Council, to the level of the constitution, and slightly strengthened the Council’s powers, it still left 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 was 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.

3. The Sixth and the Seventh Amendments

1. In June 2016, as part of the Hungarian government’s anti-migration policy the National Assembly representatives of the Fidesz-KDNP governing alliance and the radical-nationalist opposition party Jobbik approved the *Sixth Amendment* to the Fundamental Law. This

amendment authorizes the National Assembly to declare, at the initiative of the government, a “terrorism state of emergency” (terrorveszélyhelyzet) in the event of a terrorist attack or a “significant and direct danger of a terrorist attack” (terrortámadás jelentős és közvetlen veszélye). In March 2017, the Hungarian Parliament passed an amendment to the Asylum Act that forced all asylum seekers into guarded detention camps. While their cases are being decided, asylum seekers, including women and children over the age of 14, will be herded into shipping containers surrounded by a high razor-fence on the Hungarian side of the border³¹.

With these legislative measures adopted, the government started a campaign against the EU’s relocation plan. The first step was a referendum initiated by the government. On 2 October 2016, Hungarian voters went to the polls to answer one referendum question: “Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?”. Although 92 % of those who casted votes and 98 of all the valid votes agreed with the government, answering ‘no’ (6 % were spoiled ballots), the referendum was invalid because the turnout was only around 40 percent, instead of the required 50 percent.

Despite the fact that at the time of the referendum the idea of a constitutional amendment was not on the table, arguing with the 3.3 million Hungarians who voted in favor of the anti-EU referendum, Prime Minister Orbán introduced the Seventh Amendment to defend Hungarian constitutional identity to politically legitimise non-compliance with EU law in this area. The draft amendment touched upon the National Avowal, the Europe clause and the provision on the interpretation of the Fundamental law in the Foundation part, and the provision on prohibition of expulsion of Hungarian citizens and the collective expulsion of foreigners in the part on Freedoms and Responsibilities.³²

³¹ On March 14 2017 the European Court of Human Rights found that the detention of two Bangladeshi asylum-seekers for more than three weeks in a guarded compound without any formal, reasoned decision and without appropriate judicial review had amounted to a de facto deprivation of their liberty (Article 5 of the Convention) and right to effective remedy (Article 13). The Court also found a violation of Article 3 on account of the applicants’ expulsion to Serbia insofar as they had not had the benefit of effective guarantees to protect them from exposure to a real risk of being subjected to inhuman and degrading treatment (Judgment of 14 March, 2017 in the case of Ilias and Ahmed v. Hungary, Application no. 47287/15). We should take into account that this unlawful detention of the applicants in the transit zone was based on less restrictive rules enacted in 2015.

³² The National Avowal is the preamble of the 2011 Fundamental Law of Hungary, the Foundation part contains the main principles, while the Rights and Responsibilities part contains the fundamental rights and obligations.

The proposal was to add a new sentence to the National Avowal, following the sentence, “We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary’s statehood and the unity of the nation”.

The new sentence would read: “We hold that the defence of our constitutional self-identity, which is rooted in our historical constitution, is the fundamental responsibility of the state.”

Paragraph 2 of the Europe clause (Article E) of the Fundamental Law would be amended to read: “Hungary, as a Member State of the European Union and in accordance with the international treaty, will act sufficiently in accordance with the rights and responsibilities granted by the founding treaty, in conjunction with powers granted to it under the Fundamental Law together with other Member States and European Union institutions. *The powers referred to in this paragraph must be in harmony with the fundamental rights and freedoms established in the Fundamental Law and must not place restrictions on the Hungarian territory, its population, the state, or its inalienable rights.*” (new sentence in italics)

A new paragraph 4 would be added to Article R: “(4) It is the responsibility of every state institution to defend Hungary’s constitutional identity.”

The following new Paragraph 1 was planned to be added to Article XIV: “(1) No foreign population can be settled into Hungary. Foreign citizens, not including the citizens of countries in the European Economic Area, in accordance with the procedures established by the National Assembly for Hungarian territory, may have their documentation individually evaluated by Hungarian authorities”.

All 131 MPs of the Fidesz-KDNP governing coalition voted in favour of the proposed amendment, while all 69 opposition MPs either did not vote (66 representatives) or voted against the amendment (3 representatives). The proposed amendment thus fell two votes short of the two-thirds majority required to approve amendments to the Fundamental Law.

Although Jobbik in principle supported the proposed Seventh Amendment, the party’s MPs did not participate in the vote because the government had failed to satisfy Jobbik’s demand that the Hungarian Investment Immigration Program, which grants permanent

residence in Hungary to citizens of foreign countries who purchase 300,000 euros in government ‘residency bonds’, be repealed.³³

After the failed constitutional amendment, the Constitutional Court, loyal to the government, came to the rescue of Orbán’s constitutional identity defence of its policies on migration. The Court carved out an abandoned³⁴ petition of the also loyal Commissioner for Fundamental Rights, filed a year earlier, before the referendum was initiated. In his motion, the Commissioner asked the Court to deliver an abstract interpretation of the Fundamental Law in connection with the Council Decision 2015/1601 of 22 September 2015³⁵.

2. After the April, 2018 parliamentary elections, when Fidesz regained its 2/3 majority, on 20 June the government finally enacted the *Seventh Amendment*, this time with the votes of Jobbik. Besides the failed provisions on constitutional identity the Amendment contains other topics as well from freedom of assembly though establishing special administrative courts till the entrenchment of ‘Christian culture’ to be protected by state authorities.

2. 1. One of the issues of the amendment is the continued struggle against immigration by forbidding settlement of foreigners in the country en masse: “No alien population shall be settled in Hungary”. (New Article XIV Section (1) of the Fundamental Law). For this reason, the ‘Stop Soros’ legislative package, named after Hungarian-American philanthropist George Soros enacted together with the amendment criminalizes NGOs and activists aiding ‘illegal migrants in any way.’³⁶ According to Justice Minister László Trócsányi migration threatens

³³ During the vote on the amendment, Jobbik MPs displayed a sign referring to the program reading “He [or she] Is a Traitor Who Lets in Terrorists for Money!”

³⁴ The Constitutional Court has no deadline to decide on petitions.

³⁵ The petition was based on Section 38 para. (1) of the Act CLI of 2011 on the Constitutional Court, which reads: “On the petition of Parliament or its standing committee, the President of the Republic, the Government, or the Commissioner of the Fundamental Rights, the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a concrete constitutional issue, provided that the interpretation can be directly deduced from the Fundamental Law”. See a more detailed analysis of the decision: G. Halmai, ‘Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law’, 43 *Review of Central and East European Law*, 2018, 23-42.

³⁶ In its Opinion, adopted on 22-23 June, two days after the enactment of the ‘Stop Soros’ bill, but leaked to the BBC prior to the vote in the Hungarian Parliament the Council of Europe’s Venice Commission recommended to repeal the provision of the law on illegal migration, because it „criminalizes organizational activities which are not directly related to the materialization of the illegal migration.” CDL-AD(2018)013-e Hungary - Joint Opinion on the Provisions of the so-called “Stop Soros” draft Legislative Package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018).

the 'self-identity' of Hungarians the Seventh Amendment supplemented the preamble of the constitution, called National Avowal with the following text: "We hold that it is a fundamental obligation of the state to protect our self-identity rooted in our historical constitution."³⁷ Also Article R was supplemented with the following Section (4): "All bodies of the State shall protect the constitutional identity of Hungary." In order to make any further European Union joint effort, similar to the relocation plan of the Council to solve the migration constitutionally questionable Section (2) of Article E (the so-called EU clause) was replaced with the following wording: the joint exercise of certain powers with the EU "shall not limit Hungary's inalienable right of disposal related to its territorial integrity, population, form of government and governmental organisation."

2. 2. The original provision of Article R Section (3) already prescribed that "The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievement of our historical constitution." Due to the Seventh Amendment the constitutional self-identity and the Christian culture of Hungary will already be a binding element of constitutional interpretation, but the new text of Article 28 commits the courts to use of the legal reasoning of laws and their amendments. Since it isn't the legislature itself, but the initiator of bills, in most of the cases the government who encloses reasoning to the drafts, their reasoning binds the courts while interpreting the Fundamental Law.

2. 3. The amended text of Article VI limits freedom of assembly and freedom of expression by defending the private and family life of others: "Everyone shall have the right to have his or her private and family life, home, communication and good reputation respected. The exercise of freedom of expression and the right of assembly shall not harm others' private and family life and their homes." Shortly after the adoption of the amendment the Parliament also enacted a new law on the Protection of Private Life. The antecedent of these limitations was a planned demonstration in front of Prime Minister's Orbán residency in December 2014 by a group of people dissatisfied with the government's action regarding the losses of those taken mortgages in foreign currencies. Despite the fact that the that time law did not explicitly proscribed demonstrations in front of politicians' houses, both the ordinary and the

³⁷ The Hungarian historical constitution did not follow the English example, which was the model of an organic, progressively reformed basic law, but its dominant approach was rather authoritarian.

Constitutional Court concurred with the police's ban. However, the Constitutional Court in its decision instructed Parliament to harmonize regulations of privacy and freedom of assembly.³⁸

2. 4. Due to a last minute addendum to the draft Seventh Amendment by a group of Fidesz MPs, another new provision of the Fundamental Law makes homelessness illegal: "It is forbidden to live in public places on a permanent basis." The explanation to the provision says that the state "must safeguard to use of public places", and that the municipalities "will attempt to offer accommodation to all homeless persons." This provision also has a special precedent in the history of Fidesz' illiberal agenda. Following a Fidesz-majority Budapest city council's local ordinance that banned homelessness from public places, the Orbán government extended the ban to the entire country. In November 2012 the Constitutional Court found the law unconstitutional³⁹. The already mentioned Fourth Amendment added the following Section 3 to Article XXII of the Fundamental Law: "In order to protect public order, public security, public health and cultural values, an Act or a local government decree may, with respect to a specific part of public space, provide that staying in public space as a habitual dwelling shall be illegal." The new provision gives an authorization also to national bodies even to criminalize homelessness in a country of 'Christian culture.'

2. 5. In the future, all cases concerning demonstrations and homelessness, as well other issues important for the government, such as access to information of public interest, or electoral law disputes will be handled by the administrative courts, also established by the Seventh Amendment to the Fundamental Law. The amendment establishes the Administrative High Court as a new supreme court for administrative cases, parallel to the Curia, the supreme judicial organ of regular courts. Establishing a parallel judicial structure for administrative issues is of course not unprecedented but the actual cause of the change and the increased chance made possible by a ministerial decree from 2017 of former civil servants to be appointed for administrative court judges makes the government's true intention suspicious. During the 2018 election campaign PM Orbán harshly criticized an electoral law judgment of

³⁸ Decision 13/2016. (VII. 18.) AB

³⁹ Decision 38/2012. (XI. 14.). AB

the Curia being disadvantageous for Fidesz, claiming that “the Curia was not up to its task intellectually.”⁴⁰

IV. Efforts of European Institutions to Protect Human Rights in Hungary

Until 2013, when the Fourth Amendment to the Fundamental Law was enacted the EU did not use any of its available mechanisms to force Hungary’s compliance with the European values, including protection of fundamental rights. As the first reaction to the Fourth Amendment, the Danish, Finnish, Dutch and German Ministers of Foreign Affairs issued a Joint Letter, which called for a new mechanism to safeguard the fundamental values of the EU, secure compliance, and for the Commission to take an increased role in it.⁴¹ Later, upon the request of the European Parliament, 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 on the Fundamental Law of Hungary.⁴² The report is named after Rui Tavares, a Portuguese MEP at that time, who was the rapporteur of this detailed study of 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 right-leaning lawmakers, this tally gave the lie to the Hungarian government’s claim that the report was merely a conspiracy of the left.

With its acceptance of the Tavares Report, the European Parliament has called for a new framework for enforcing the principles of Article 2 of the Treaty. The report calls on the European Commission to institutionalize a new system of monitoring and assessment.

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

⁴⁰ See D. G. Szabó, ‘Criminalizing Migrants’ Helpers and Establishing Special Administrative Courts in Hungary’, *Diritti Comparati*, June 22, 2018.

⁴¹ Available at [www.Ministerie van Buitlandse Zaken brief-aan-europese-commissieover-opzetten-rechtsstatelijkheidsmechanisme%20\(1\).pdf](http://www.Ministerie van Buitlandse Zaken brief-aan-europese-commissieover-opzetten-rechtsstatelijkheidsmechanisme%20(1).pdf).

⁴² <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN>

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 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 Hungarian 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 which for years have gained extra profits from their monopoly in Hungary. In its conclusion, the Hungarian Parliament calls 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 improving life for Hungarian families”. 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 unsolicited help from strangers who are keen to guide us...Hungary must turn on its own axis”.⁴³

Encouraged by the Tavares report, then-Commission President Barroso also proposed a European mechanism to be “activated as in situations where there is a serious, systemic risk to the Rule of Law”.⁴⁴ Commission Vice-President Reding, too, announced that the Commission would present a new policy communication.⁴⁵

Due to the pressure, the Hungarian government finally made some cosmetic changes to its

⁴³ For the original, Hungarian-language text of Orbán’s speech, entitled *Nem leszünk gyarmat!* [We won’t be a colony anymore!] see e.g. <http://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, at: <<http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFtC>>.

⁴⁴ J. M. D. Barroso, ‘State of the Union address 2013’, Plenary session of the European Parliament (Strasbourg: 1 September, 2013) SPEECH/13/684. http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm.

⁴⁵ V. Reding, ‘The EU and the Rule of Law – What Next?’, Centre for European Policy Studies (Brussels: 4 September, 2013) SPEECH/13/677. http://europa.eu/rapid/pressrelease_SPEECH-13-677_es.htm.

Fundamental Law, doing little to address concerns set out by the European Parliament. The changes leave in place provisions that undermine the rule of law and weaken human rights protections. The Hungarian parliament, with a majority of its members from the governing party, adopted the Fifth Amendment on 16 September 2013.⁴⁶ The government's reasoning states that the amendment aims to "finish the constitutional debates at international forum" (meaning with European Union – G.H.). 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," But this minor political concession does not really mean that the Hungarian government demonstrated respect for the formal rule of law, as some commentators rightly argue.⁴⁷

As none of the suggested elements have worked effectively in the case of Hungary, the European Commission proposed a new EU framework to the European Parliament and the Council to strengthen the rule of law in the Member States.⁴⁸ This framework is supposed to be complementary to Article 7 TEU and the formal infringement procedure under Article 258 TFEU, which the Commission can launch if a Member State fails to implement a solution to clarify and improve the suspected violation of EU law. As the Hungarian case has shown, infringement actions are usually too narrow to address the structural problem which

⁴⁶ 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 over the next 5 years. d) 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. 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: <http://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>

⁴⁷ A. v. Bogdandy, 'How to Protect European Values in the Polish Constitutional Crisis', *verfassungsblog.de*, 31 March 2016.

⁴⁸ Communication from the Commission of 11 March 2014, A new EU Framework to strengthen the Rule of Law, [A new EU Framework to strengthen the Rule of Law](#)

persistently noncompliant Member States pose. This happened in the previously mentioned case, when Hungary suddenly lowered the retirement age of judges and removed from office the most senior ten percent of the judiciary, including many court presidents and members of the Supreme Court. The European Commission brought an infringement action, claiming age discrimination. The European Court of Justice in *Commission v. Hungary* established the violation of EU law, but unfortunately the decision was not able to reinstate the dismissed judges into their original positions, nor could it stop the Hungarian government from further seriously undermining the independence of the judiciary and weakening other checks and balances with its constitutional reforms. Even though the Commission formulated the petition, the ECJ apparently wanted to stay away from Hungarian internal politics, or had an extremely conservative reading of EU competences and legal bases, merely enforcing the existing EU law rather than politically evaluating the constitutional framework of a Member State. This was the reason that Kim Lane Scheppele suggested to reframe the ordinary infringement procedure to enforce the basic values of Article 2 through a systemic infringement action.⁴⁹

Finally, on 12 September the European Parliament launched Article 7 TEU proceedings against Hungary - the first time ever against a Member States' government. The MEPs by 448 votes for to 197 against and with 48 abstentions adopted the report prepared by Judith Sargentini denouncing the many violation of EU values by Viktor Orbán's government. The report lists 12 major issues, among them many human rights concerns, which violate all possible values pronounced in Article 2 TEU: 1) the functioning of the constitutional and the electoral system; 2) the independence of the judiciary and of other institutions and the rights of the judges; 3) corruption and conflicts of interests; 4) privacy and data protection; 5) freedom of expression; 6) academic freedom; 7) freedom of religion; 8) freedom of association; 9) the right to equal treatment; 10) the right of persons belonging to minorities, including Roma and Jews, and protection against hateful statements against such minorities; 11) the fundamental rights of migrants, asylum seekers and refugees; 12) economic and social rights.

Unfortunately this Parliamentary resolution came too late, several years after the Orbán government's actions already represented a 'clear risk of a serious breach of the values on which the Union is founded.' Launching Article 7 meant also too little, because besides the

⁴⁹ K.L. Scheppele, 'EU can still block Hungary's veto on Polish sanctions', politico.eu, 11 January 2016.

important political function of naming and shaming Hungary as a violator of EU values, including the protection of human rights, the chances to reach real corrective measures of the procedure are extremely low⁵⁰. Hence, one can argue that instead of Article 7 alternative means from the toolkits of the EU may be more effective⁵¹. Infringement actions as alternatives did not really work so far in the case of Hungary, but cutting off EU structural funds for regional development or other forms of assistance as a value conditionality approach was not really tried as of yet⁵².

V. Conclusion

As I argued in this paper, due to the democratic backsliding the constitutional guarantees of human rights substantially declined in Hungary, and neither internal nor external challenges could prevent this development towards a new authoritarian regime. 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 to judges loyal to the government. This packed Court is impeded in fulfilling its function as protector of fundamental rights. Since the regulation and the institutional guarantees of rights are entrenched in the Fundamental Law, enacted exclusively by the governing parties, unless a new government get a two-third majority support, Hungary cannot be a liberal democracy, which guarantees the

⁵⁰ See the same assessment of the vote by Sergio Carrera and Petra Bárd, 'The European Parliament Vote on Article 7 TEU against the Hungarian government: Too Late, Too Little, Too Political?' <https://www.ceps.eu/publications/european-parliament-vote-article-7-teu-against-hungarian-government-too-late-too-little>

⁵¹ Klaus Bachmann argues for using alternative tools instead of Article 7. See K. Bachmann, 'Beyond the Spectacle: The European Parliament's Article 7 TEU Decision on Hungary', *verfassungsblog*, 17 September 2018. <https://verfassungsblog.de/beyond-the-spectacle-the-european-parliaments-article-7-teu-decision-on-hungary/>

⁵² See a detailed analysis of this possibility in G. Halmai, 'The Possibility and Desirability of Rule of Law Conditionality', *Hague Journal of Rule of Law*, June 2018.

protection of human rights, and not even ‘illiberal democracy,’ or ‘Christian democracy⁵³’, as Viktor Orbán nowadays likes to characterise his own regime. It isn’t a democracy anymore⁵⁴, rather an authoritarian regime, even if ‘competitive,’⁵⁵ and soft, in the sense that so far it did not need to use violence to keep its power.

⁵³ Four years after his mention speech on ‘illiberal democracy’ at the same place Orbán, already preparing himself for the upcoming debate before the European Parliament refrained the concept, and talked about ‘Christian democracy’. Prime Minister Viktor Orbán’s Speech on the 29th Bálványos Summer University and Summer Camp on 28 July 2018. <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-29th-balvanyos-summer-open-university-and-student-camp>

⁵⁴ As Jan-Werner Müller rightly argues, it is not just liberalism that is under attack in Hungary, but democracy itself. Hence, instead of calling them “illiberal democracies” we should describe them as illiberal and “undemocratic” regimes. See J-W. Müller, “The Problem with ‘Illiberal Democracy,’” *Project Syndicate*. January 21, 2016, <https://www.project-syndicate.org/commentary/the-problem-with-illiberal-democracy-by-jan-werner-mueller-2016-01?barrier=accessreg>.

⁵⁵ See S. Levitsky & L. A. Way, ‘The Rise of Competitive Authoritarianism’ 13 *Journal of Democracy*, 2. 2002.