

Silence of Transitional Constitutions

The 'Invisible Constitution' Concept of the Hungarian Constitutional Court

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Transitional Constitutionalism in East-Central Europe

Constitutions are usually created during periods of transition following political repression. As András Sajó argues in his book 'Limiting Government', constitutions in general, and the constitutions of the transitions from communism especially reflect fears from the past to be repeated.¹ Similarly, Ruti Teitel claims that the content of contemporary constitutionalism is a systematic response to the wrongs of the prior regime, and thus it is being shaped through developments in transitional justice², which has a fundamental role to play in transitional constitutionalism challenging the constitutional canon.³

Transitional constitutionalism represented in the provisional constitutions as opposed to the conventional understanding of constitutionalism features transitory constitutional arrangements, unconventional constitutional adjudication and also quasi-constitutional statutes. Unlike the classical limiting functions of traditional constitutions, transitional constitutionalism functions as managing reform agendas, substituting violent revolutions and facilitating social and political integration.⁴ The more sceptical perspectives of transitional constitutionalism do not appreciate the transitory and flexible features in transitional developments, and urge to return

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¹ A. Sajó, *Limiting Government: An Introduction to Constitutionalism*, Central European University Press, 1999. 3.

² See R. Teitel, 'Transitional Justice and Transformation of Constitutionalism', in Rosalind Dixon and Tom Ginsburg (eds.), *Comparative Constitutional Law*, Edward Elgar, 2011. 57.

³ R. Teitel, 'The Constitutional Canon: The Challenge Posed by A Transitional Constitutionalism', 17 *Constitutional Commentary*, 2. 2000, 237-240.

⁴ See J-R. Yeh and W-C. Chang, 'The Changing Landscape of Modern Constitutionalism: Transitional Perspective', 4 *National University Law Review*, 1, 2009. 145-183.

relatively quickly to the discourse of normalcy of traditional constitutionalism after the period of transition.⁵

A paradoxical aspect of the constitutional history of East-Central Europe is, that those two countries, i.e., Hungary and Poland, which were the most developed countries before 1989 did not enact a new constitution at the very beginning of the democratic change, so they were the ones who used transitional constitutional approaches. Conversely, those countries where the obstacles of a new democracy were seemingly more present, enacted new final constitutions very rapidly, e.g. Russia, Bulgaria, Romania. In other words, the way of constitution-making very much depends on the power relations at the time the transition towards democracy starts. The most radical, revolutionary way of transition is the violent overthrow or collapsing of the repressive regime; there is then a clear victory of the new forces over the old order, which is represented by a new final constitution. Democracy can also arrive at the initiative of reformers inside the forces of the past, or as a result of joint action by and the negotiated settlement between governing and opposition groups. The different forms of constitution-making that took place in the early 1990s can be understood as expressions of these countries' will to rid themselves of the past and enter a new era, but through different ways.

In both Poland and Hungary the new constitutional order has been generated within by the illegitimate legislatures, which after the peaceful negotiations between the representatives of the authoritarian regime and their democratic opposition enacted comprehensive modifications of the old constitutions. Similar 'post-sovereign'⁶ or

⁵ Regarding the post-communist transition see such arguments at that time by B. Ackerman, *The Future of Liberal Revolution*, 1992., and more recently by W. Sadurski, 'Transitional Constitutionalism: Simplistic and Fancy Theories', in , Adam Czarnota, Martin Krygier, Wojciech Sadurski (eds.), *Rethinking the Rule of Law After Communism*, CEU Press, 2005. 9-24.

⁶ The term 'post-sovereign' constitution making is used by Andrew Arato, referring to countries, where the first, interim constitution is enacted by a not democratically elected body, ideally followed by a final constitution of the legitimate *pouvoir constituant*. See A. Arato, 'Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?', *South African Journal of Human Rights*, Vol. 26, 2010., p. 19. The extensive database of Jennifer Widner that describes 195 constitution making processes taking place between 1975 and 2002, does not make such distinctions regarding constitution making processes. Romania and Bulgaria fall into one category in her work, because the GDP was low during negotiations; and again, for reasons related to GDP, the Czech Republic, Hungary, Poland and Slovakia fall into another group. Within this group, Hungary is placed into a different category than the other Visegrád countries, because the rights restriction was harsher at the time of the constitutional preparatory work, in 1989 in Hungary then in the Czech Republic and Slovakia in 1992, and in Poland in 1997 when the final constitution was enacted. Because of this

‘pacted constitution-making’⁷ process happened in Spain in the end of the 70s and in South Africa from the beginning through the middle of the 90s. While in Poland the constitution-making process was closed in 1997 by a final constitution, in Hungary this second phase of the post-sovereign constitution-making process failed in 1996, when a new constitution was rejected by parts of the governing Socialist party fraction, and the 2011 new Fundamental Law breaks with the principles of liberal constitutionalism of the 1989 transition altogether.

Filling the Gap Caused by Silence through Activism of the Court

Hungary during its transition to democracy has chosen its own unique method of constitution-making, retaining – if in name rather than substance – the Constitution from the beginning of the country’s communist period, but radically changing its content in a process of comprehensive amendment in 1989. Additional to this the Constitutional Court of Hungary developed an activist practice of judicial review of parliamentary legislation, especially in the first nine-year cycle of its jurisprudence, which came to an end in 1999. These nine years will enter into not only Hungarian political and public law history as the era of the ‘Sólyom Court’, but - and what is at least as important to a genuine constitutional judge/court - into legal textbooks as well. Judge László Sólyom was the president of the court during this time, and the Court’s jurisprudence and style very much reflected his leadership. Especially in this period the use of foreign law in the interpretation of the constitution was a deliberate strategy by the Hungarian Constitutional Court, which merely designates the law of a foreign legal system without being bound by it in the same way as when a foreign law is incorporated, or international law ratified.

The concept of an ‘invisible constitution’ was also developed by László Sólyom. The idea behind it is that the Court’s jurisprudence offers a theoretical framework for evaluating the question of constitutionality, thus complementing the text of the

categorization, Widner’s conclusion that the preparatory procedures are not of utmost importance in constitution making, does not come as a surprise. See: J. Widner, ‘Constitution Writing in Post-Conflict Settings: An Overview’, *William and Mary Law Review*, 2008, Vol. 49, p. 1513, 1532.

⁷ The term referring to a deal between the representatives of the old regime and its opposition movements is used by M. Rosenfeld, 2009.

Hungarian transitional Constitution of 1989, and in fact, superseding it when the latter is amended in a way that violates crucial constitutional values. In introducing the notion, Sólyom wrote the following in his concurring opinion to the decision on the death penalty: “The Constitutional Court must continue the work of laying down the theoretical foundations of the Constitution and the rights enshrined therein, and to create a coherent system through its decisions. This system may stand above the Constitution – which is still often amended to satisfy current political interests – as an ‘invisible constitution,’ serving as a stable measure of constitutionality. In so doing, the Constitutional Court enjoys a latitude as long as it remains within the conceptual confines of constitutionality.”⁸ While it is true that the comments irritating politicians were not repeated by Sólyom, the content has never been negated. In an interview he said: “I have never denied that our constitutional jurisdiction, especially in the ‘hard cases’.... is at the borderline of constitution writing.”⁹ This was underlined in another interview that he gave in 1998, before his end of term. He was elaborating on the misinterpretation of the term ‘invisible constitution’ when the journalist confronted him with the question whether the metaphor should be unsaid altogether, the response was: “No, what I have written, is there. In those days the constitution was amended month by month, depending on the political climate. For this reason I wanted to point out that the Constitution is of a higher nature: a firm system based not only on technical rules but on values too. Our decisions were meant to express this value system; to clarify, to expose, to use; because from a one line paragraphs and brief sentences one cannot see it. Some focus purely on the letter in their constitutional adjudication, I have seen it both in Europe and Asia.”¹⁰

Indeed, the Constitutional Court led by László Sólyom expressly followed an activist approach in the interpretation of the transitional Constitution. Therefore Sólyom, along with many academics, including the author of these lines at that time argued that the text of the 1989 constitution and the jurisprudence of the Constitutional Court

⁸ Decision 23/1990. (X. 31.) AB

⁹ See G. A. Tóth, 'A 'nehéz eseteknél' a bíró erkölcsi felfogása jut szerephez. Beszélgetés Sólyom Lászlóval, az Alkotmánybíróság elnökével' [In the 'difficult cases' the judge's moral views come into play. A conversation with László Sólyom, the president of the Constitutional Court], *Fundamentum*, No. 1, 1997. 37.

¹⁰ Cs. Mihalicz, Interjú Sólyom Lászlóval, az Alkotmánybíróság volt elnökével [Interview with László Sólyom, former President of the Constitutional Court], , *BUKSZ*, Winter, 1998. 438.

make a new constitution unnecessary. In Sólyom's view the idea of 'invisible constitution' is divorced from the actual constitutional text, but at the same time it may serve as a basis for enforcing constitutional principles in the context of constitutional amendments, too. In his quoted concurring opinion to the decision on the abolition of the death penalty he unequivocally displays the unmistakable signs of interpretive activism, in terms of both, the Constitutional Court's relation to Parliament and to the actual Constitution: "Parliament may preserve, abolish, or restore the death penalty as it sees fit - as long as the Constitutional Court makes a final pronouncement on the constitutionality of this form of punishment."¹¹ One reading of this text rules out the possibility of restoring the death penalty at a later point through a constitutional amendment, thereby authorizing the Constitutional Court to declare even a constitutional amendment unconstitutional. Sólyom himself did not rule out this possibility in an interview: "The majority of the Constitutional Court does not desire to examine the constitutionality of constitutional amendments, even though that could be theoretically justified."¹²

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 book¹³ 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.¹⁴ 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

¹¹ Decision 23/1990. (X. 31.) AB

¹² G. A. Tóth, *ibid.* 34.

¹³ C. Dupré, *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity* (2003), Hart Publishing

¹⁴ As a German scholar observes the influence of the German Federal Constitutional Court was decisive on the jurisprudence of political and civil rights. See A. Zimmermann, *Bürgerliche und politische Rechte in der Verfassungsrechtsprechung mittel- und osteuropäischer Staaten unter besonderer Berücksichtigung der Einflüsse der deutschen Verfassungsgerichtsbarkeit*, in Jochen Abr. Frowein (eds.), *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa* (1998), Springer. 89-124. In the same volume the that time President of the Hungarian Constitutional Court and his advisor acknowledge this use of German law in the constitutional interpretation. See L. Sólyom, *Anmerkungen zur Rezeption auf dem Gebiet der wirtschaftlichen und sozialen Rechte aus ungarischer Sicht*, at 213-227., G. Halmai, *Bürgerliche und politische Rechte in der Verfassungsrechtsprechung Ungarns*, at 125-129.

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 defence of individual autonomy if none of the specifically named fundamental laws apply to the case in question. Next, the justices determined in Decision 57/1991 that “the right to self-identity and self-determination is part of the ‘general rights of individuals.’” Further, this right includes everyone’s most personal right to discover 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.

As Dupré also indicates¹⁵, the Hungarian Constitutional Court elaborated another conception of human dignity, reading it in connection with the right to life as an absolute, not allowing any limitations on it. The very first and most prominent example of this concept is the Court’s already mentioned decision on death penalty. Dupré criticizes the Hungarian judges for focusing on the individual’s dignity, while failing to mention the society’s need for retribution and protection against deeds.¹⁶ This critic is only partly justified. Since the justices were unable to reach an agreement on the mentioned matters, among them on the very aim of criminal punishment, including the death penalty, the majority judgment relied exclusively on the absolute interpretation of the right to human dignity with the right to life. But concurring justices offer alternative conceptions as well. Justice Szabó for instance emphasizes the repressive aim of criminal punishments, while justice Zlinszky in his concurring opinion the preventive one, adding that according to the current scientific

¹⁵ See Dupré, note 118, at 70 at seq.

¹⁶ *Ibid.*, at 124.

results the preventive effect of the death penalty can not be proved, therefore it is unconstitutional.

The next major examples of the Hungarian Constitutional Court's liberal understanding of human dignity are the decisions on abortion (48/1991 and 64/1998 AB), which center on the individual and human autonomy, and are divested of human dignity's implication and impact on the community and the society. Dupré argues that although the concept of human dignity as applied by the Hungarian Court resonates German jurisprudence, the internal logic of the approaches followed by the two courts is radically different.¹⁷ Dupré's main argument is that in stark contrast to the German position, the Hungarian Constitutional Court did not consider that the rights to life and human dignity under Article 54 of the Constitution meant that the foetus had a right to be born. But the author seems to forget that even without the legal capacity of the foetus - what also the new statute failed to consider – similar to the first decision of the German Court the Hungarian judges derived from Article 54 the obligation of the state to protect all human life, including that of the foetus's, which limits the right of the mother for self-determination.

Describing the genesis of a new legal system in Hungary, Dupré states that relying on law importation to develop its case law in the transitional period the Hungarian Constitutional Court discovered new rights in the wake of human dignity and the general personality rights. The main characteristic of this imported law is that it is between natural law and globalization, or more precisely “not global but German” as the author highlights the particular nature of Hungarian law importation. The discourse on law importation can be likened to a modern form of natural law.

The other main area of the use of foreign law is freedom of expression, and especially hate speech. The American free speech doctrine used by the Sólyom-Court was clearly more liberal than its German counterparts. However, as Michel Rosenfeld and András Sajó observe, “paradoxically, it may be that anti-liberalism towards authoritarianism may be a better weapon in the fight of liberalism against illiberalism

¹⁷ *Ibid.*, at 114-117.

in formerly authoritarian polities such as Germany and Hungary”.¹⁸ But assessing the free speech jurisprudence of the Sólyom-Court they conclude that the Hungarian Constitutional Court in many regards adopted an absolutist theory of speech going beyond the U.S. Supreme Court’s position¹⁹. The free speech practice of the Court can rather be characterized with the divide in the standards applied in American jurisprudence, which rejects all limitations, and those of (Western) Europe inclined toward more resolute limitation based on the “concept of militant democracy”. The Sólyom-Court first encountered the problem in examining the constitutionality of the provision in the nation’s Criminal Code concerning public incitement. In Decision 30/1992, the Constitutional Court found the facts of the crime of incitement of hatred to be constitutional and annulled the form of defamation. Its reasoning was based on the notion that the freedom of expression has a distinguished role among other fundamental rights guaranteed by the Constitution; that in fact it is a sort of a “mother right” of the so-called rights to “communication”.

According to the Court justices, the right to free expression of opinion protects opinion without regard to its content in terms of value and truth, for this condition alone lives up to the ideological neutrality of the Constitution. In confirming the constitutionality of the facts of the crime of incitement, the justices apparently reasoned on grounds similar to U.S. Supreme Court Chief Justice Oliver Wendell Holmes’s famous test of “clear and present danger”. At the same time, it must be said that the “danger” attached by the Hungarian Constitutional Court justices as a condition of constitutionality is more distant and contingent than the sort their erstwhile American peers had in mind. Presumably this is why the Constitutional Court elaborated on its decision by explaining that the “unavoidable social tensions of system-change” (i.e. the post-1989 political-economic transition) notably increase the danger of incitement, before large public audiences, to hatred against certain groups. In contrast to U.S. jurisprudence, the Sólyom-Court did not address the problem of the “scope” of the facts, that is, whether the incitement provision can be applied even in the absence of a real possibility that hatred will develop. In other words, the

¹⁸ Michel Rosenfeld and András Sajó, *Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech Rights in New Democracies*, in Sujit Choudhry (ed.), *Migration of Constitutional Ideas* (2006), Cambridge University Press, at 149.

¹⁹ *Ibid.*, at 159.

Hungarian justices did not set a constitutional standard that requires incitement to hatred to actually *cause* “clear and present danger.” This approach, along with the citing of the historical circumstances of the change of system, recalls not so much the American concept of justice in this respect, but that of Germany’s Federal Constitutional Court, which likewise cites historical reasons in reacting to militant threats to democracy by limiting the freedom of expression – namely, Germany’s interest in avoiding to repeat the scenario that followed the collapse of the Weimar Republic. The main reasons of declaring defamation unconstitutional was, however, that in this case the Hungarian Parliament had in fact made its qualification on the basis of the value content of the opinion expressed, in other words, with the violation of public peace attached to this only on the basis of presumption and statistical probability. Moreover, the Constitutional Court pointed out, not even the public peace is independent of the degree of the freedom of expression that prevails in society. Indeed, in countries where people can encounter numerous different opinions, public opinion becomes more tolerant, whereas in closed societies particular instances in which people express opinions out of the norm have far more potential to disturb the public peace. Further, the needless and disproportionate limitation of the freedom of expression has a detrimental effect on an open society. Indeed, in such a society those who use abusive language only mark themselves as “slanderers” in the arena of public opinion. Criticism is the appropriate response to slander, not criminal prosecution, argued the Constitutional Court justices. At the same time they added that the need to protect the “dignity of communities” may constitute a valid constitutional limitation on the freedom of expression. Thus the Court decision does not rule out the possibility that Hungary’s lawmakers might establish such protection under criminal law even beyond the scope of incitement to hatred. In the assessment of the justices, however, the expansion of other legal instruments, for example non-pecuniary compensation, is also suitable for the effective protection of the “dignity of communities”. In other words, in deciding on the constitutionality of this particular element of fact in the statutory provision on incitement, the justices looked to an American standard still being applied in the present day.

At the same time, the uncertainty caused by the application of varying standards is reflected in László Sólyom’s later remark, in which he rejected the idea of adopting certain consequences of U.S. Supreme Court jurisprudence. “[I]f here in Hungary we

follow the simple logic that would see us adopt the decision on flag-burning as a consequence of the use of the *Sullivan-test*, why then, in the name of unlimited freedom of expression must we consequently also adopt the test applied in the *Skokie* case and allow neo-Nazis to hold a threatening procession in a Jewish district?”²⁰ However, if the justices had consistently upheld the principle of guaranteeing special protection to the freedom of expression without regard to truth or value content in determining the crime of defamation to be unconstitutional, then this principle should have been applied with respect to the constitutionality of the crime of incitement as well.

Critique and Aftermath of the ‘Invisible Constitution’

The criticism of Sólyom’s ‘invisible constitution’ concept was present from the very beginning both in the politics and the legal academia. The clear leader of these critics has been Béla Pokol, ones professor of law, later party politician, and head of the Parliament’s constitutional committee, and finally from 2011 onwards as member of the Constitutional Court. In his first critique Pokol argued that rights that are not explicitly stated in the constitution but are ‘melted out’ of rights that are, especially those from the right to human dignity, are considered as the ‘activist credo’ of the first Constitutional Court led by László Sólyom. Pokol argued that even the constitutionally binding minimum on which to base the Constitutional Court’s decisions disappeared to be replaced by the merest sense of justice, represented by the concept of ‘invisible constitution’.²¹

After the 2010 parliamentary election the populism of Fidesz, the center-right conservative party, which with its tiny Christian democratic coalition partner with its two-thirds majority of the seat was able enact a new constitution, called the Fundamental Law, which entered into force on 1 January 2012 superseding the 1989 constitution. The quick constitution-making process took place with the sole and exclusive participation of representatives of the governing political parties. The new

²⁰ See A. G. Tóth, *ibid.*, 42.

²¹ See B. Pokol, ‘Az alkotmánybíráskodás’ [Constitutional Review], in B. Pokol, *A magyar parlamentarizmus* [The Hungarian Parliamentarism], Cserépfalvi, 1994. Chapter V.

constitutional order of the Fundamental Law, which does not respect separation of powers is especially hostile towards activist judicial review, not to speak about concepts, like the 'invisible constitution'.

The Constitutional Court itself has been packed and its jurisdiction has been limited. The considerable restriction on ex-post control has caused great controversy in Hungary and abroad, because the withdrawal of the right to review financial laws created a solution found nowhere else in the world, since there is no other institution functioning as a constitutional court whose right of review has been restricted based on the object of the legal norms to be reviewed. The constitutional court judges can only review these laws from the perspective of those rights (the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion, or the right to Hungarian citizenship) that they typically cannot breach. The restriction remains in effect for as long as state debt exceeds half of what is referred to in the Hungarian text as 'entire domestic product', the content of which is uncertain. Therefore, in the case of laws that are not reviewable by the court the requirement that the constitution be a fundamental law, and that it be binding on everyone, is not fulfilled.

On 11 March 2013 the Hungarian Parliament added the Fourth Amendment to the country's 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court, and annulling all of the case law of the Constitutional Court from 1990-2011. Also, as a direct reaction to unwelcome decisions of the Court the amended Fundamental Law bans the Constitutional Court from reviewing constitutional amendments for substantive conflicts with constitutional principles, and allows only review for conformity with the procedural requirements with respect to an amendment's adoption and promulgation.

The Fundamental Law also contains a provision, which aims to direct the Constitutional Court while interpreting the constitution. Paragraph (3) of Article R, in respect of the Fundamental Law as a whole makes it compulsory to take the preamble and the achievements of the historical constitution into consideration for the purposes of interpretation. The lengthy preamble, entitled National Avowal, defines the

subjects of the constitution not as the totality of people living under the Hungarian laws, but as the Hungarian ethnic nation: “*We, the members of the Hungarian Nation ... hereby proclaim the following*”. A few paragraphs down, the Hungarian nation returns as “our nation torn apart in the storms of the last century”. The Fundamental Law defines it as a community, the binding fabric of which is “intellectual and spiritual”: not political, but cultural. There is no place in this community for the nationalities living within the territory of the Hungarian state. At the same time, there is a place in it for the Hungarians living beyond our borders.

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

The preamble characterises the nation referred to as the subject of the constitution as a Christian community, narrowing even further the range of people who can recognise themselves as belonging to it. “We recognise the role of Christianity in preserving nationhood”, it declares, not as a statement of historical fact, but also with respect to the present. And it expects everyone who wishes to identify with the constitution to also identify with its opening entreaty: “God bless the Hungarians”. Despite the fact that the republic remains to be the form of government (although the official name of the country has been changed from Republic of Hungary to Hungary only), the concept of the Holy Crown found its way into the preamble, as an embodiment of national unity.²² The text of the National Avowal stipulates that “we honour the Holy Crown, which embodies the constitutional continuity of Hungary’s statehood and the unity of the nation”. On the other hand, the provision of the 1989 Constitution that said that “the President of the Republic [...] shall embody the nation’s unity” was also left intact. Thus, according to the Fundamental Law both the Hungarian Holy Crown

²² See Z. Szente, ‘The Doctrine of the Holy Crown in the Hungarian Historical Constitution’, 1 *Journal on European History of Law*, 2013.

and the President of the Republic embody the nation's unity, which raises the question how can a symbol of the monarchy and an institution of the republic symbolise the same time a state.²³

The preamble of the Fundamental Law also claims that the “continuity” of Hungarian statehood lasted from the country's beginnings until the German occupation of the country on 19 March 1944, but was then interrupted only to be restored on 2 May 1990, the day of the first session of the freely elected Parliament. Thus it rejects not only the communist dictatorship, but also the Temporary National Assembly convened at the end of 1944, which split with the fallen regime. It rejects the national assembly election of December 1945. Today's democracy-watchers would classify the parliamentary election of December '45 as “partly free”, adding that it was the freest in Hungary's entire history up until that time. It also rejects the progressive legislation of the National Assembly: the “little constitution” of the Republic approved at the beginning of 1946, which the Round Table was able to draw on in 1989; as well as the abolition of noble titles and the Upper House of Parliament.

With the historical dividing lines drawn by the preamble of the Fundamental Law, it does not take care of acknowledging that war crimes and crimes against humanity were committed not only by foreign occupying forces and their agents, but also between 1920 and 1944 by extreme right-wing “free troops” and the security forces of the independent Hungarian state, and not only against “the Hungarian nation and its citizens”, but also against other peoples. Neither does it acknowledge that the continuity of Hungary's statehood was not interrupted on 19 March 1944. Restrictions were placed on the government agencies' freedom to act, but they were not shut down. The Regent remained in his office, and the parliament sat and regularly passed those bills that were introduced by the government. The Hungarian state leadership did not declare the termination of legal continuity, but cooperated with the occupying powers.

²³ See I. Császár, B. Majtényi, 'Hungary: The Historic Constitution as the Place of Memory', M. Suksi, K. Agapiou-Josephides, J-P. Lehnars, M. Nowak (eds.) *First Fundamental Rights Documents in Europe*, Cambridge: Intersentia, 2015. 57-69.

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

The substantive meaning of “the achievements of our historical constitution” is totally ambiguous²⁴; there is no legal-scientific consensus in Hungary regarding their precise nature²⁵, and since the case law of the Constitutional Court prior to 2011 has been annulled, it is obvious that it should not be taken to include the precedents stemming from the Court’s interpretation practice accumulated since the regime change. As opposed to the British tradition of unwritten constitution, in the thousand year of the Hungarian historical constitution – with the exception of some short moments, such as during the failed revolution of 1848 - the dominant approach is an authoritarian one. ²⁶

Before March 2013, when the Court finally became packed²⁷, the judges have only used ones the historical constitution as a reference of interpretation. In a 2011 decision the majority of the justices declared the immediate lowering of the retirement age of ordinary judges as unconstitutional.²⁸ In the reasoning of the decision the constitutional judges referred to two laws on judicial independence from 1989 and 1871 respectively.²⁹ In its decision of 30 November 2016 on the EU migrant quotas the packed Constitutional Court stipulated that it has the right to study any EU legislation including the mandatory distribution of migrants in the EU in order to protect Hungary’s sovereignty and constitutional identity based on the country's historical constitution.³⁰

²⁴ Some critics of the historical constitution even raise the possibility that the Court might consider the Hungarian Jewish laws, first of such acts in Europe as part of it.

²⁵ See G. Schweitzer, ‘Fundamental Law – Cardinal Law – Historical Constitution: the Case of Hungary since 2011’, 4 *Journal on European History of Law*, 124-128.

²⁶ See Császár-Majtényi, *ibid.*

²⁷ It was the date, when the eighth out of the fifteen judges was elected to the bench by the governing majority of the Parliament, without any consensus with the opposition parties.

²⁸ About the case see G. Halmai, ‘The Case of the Retirement Age of Hungarian Judges’, forthcoming in B. Davies and F. Nicola (eds.) *EU Law Stories*, Cambridge: CUP, 2017.

²⁹ Decision 33/2012. (VII. 17.) AB

³⁰ Decision 22/2016. (XII. 5.) AB. The antecedents of the decision were the Hungarian government’s attempts to hinder the implementation of the EU’s migration policy in Hungary. First, they initiated a referendum on October 2, 2016 on the “imposed settlement of migrants”. After the unexpected defeat

As Gary Jeffrey Jacobsohn observes the constitution's language, and especially the preambles to constitutions are exceptionally informative in conveying the underlying meaning of the authors, and may indicate a commitment on their part to establish a constitutional identity, but until confirmed in the accumulated practice of the constitutional community, the goal will remain unfulfilled.³¹ With the concept of the 'invisible constitution' the Sólyom Court tried to establish a certain liberal democratic constitutional identity by filling up the gap caused by the silences of the transitory constitution. This identity was based on the parliamentary system of the 1989 Constitution, which is relied on the parliamentary traditions of 1848, as well as on the short republic period right after WWII, symbolised by Act I of 1946 of the Republic. In contrast, the Fundamental Law of 2011 goes back to the 'achievements of the historic constitution', and to the thousand-year-old concept of the Holy Crown, as determining national identity. It remains to be seen, what kind of constitutional identity will be established by the packed Constitutional Court on the basis of uncertain provisions of the new Fundamental Law and the historical constitution.

Legal Constitutionalism: Success or Failure?

In the mentioned and other similar decisions reached on the basis of the 'invisible constitution' the Sólyom-Court appealed to the 'charisma' of (natural) law.³² The Court in the eyes of the public became a 'saviour' of common sense in contrast to the dirty struggle of politics: its popularity was ranked consistently higher than that of Parliament, the government and the political parties, and for a short period of time 'constitutionalism' turned out to have a higher prestige than 'democracy'.³³

of the referendum the government submitted the Seventh Amendment of the Fundamental Law seeking to protect Hungarian constitutional identity in the face of European imposition. After on November 8, 2016 the amendment fell 2 votes short of the 2/3 majority the Constitutional Court carved out an earlier request of the Ombudsman, also loyal to the government for constitutional interpretation.

³¹ G. J. Jacobsohn, 'The Formation of Constitutional Identity', in T. Ginsburg & R. Dixon (Eds.), *Comparative Constitutional Law*, Edward Elgar, 2011, p. 131.

³² C. Boulanger, *The Charisma of Law in Times of Transformation. Max Weber's Relevance for Understanding Institutional Change*, Paper presented at Law and Society and ISA RCLS Joint Meeting, Budapest, 2001.

³³ C. Boulanger, *Europeanization Through Judicial Activism, The Hungarian Constitutional Court's Legitimacy and the 'Return to Europe'*, in W. Sadurski, A. Czarnota and M. Krygier, *Spreading Democracy and the Rule of Law?* Springer, 2006.

On the other hand there are arguments saying, that the potential of democracy in Hungary following the transition in 1989-90, (and also in the other new democracies of Central and Eastern Europe), was exactly diminished by technocratic, judicial control of politics, and the treasure of civic constitutionalism, civil society and participatory democratic government as a necessary counterpoint to the technocratic machinery of legal constitutionalism was lost.³⁴ This concept argues that the legalistic form of constitutionalism (or legal constitutionalism) while consistent with the purpose of constitutionalism of creating the structure of the state and setting boundaries between the state and citizens, risks the possibility of creating participatory democracy.³⁵ In other word, these authors think that legal constitutionalism falls short, reducing the constitution to an elite instrument, especially in countries with weak civil society and a weak party political system which undermines a robust constitutional democracy based on the idea of civic self-government. Wojciech Sadurski explicitly mentions the concept of ‘invisible constitution’ as an example of ‘normative overshooting’ of an exceptionalist sui generis, fancy theory of transitional constitutionalism.³⁶ As we have seen, applying the ‘invisible constitution’ doctrine in some cases of transitional justice, such as the informational self-determination or the reparation, the Hungarian Constitutional indeed referred to the exceptional character of the historic situation by legitimizing the activist interpretation, but in other issues, like the prohibition of retroactively justice in criminal prosecution or the privacy of spies of the secrete police they did not acknowledge sui generis solutions based on the unusual historical circumstances. This latter approach using Sadurski’s binary terminology rather follows the intermediary, more ‘simplistic’ theory of transitional constitutionalism, which pursues a discourse of normalcy.

Other critics of legal constitutionalism argue that the rule of law institutions in

³⁴ See this argument in P. Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Routledge, 2013. Also Wojciech Sadurski argued that legal constitutionalism might have a ‘negative effect’ in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society. See W. Sadurski, ‘Transitional Constitutionalism: Simplistic and Fancy Theories’, in A. Czarnota, M. Krygier and W. Sadurski (Eds.), *Rethinking the Rule of Law After Communism*, CEU Press, 2005., pp. 9-24.

³⁵ See R. Albert, ‘Counterconstitutionalism’, 31 *Dalhousie Law Journal* 1, 2008, p. 4.

³⁶ Cf. Sadurski, 2005. p. 23.

Hungary and in other countries of Central and Eastern European were created from above, without the support of various political groups and civil society associations.³⁷ Grażina Skapska contrasts ‘institutional optimism’ and ‘sociological realism’.³⁸

László Sólyom, former President of the Constitutional Court (and later also of the Republic of Hungary) argued that the damage of liberal constitutionalism that occurred with the 2011 new Fundamental Law may not necessarily be irreparable, because there is a constitutional culture that can maintain the prospect of constitutionalism.³⁹ Half a year later in a speech, Sólyom repeated his optimistic view on constitutional culture: “there are several elements of constitutional culture that are still present: institutions like the ombudsman’s office, local governments, and most importantly the conscious citizen, who is aware of his own balancing role in the political system, and even more, that he is the source of political power.” Incidentally, Sólyom never defined constitutionalism and constitutional culture. His use of constitutional culture is not in line with other definitions. For instance, Robert Post uses the term referring to the beliefs and values of non-judicial actors, most of all the people. On the other hand the term ‘constitutional law’ according to Post refers to constitutional law as it is made from the perspective of the judiciary in the American-type of decentralized judicial review system, or in countries with a German-type centralized judicial review and constitutional courts. There is a dialectic relation between the two, as constitutional law is based on constitutional culture and is also its influencer.⁴⁰ The Constitutional Court of Hungary, presided over by Sólyom, presented a constitutional law with the values of liberal constitutionalism, but the constitutional backsliding since 2010 indicates that the ‘invisible constitutional’ concept of the Sólyom-Court in the 1990s had no genuine effect on the constitutional culture of the country. One of the possible reasons for this is the lack of the joint constitutional experience of the community. But one wonders, whether there would have been any other way to build

³⁷ See B. Bugarič, ‘A crisis of constitutional democracy in post-Communist Europe: ‘Lands in-between’ democracy and authoritarianism’, *ICON*, 13 (2015), 219-245, at 236.

³⁸ G. Skapska, ‘The Rule of Law, Economic Transformation and Corruption After the Fall of the Berlin Wall’, 1 (2) *Hague J. Rule of Law* 284 (2009), 289.

³⁹ See L. Sólyom, ‘Az alkotmányosság esélyei’ [The Chances of Constitutionalism], *HVG*, január 8, 2012.

⁴⁰ See R. C. Post, The Supreme Court 2002 Term. Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, *Harvard Law Review*, Vol. 117, 2003, pp. 4-112, at 7.

up constitutionalism other than the one from above by the elite, including the Constitutional Court and using its doctrine of 'invisible constitution' and transplanting elements from Western legal systems in a country with no tradition of rule of law, and without any vibrant civil society.