Constitutional Law / Droit constitutionnel

2017

HUNGARY / HONGRIE

NORBERT TRIBL*

INTRODUCTION

HUNGARY's new Fundamental Law (FL) was adopted by the National Assembly on 18 April 2011. The new Constitution entered into force on 1 January 2012. The former Constitution of the Republic of Hungary (Act XX of 1949) preceding the entry into force of the new Fundamental Law was adopted in its original form on 18 August 1949 by the National Assembly on the basis of the Soviet Constitution of 1936. Fundamental changes were made to it in 1989 during the Hungarian transition from Communism into democracy. Our Constitution was amended several times between 1949 and 1989 then also between 1989 and 2010, leading to the adoption of the new Fundamental Law in 2011.

Following the adoption of the FL in 2010, a number of constitutional changes took place in the Hungarian constitutional system, which required a longer period of solidification. Because of this, 2017 could be considered as the year of constitutional consolidation

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within the Hungarian constitutional system. One of the most significant changes introduced by the FL was the reform of the system of constitutional complaints, introducing the so-called "German" model (*Urteilsverfassungsbeschwerde*) as one of the options for the complaint. In 2017, 50 of these "German-type" constitutional complaints (dubbed "real" in Hungarian legal literature) were received by the Hungarian Constitutional Court (HCC), 30 of which have been admitted by the Court. In contrast, in 2011 (in the year of introduction of the "real" constitutional complaint) 10 constitutional complaints were filed, of which 5 were admitted. It can be seen that the use of this new form of constitutional remedy increased tenfold over the course of merely 6 years.

By the beginning of 2017, a landmark HCC decision was made [22/2016 (XII. 5.) AB] on the definition of constitutional identity as part of the European integration. This so-called "identity decision" is crucial as the HCC introduces an "identity test" in the protection of the constitutional identity of Hungary along with formulating a "sovereignty test" as well[1].

1. Amendments of the Fundamental Law of Hungary

After the 2011 adoption of the FL[2], until 2015, altogether six amendments were adopted to the text, along with the seventh attempt in 2016 which failed due to the lack of the necessary majority in Parliament.

[1] The full text of the decision can be found in English at: https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf

[2] The Fundamental Law of Hungary, updated with the Fifth Amendment (consolidated text) is available in English, German and French at: http://www.kormany.hu/en/news/the-new-fundamental-law-of-hungary and updated with the Sixth Amendment (currently applicable text) on the official page of the Constitutional Court of Hungary: https://hunconcourt.hu/fundamental-law/

1.1. The First Amendment of the Fundamental Law

The First Amendment was adopted on 4 June 2012. After the Fundamental Law was adopted, certain Transitional Provisions (TP) were adopted to help the constitutional system transition. These were not part of the normative text at the time of adoption[3]. When they entered into force, the Commissioner for Fundamental Rights requested the HCC to annul the TP in view of the unclear nature of their exact location in the hierarchy of legal norms in relation to the Constitution[4]. In view of this development, the National Assembly as the holder of constitutional legislative power (*pouvoir constituant*) incorporated many of these interim (transitional) provisions into the FL through the First Amendment, thereby making them permanent. (It should be noted that an indication that these provisions should be regarded as part of the FL was originally included in Article S) and the Closing Provisions of the FL[5].)

1.2. The Second Amendment of the Fundamental Law

The Second Amendment was adopted on 9 November 2012. With the Second Amendment, the National Assembly introduced electoral registration into the constitutional system. The most important provision of the amendment stipulated that the TP were supplemented by the rules governing the exercise of the right to vote. According to this, "*in order to enforce the rights contained in Article XXIII of the Fundamental Law, all voters under Article XXIII*

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[3] Hungarian Official Gazette *Magyar Közlöny* n. 63/2012, p. 13878.

[4] *Cf.* Decision 45/2012. (XII. 29.) AB.

[5] Article S) "(1) A proposal for the adoption of a new Fundamental Law or for the amendment of the Fundamental Law may be submitted by the President of the Republic, the Government, any parliamentary committee or any Member of the National Assembly.

(2) For the adoption of the new Fundamental Law or the amendment of the Fundamental Law, the votes of two-thirds of the Members of the National Assembly shall be required."

(1) to (3) and (7) shall be listed and the right to vote may be exercised upon entry into the Register."[6]

Most provisions of these Amendments were ultimately annulled by the HCC. Due to the indeterminate status of these provisions in the hierarchy of legal norms and doubts about their transitional nature, the HCC declared that the Transitional Provisions are contrary to the FL. The Body argued that the substantive examination of the TP was possible because it was "*not considered as part of the Fundamental Law, its legal status was unclear and contrary to the nature of the single legal document of the Fundamental Law.*"[7]

Constitutional review (by the HCC) of the provisions related to the introduction of electoral registration was initiated by the President of the Republic. Due to the annulment of the TP - which constituted the constitutional basis of registration -, registration was also annulled.

1.3. The Third Amendment of the Fundamental Law

The Third Amendment was adopted on 21 December 2012. Its aim was to protect agricultural land, forests and the sustainable agricultural production. The Amendment contains a supplement to Article P) of the Fundamental Law. The normative text is supplemented by the following paragraph: "*The limits and conditions for acquisition of ownership and for use of arable land and forests necessary for achieving the objectives referred to in Paragraph (1), as well as the rules concerning the organization of integrated agricultural production and concerning family farms and other agricultural holdings shall be laid down in a cardinal Act.*[8]" Act CXXII of

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[6] Hungarian Official Gazette *Magyar Közlöny* n. 149/2012, p. 25018.

[7] HCC Decision 45/2012. (XII. 29.) AB határozat [66].

[8] The concept of cardinal act is defined in Article T (4) of the FL. "*Cardinal Acts shall be Acts, for the adoption or amendment of which the votes of two-thirds of the Members of the National Assembly present shall be required.*" The FL defines the subjects that can only be governed by cardinal act; there are 32 such fields in total. The regulation of fundamental consti-

2013 on the traffic of agricultural and forestry lands has been created to implement this provision[9].

1.4. The Fourth Amendment of the Fundamental Law

The Fourth Amendment was adopted on 25 March 2013[10]. The Fourth Amendment contained extensive changes. Among others, the "Foundation" has been supplemented with Article U), which contains an exclusion of the statute of limitations on the crimes committed during the dictatorship periods before 1989.

Another provision, possibly subject to the most extensive debate, according to which the HCC "*may review the Fundamental Law or the amendment of the Fundamental Law only in relation to the procedural requirements laid down in the Fundamental Law for its making and promulgation*"[11], was also introduced by this Amendment (by generating this provision, the legislator obviously reacted to the annulment of the first two Amendments by the HCC).

Under the Fourth Amendment, HCC decisions based on the previous Constitution have been repealed[12]. However, it is necessary to mention the case law of the HCC in relation to this provision of the amendment. Following the entry into force of the FL, the HCC stated, in terms of its decisions based on the previous Constitution, that it is possible to use the arguments therein in newer cases as well, if the provisions of the FL and the rules of interpretation thereof have the same or similar content as the previous Constitution did[13]. Following the Fourth Amendment, the HCC stated in the

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tutional rights and the basic institutions of state organization can only be regulated by cardinal acts.

9 Hungarian Official Gazette *Magyar Közlöny* n. 111/2013, pp. 63137-63161.

10 The text of the Fourth Amendment is available in English: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2013)014-e

11 *Cf.* Article 24 (5) of FL.

12 *Cf.* Article 5, "Closing and Miscellaneous Provisions" FL.

13 22/2012. (V. 11.) AB [40].

13/2013. (VI. 17.) AB that, according to its established practice, the application of theoretical considerations in the decisions based on the previous Constitution required the comparison of the provisions of the Constitution and those of the FL[14]. At the same time, the HCC also noted that, following the entry into force of the Fourth Amendment, the application of the arguments contained in the HCC's decisions made before the entry into force of the FL must be necessary and appropriately detailed[15]. In the decision, the HCC declared that it is allowed to continue to refer or cite arguments and legal principles developed in its jurisprudence established prior to the entry into force of the FL with the necessary and substantive content if it is necessary to decide the constitutional issue before it[16].

The Amendment has defined marriage and parent-child relations as the basis of family relations[17], affected the rules for the establishment of churches[18], adopted declarative provisions on the Communist dictatorship from the text of the TP[19], raised restrictions on the broadcasting of political advertising to the constitutional level[20] as well as incorporated the dignity of communities into the external limitations of freedom of expression[21].

In addition, it introduced administrative oversight in the management of higher education institutions undertaken by the government, forbade the habitual living in public space[22] and created the

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[14] 13/2013. (VI. 17.) AB [30].

[15] 13/2013. (VI. 17.) AB [31].

[16] 13/2013. (VI. 17.) AB [33].

[17] *Cf.* Article L) (1) FL.

[18] *Cf.* Article VII (2) - (3) FL.

[19] *Cf.* Article U) FL.

[20] *Cf.* Article IX (3) FL.

[21] *Cf.* Article IX (4) - (6) FL.

[22] "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." - *Cf.* Article XXII (3) FL.

possibility for the Speaker of the National Assembly to exercise disciplinary powers[23].

1.5. The Fifth Amendment of the Fundamental Law

The Fifth Amendment was adopted on 26 September 2013. This Amendment - particularly -, as a result of international discussions around the Fundamental Law, annulled a number of provisions introduced after the creation of the Fundamental Law. Especially the Amendment, based on the consultation of the Venice Commission, removed the possibility of relocating judges by the President of the National Office for the Judiciary[24] and allowed - free of charge - commercial radio and television broadcasting of political advertising on the same terms[25]. The amendment also changed the rules on religious communities[26], as well as created the constitutional basis for the Hungarian National (Central) Bank (MNB) to take over the supervision of the financial intermediary system from the Financial Supervisory Authority (PSZÁF)[27]. Finally, the Fifth Amendment of the FL, due to the great international debates, mainly from the side of the European Union, abolished the special provision of the Fourth Amendment according to which: "*As long as state debt exceeds half of the Gross Domestic Product, if the State incurs a payment obligation by virtue of a decision of the Constitutional Court, the Court of Justice of the European Union or any other court or executive body for which the available amount under the State Budget Act is insufficient, a contribution to the satisfaction of common needs shall be established which shall be exclusively and explicitly related to the fulfilment of such obligation in terms of both content and designation.*"[28]

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[23] *Cf.* Article 5 (7) FL.
[24] *Cf.* Article 25 (5) - (6) FL.
[25] *Cf.* Article IX (3) FL.
[26] *Cf.* Article VII (4) FL.
[27] *Cf.* Article 41 (2) - (5) FL.
[28] *Cf.* Article 17 of the Fourth Amendment.

1.6. The Sixth Amendment of the Fundamental Law

The Sixth Amendment was accepted on 14 June 2016. By this Amendment, the FL provisions on Special Legal Order (Emergency Situations) were supplemented by a new independent case entitled "Terrorist Emergency Situation". The explanation for the Amendment states that the new case is the homeland security equivalent of the preventive security situation, another instance of special legal order under the FL, but it differs from it in a way that it allows for narrower powers at the level of the Defense Law, as well as the possibility of using the Hungarian Defense Forces if the forces of the police and the national security services are insufficient. In case of major and immediate threat of a terrorist attack the new special legal order can be announced - at the initiative of the Government - by the National Assembly with two-thirds majority[29].

1.7. The Seventh Amendment of the Fundamental Law

The Seventh Amendment was submitted for adoption on 8 October 2016[30]. Reflecting on Article 4(2) TEU[31], the Amendment - ultimately not adopted by the National Assembly - would have included a clause on constitutional identity. Provisions of the National Avowal of the Fundamental Law would have been supplemented by the following: "*We believe that the defense of our consti-*

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[29] *Cf.* Article 51/A FL.

[30] The Draft of the Seventh Amendment is available only in Hungarian: http://www.parlament.hu/irom40/12458/12458.pdf

[31] In accordance with Article 4.2. TEU: "*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect its essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State*."

tutional identity, rooted in the historical constitution, is a fundamental obligation of the state."[32]

In addition, Article R) of the Fundamental Law would also have been supplemented by the following provision: "*The protection of the constitutional identity of Hungary is a duty of all organizations of the state.*"[33]

Furthermore, the Amendment would have included changes to the "Integration Clause"[34] of the FL. According to this: "*this exercise of competence must be in accordance with the fundamental rights and freedoms contained in the Fundamental Law and must not be restricted the inalienable right of disposal of the territorial integrity, population, state form and state structure of Hungary.*"[35]

As for the background of this Amendment, it needs to be noted that on 2 October 2016 a referendum was held on the government's initiative, on the question whether the European Union (through its so-called "quota-decision"[36]) could require the compulsory entry of non-Hungarian citizens into Hungary without the consent of the National Assembly. The issue emerged in the context of the European migration crisis.

The referendum was invalid because fewer than half of those entitled to vote participated. More than 98% of the valid votes answered the question positively, however. Based on this referendum, the proponents of the Amendment intended, among others, to

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[32] *Cf.* Article 1 of the Draft.

[33] *Cf.* Article 3 of the Draft.

[34] The text currently in force is identical to the text before the draft amendment, according to which: "With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfill the obligations deriving from the Founding Treaties, exercise some of its competences set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union." - Fundamental Law of Hungary, Article E) (2).

[35] *Cf.* Article 2 of the Draft.

[36] *Cf.* the Council Decision (EU) 2015/1601 of 22 September 2015 on establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

regulate these issues regarding asylum and immigration[37]. In accordance with the provisions of Article S) of the Fundamental Law - "*for the adoption of a new Fundamental Law or the amendment of the Fundamental Law, the votes of two-thirds of the Members of the National Assembly shall be required*" - the 131 votes (out of the 199 total number of seats) on the adoption of the Amendment proved inadequate for the entry into force of the Amendment.

In summary, during the five years after the adoption of the FL, as a result of the interplay between the HCC and the National Assembly (with the HCC acting as a quasi "negative legislator"), the FL has been supplemented with provisions aimed at the stability of the constitutional system and the rule of law, as well as the protection of Hungarian sovereignty. In 2017, there was no need to amend the FL, as the necessary amendments had already been adopted; perhaps it is no exaggeration to say that 2017 marks the start of a period of constitutional consolidation in Hungary based on the FL.

2. The Transformed System of Constitutional Complaints and Relevant HCC Jurisprudence

In Hungary, the institution of constitutional complaint was not unknown before the entry into force of the FL or the new Constitutional Court Act. However, until 31 December 2011, constitutional complaints were only permitted to request the constitutional review of an unconstitutionally applied law in judicial proceedings.

The system of constitutional complaints has been fundamentally changed by the entry into force of the FL and Act CLI of 2011 on the Constitutional Court (HCCA)[38]. According to the regulations in force, we distinguish between the following types of complaints filed for the purpose of: (*i*) examining the compatibility of legislation applied in an individual case with the Fundamental Law (dubbed "old"); (*ii*) examining the unconstitutionality of individual judgments (dubbed "real"); (*iii*) remedying violations of fundamen-

37 *Cf.* Article 4 of the Draft.

38 The text of the HCCA is available in English at: https://hunconcourt.hu/act-on-the-cc/

tal rights as a result of the entry into force of a piece of legislation (dubbed "direct"). Among these, the most important one is the one under (ii), so-called "real" complaint, which can be filed within sixty days upon receipt of the final decision regarding the merits of the case, in case it violates petitioners' fundamental rights laid down in the FL, and the possibilities for legal remedy have already been exhausted or no possibility for legal remedy is available.

2.1. The New Constitutional Court Act Resting upon the Fundamental Law

The operation of the Constitutional Court is basically determined by three sources of law: (*i*) the constitutional rules on the Constitutional Court under Article 24 FL; (*ii*) the HCCA; and (*iii*) the Rules of Procedure of the HCC. Under (i) and (ii) Art. 24 paragraph 9 lays out that "*the detailed rules for the powers, organization and operation of the Constitutional Court shall be laid down in a cardinal Act*", which is the HCCA. Under (ii) and (iii) the HCCA sets forth under its Article 70 that "*the detailed rules of the procedures followed by the Constitutional Court shall be laid down in the Rules of Procedure of the Constitutional Court*", which is then adopted by a resolution of the full session of the Court[39].

2.2. Types of Constitutional Complaints

(*i*) Under Article 24 para. (2) (c) FL, and Article 26 para. (1) of the HCCA, the petitioner (*i.e.* a natural person or organization) may turn to the HCC with a constitutional complaint if, due to the application of a legal regulation contrary to the FL in judicial proceedings with their participation, their rights enshrined in the FL were violated, provided that they have already exhausted all possibilities for legal remedy or no such possibility was available to them. (The so-called "old" complaint, referring to the fact that this type existed

[39] The Rules of Procedure are also available in English: https://hunconcourt.hu/rules-of-procedure/

under the Constitution and the previous Act on the Constitutional Court as well.)

(*ii*) Under Art. 24 para. (2) (c) FL and Article 26 (2) of the HCCA, complaints may also be filed if "*due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision, and there is no procedure for legal remedy designed to repair the violation of rights, or the petitioner has already exhausted the possibilities for remedy.*"[40] (The so-called "direct" complaint, emphasizing a direct recourse to the HCC in case of a statutory violation of fundamental rights.)

(*iii*) Under Article 24 (2) (d) FL and Article 27 HCCA, complaints may be filed against a final court decision in individual cases if the decision on the merits of the case or other decision terminating the court proceedings violate the petitioners' fundamental rights protected by the FL and they have already exhausted all remedies or such have not been available to them[41]. (The so-called "real" complaint, similar to the German model of "*Urteilsverfassungsbeschwerde*".)

2.3. Increase in the Number of Constitutional Complaints Filed under the New System until 31 December 2017

When we analyze the efficiency of a newly introduced legal institution, we can find more informative tool than the statistical data of this institution's operation. However, during the analysis of these statistics, we have to look at the "preparation of the proceedings" and "the preliminary examination of the admissibility of petitions". Both were created at the same time with the HCCA[42] and they contribute to the proceedings of the HCC on the merits of each of the petitions filed. Under Article 55 HCCA the Secretary General shall

[40] *Cf.* Article 26 HCCA.
[41] *Cf.* Article 27 HCCA.
[42] *Cf.* Article 55-56 HCCA.

prepare the proceedings of the HCC as specified in the HCCA and in the Rules of Procedure. The Secretary General shall examine whether the petition is suitable for HCC proceedings and meets the requirements on the format and content of such a petition as specified in the HCCA, and whether there are obstacles to the proceedings. If the petition does not meet the requirements on the format and content of such a petition as specified in the HCCA, the Secretary General shall call upon the petitioner to submit a duly completed petition. In cases like this, the petitioner shall be obliged to comply within 30 days. If the petitioner fails to submit a duly completed petition within the time-limit or submits it unduly again, the petition shall not be examined on the merits. Under Article 55 (4) HCCA the petition shall not be adjudicated on the merits if the petition does not satisfy the requirements of the HCCA's referenced rules.

If the HCC rejects the petition without examining its merits, the decision shall be taken by a single judge. Before rejection, the HCC shall decide on the admission of a constitutional complaint in a panel formation. The panel shall examine in its discretionary power the content-related requirements of the admissibility of a constitutional complaint. In the case of the rejection of admission, the panel shall pass an order that contains a short reasoning specifying the reason for rejection. The admitted constitutional complaint shall be submitted by the judge rapporteur for an examination on the merits to the standing panel to adjudicate the case.

Regarding the number of constitutional complaints, in 2012, the year following the reforms of the HCC procedure under the HCCA, a total of 730 constitutional complaints were submitted. Of these, 299 were based on Article 27 HCCA (*i.e.* "real" complaints)[43]. Of

[43] The constitutional complaint based on Article 26 (1) HCCA was submitted in 78 cases, while the complaint based on Article 26 (2) HCCA was submitted in 353 cases.

these, only 20 have been admitted, and only 18 were resolved after examination on the merits[44].

In 2014, a total of 698 complaints were submitted. Out of these, 492 were "real", *i.e.* submitted to review a judicial decision in a specific case (under Art. 27 HCCA). Among these, the HCC stated in 31 cases that the conditions of admissibility were met. In the same year, a total of 37 cases (together with cases pending from previous years) were decided on the merits[45].

After 2012, an increase in the number of incoming constitutional complaints[46] could be detected under the new system of constitutional complaints, which is clearly the effect of Art. 27 HCCA, introducing the possibility to file "real" complaints. As a result, in 2017, a total of 982 complaints were submitted, of which 765 were filed under Art. 27 HCCA and aimed at reviewing a judicial decision in a specific case[47].

We can see, therefore, that the number of "real" constitutional complaints filed has almost tripled compared to the year of the introduction of the new system[48]; however, it is noteworthy that the number of cases admitted by the HCC and the decisions on the merits of the cases admitted has not changed, compared to the year of introduction of the new system. In 2017, for instance, the HCC found that the conditions of admissibility were met by 12 com-

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[44] In the case of constitutional complaints based on Article 26 (1) HCCA, this number is 4, and in the cases based on Article 26 (2) HCCA, 62 decisions have been made.

[45] In the case of a constitutional complaint based on Article 26 (1) of the HCCA, this number is 12 and 23 cases have been resolved in cases based on Article 26 (2).

[46] In 2015, a total of 737, and in 2016 a total of 894 constitutional complaints were submitted to the HCC.

[47] The constitutional complaint based on Article 26 (1) of the HCCA was submitted in 147 cases, while the complaint based on Article 26 (2) HCCA was submitted in 72 cases.

[48] The number of other cases of constitutional complaint has changed in the opposite direction, the number of these complaints has decreased considerably.

plaints and together with the remaining cases, a total of 14 cases were closed by a decision on their merits[49].

3. Case Study: 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law

Decision 143/2010. (VII. 14.) AB (also known as the "*Lisbon*-decision" of the HCC[50]) examined the constitutionality of the Act CLXVIII of 2007 on the promulgation of the Treaty of Lisbon. The decision has been a subject of heavy criticisms for its approach and for only tangentially touching upon the dogmatic problems of the conflict between Union and domestic (Member State) law. The decision also failed to address the issue of the protection of national sovereignty as part of the EU integration, as the issue was only brought up in one of the concurring opinions[51]. In 2010, the HCC did not essentially outline the direction to follow in terms of the constitutional relationship of the Hungarian legal system and European integration. However, with its decision 22/2016. (XII. 5.) AB, the HCC took to consider the interpretation of Article 4 (2) TEU in light of the "integration clause" of the FL (primarily Article E)) and to answer the questions it left open in the (first) *Lisbon*-decision.

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[49] In the case of constitutional complaints based on Article 26 (1) HCCA, this number is 2, and in cases based on Article 26 (2) HCAA, no decisions on the merits of the cases have been made by the HCC.

[50] Decision 143/2010. (VII. 14.) AB.

[51] László Trócsányi emphasized in his concurring opinion that when Member States have transferred some of their powers to the EU organs, they did not give away their statehood, sovereignty and the essence of their independence. The Member States retained the right of disposal to the fundamental principles of their Constitution that are indispensable for maintaining statehood and constitutional identity. A state, joining integration, maintains its state sovereignty without a separate declaration, as it is the basis of the constitutions of the Member States (and the Community legal order). *Cf.* László Trócsányi's concurring opinion.

3.1. Article E) for Europe. The "Integration Clause" in the Fundamental Law of Hungary

The second time around, the Commissioner for Fundamental Rights petitioned the Constitutional Court regarding the interpretation of certain provisions of the Hungarian Fundamental Law, among others the "integration clause". The second paragraph of the clause of the FL provides the following: "*In order to participate in the European Union as a Member State, and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties, exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the European Union.*" The clause continues with the following (third) paragraph: "*The law of the European Union may stipulate generally binding rules of conduct subject to the conditions set out in paragraph (2).*"[52]

*3.2. Decision 22/2016. (XII. 5.) AB - The Second "*Lisbon-*decision"*

In this second "*Lisbon*-decision" of the HCC (the so-called "Identity decision"), the HCC argued that the 'self-identity' (in Hungarian "*önazonosság*", with the Hungarian expression literally meaning: identity) of Hungary is to be understood under the concept of constitutional identity, and the scope of this identity can only be considered on a case-by-case basis, based on the "*whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of the historical constitution - as required by Article R) (3)*[53] *of the Fundamental Law.*"[54]

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[52] *Cf.* Article E) (2)-(3) FL.

[53] According to Article R) (3) of the Fundamental Law: "*The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution.*"

[54] Decision 22/2016. (XII. 5.) CC [64].

At the same time, the HCC regards constitutional identity as a bridge between Member States and European integration when it states that the protection of constitutional identity should be granted in the framework of an informal cooperation with the Court of Justice of the European Union - namely constitutional dialogue - based on the principles of equality and collegiality[55].

The Commissioner for Fundamental Rights has filed the motion for interpretation to the HCC, based on which the "Identity decision" was made. The Commissioner's petition was filed in relation to the provisions of Article XIV and Article E) (2) of the FL in view of the prohibition of group expulsion, and asked for the interpretation of Article E) (2) regarding (*i*) whether Hungary was obliged to implement measures that are in violation of the FL; and (*ii*) whether an EU act could violate fundamental rights; the Commissioner also asked for further "guidance" in relation to *ultra vires* actions of the EU[56]. The HCC separated the questions in the petition and considered the interpretation of Article XIV in a separate procedure, while the questions concerning Article E) have been discussed above[57]. Following the presentation of the petition and the determination of its competence, the HCC engaged in a broad-ranging comparative examination into the high court practices of the Member States[58].

As a result[59], the position of the HCC is that in exceptional cases and as a last resort ("*ultima ratio*") it is possible to examine "*whether exercising competences on the basis of Article E) (2) of the Fundamental Law results in the violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the State) and the*

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[55] Decision 22/2016. (XII. 5.) CC [63].

[56] Decision 22/2016. (XII. 5.) CC [1] - [21].

[57] Decision 22/2016. (XII. 5.) CC [29].

[58] Decision 22/2016. (XII. 5.) CC [33] - [45].

[59] Regarding the decision, the dominance of the comparative investigation, sometimes its exclusivity, is expressed as a criticism in Hungarian legal literature. See more: DRINÓCZI 2017, 6.

constitutional self-identity of Hungary."[60] Regarding the possibility of an exercise of competences under Article E) (2) infringing fundamental rights, it is determined by the HCC that any exercise of public authority in the territory of Hungary (including the joint exercise of competences with other Member States) is linked to fundamental rights[61].

With reference to the German *Solange* decisions[62], the HCC declares that the Constitutional Court must act with regard to the possible application of European law in protecting fundamental rights. However, the HCC also noted that - as a last resort - "*it must grant that the joint exercising of competences under Article E) (2) of the Fundamental Law would not result in violating human dignity or the essential content of fundamental rights.*"[63] With regard to *ultra vires* acts, the HCC emphasized the fact that the "Integration clause" of the FL allows for the application of the EU legal acts in Hungary but also means the limitation of joint exercises of competences[64]. In accordance with the above, based on Article E) (2) FL and Article 4 (2) TEU, as a constraint on the joint exercise of powers within European integration, the HCC established "sovereignty control" and "identity control" (protection of the constitutional identity of Hungary)[65]. In this context, the Constitutional Court essentially declared and strengthened the consensus on constitutional identity in Hungarian academic literature, when it states that the Constitutional Court is the supreme guardian of the protection of constitutional self-identity[66]. However, following this declaration of principle, the HCC notes that "*the direct subject of sovereignty- and identity control is not the legal act of the Union or its interpreta-*

[60] Decision 22/2016. (XII. 5.) CC [46].
[61] Decision 22/2016. (XII. 5.) CC [47] - [49].
[62] For more details see: *Solange I.* and *II.*
[63] Decision 22/2016. (XII. 5.) CC [49].
[64] Decision 22/2016. (XII. 5.) CC [53].
[65] Decision 22/2016. (XII. 5.) CC [54].
[66] Decision 22/2016. (XII. 5.) CC [55].

tion, therefore the Court shall not comment on the validity, invalidity or the primacy of application of such Union acts."[67]

3.3. Academic Echos around the Second Lisbon*-decision*

Academic cirles in Hungary and also internationally took note of the HCC decision in a controversial manner. One of the biggest criticisms of the decision is that it may raise more questions about the relationship between national and EU law than it can answer[68]. Despite the fact that the HCC has laid out the results of a broad-ranging comparative overview of different jurisdictions in Europe in the rationale of its decision, its position was most significantly influenced by the judgments of the German Constitutional Court. The HCC was criticized for making too many references to the practice of European constitutional (and supreme) courts (in the name of the constitutional dialogue), while at the same time, despite the declarations of theoretical singificance in the decision, the relationship between Hungarian national law and the legal order of the European Union was not exactly determined in the decision[69]. As far as European judicial dialogue is concerned, not as a criticism, but rather as an opportunity for the constitutional courts, the preliminary reference procedure has been mentioned by scholars as a possibility in the issue which was set aside by the jurisprudence of the HCC[70]. (It should be noted that it is not excluded that the HCC initiates the preliminary reference procedure of the CJEU - as the

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[67] Decision 22/2016. (XII. 5.) CC [56].

[68] CHRONOWSKI NÓRA / VINCZE ATTILA: Alapjogvédelem, szuverenitás, alkotmányos önazonosság: Alapjogvédelem, szuverenitás, alkotmányos önazonosság: az uniós jog érvényesülésének új határai? *In: Szuverenitás és államiság az Európai Unióban*, ELTE Eötvös Kiadó, Budapest, 2017, p. 93, DRINÓCZI TÍMEA: A 22/2016 (XII.5.) AB határozat: mit (nem) tartalmaz, és mi következik belőle – Az identitásvizsgálat és az ultra vires közös hatáskörgyakorlás összehasonlító elemzésben *In: MTA Law Working Papers*, 2017/1, pp. 1-6, 10-11.

[69] CHRONOWSKI / VINCZE, p. 96.

[70] CHRONOWSKI / VINCZE, p. 122.

authentic interpreter of the EU law - on this issue[71] with reference to the identity-test. Especially since HCC has made an abstract interpretation of Article E) of FL[72] and did not decide on the concrete conflict between EU law and national law in the 'Identity decision'.)

Another fundamental concept in the decision - besides that of European constitutional dialogue - which is controversial in Hungarian (and perhaps also in broader European) legal literature is the notion of (national) constitutional identity[73]. In the European view[74], there is academic consensus on the fact that the exact meaning and content of constitutional identity (which shall contribute to the "self-definition" of the constitutional systems of the respective Member States as the ensemble of fundamental constitutional provisions and institutions with historical origins defining the constitutional system) has not yet been defined, however, the ultimate interpretation and concept of constitutional identity must materialize in the practice of the constitutional courts of the Member States in charge of the interpretation of the Constitution and be consistent with the case law of the CJEU and the provisions of the Lisbon Treaty. The indefinite nature of the constitutional identity concept has amounted to academic positions arguing the incorporation of an undefined concept into the practice of the CC, which resulted - according to some - in further uncertainties[75]. According to some Hungarian authors, the HCC decision does not make it clear "what exactly 'protecting the constitutional identity of Hungary' means,

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71 CHRONOWSKI / VINCZE, p. 109.

72 *Cf.* Article 38 of the HCCA.

73 The concept of constitutional identity is dealt with extensively in legal literature across Europe, for a well-rounded collection see *e.g.*: ALEJANDRO SAIZ ARNAIZ / CARINA ALCOBERRO LLIVINA (eds.): *National Constitutional Identity and European Integration*, Intersentia, Cambridge - Antwerp - Portland, 2013.

74 The concept of constitutional identity appears in a different approach in the Anglo-Saxon legal systems and in the European integration. In Anglo-Saxon approaches, constitutional identity is understood as the interpretation of legal institutions in conformity with the Constitution.

75 DRINÓCZI, p. 13.

i.e. that identity is based on Hungary's historical constitution, and the wording that identity is recognized by the Fundamental Law."[76]

Taking everything into account (facts and opinions), the representatives of Hungarian legal literature are united in the conclusion that Decision 22/2016. (XII. 5.) AB is a landmark decision - or at least it is unavoidable in discussions on the topic of constitutional identity; a milestone, which obviously outlines the future direction of HCC jurisprudence on similar matters[77].

3.4. Connections of the Hungarian 'Identity-decision' and CJEU Case Law

As it appeared among the academic opinions on the decision above, the HCC refused to initiate the proceedings of the CJEU and it would not have been necessary since the decision of the HCC does not result in resolving the concrete conflict between EU law and national law. (In view of the separation of the questions raised in the petition, the HCC did not decide on the question of the concrete applicability of EU law.) However, this does not mean that CJEU's case law would not have been taken into account by the HCC. According to paragraph [32]:

> "*The Constitutional Court is aware of the fact that from the point of view of the Court of Justice of the European Union the EU law is defined as an independent and autonomous legal order (Cp. C-6/64 Costa v ENEL [1964] ECR 585). However, the European Union is a legal community with the power - in the scope and the framework specified in the Founding Treaties and by the Member States - of independent legislation and of concluding international treaties in its own name, and the core basis of this community are the international treaties concluded by the Member States. As the contracting parties are the Member States, it is their national enforcement acts that ultimately determine the extent of primacy to be enjoyed by EU law against the relevant Member State's own law in the Member State*

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[76] *Id.*

[77] *Cf.*: BLUTMAN LÁSZLÓ: Szürkületi zóna - Az Alaptörvény és az uniós jog viszonya. *In: Közjogi Szemle*, 2017/1, pp. 1-14.

concerned (Cp. BVerfGE 75, 223 [242]). There is no difference in this respect whether the norm defining the way of the EU law's enforcement can be found in the relevant Member State's constitution or constitutional law (e.g. in France, Article 55 of the Constitution; in Austria, Federal Constitutional Act on the Accession of Austria to the European Union, 744/1994; in Spain, Article 96 (1) of the Constitution), in the Act ratifying the accession (e.g. in Great Britain, European Communities Act 1972), through the constitutional court's interpretation of the Act ratifying the accession (e.g. in Germany), or it has been formulated through solutions of case law (e.g. in Italy, see Corte Costituzionale, 170/1984)."

In the context of the HCC's *Identity*-decision it is worth mentioning the united cases n. C-643/15 and C-647/15 of the CJEU. The motion of the Commissioner for Fundamental Rights (on which the '*Identity*-decision' was based) was related to the European Union's Council Decision (EU) 2015/1601 of 22 September 2015, establishing provisional measures in the area of international protection for the benefit of Italy and Greece. However, before the motion of the Commissioner for Fundamental Rights, and the procedure of HCC, the Hungarian Government - along with Slovakia - brought an action for annulment to the CJEU on 3 December 2015.

The decision of the CJEU came almost one year after the *Identity*-decision, dismissed the Hungarian Government's claim and obliged Hungary to implement the provisions of the Council Decision. The CJEU's decision was accepted by the Hungarian government, however, no attempt has yet been made to investigate and detect possible conflicts between the CJEU's and the HCC's decisions.

4. Excerpts from the Jurisprudence of the Hungarian Constitutional Court in 2017[78]

In addition to the practice described above, in 2017 the HCC has made several further landmark decisions[79]. Of these, only the most significant ones are summarized hereunder[80]:

[78] It should be noted that during the year 2017, a preliminary reference at the CJEU was not initiated by the HCC.

In 22/2016. (XII. 5.) AB, the HCC stated that Articles 7 (4) and 12 (2) (a) and (c) - the provisions of the applicable law to the court acting as an administrative high court - of the (new) Administrative Procedure Code (APC, adopted by the Parliament on 6 December 2016 and not yet pronounced (promulgated) at the time of the decision)[81] are in violation of the FL[82]. The procedure of the HCC (*ex ante* review of conformity with the FL) was initiated by the President of the Republic regarding certain provisions of the Act on courts acting as administrative high courts[83]. According to the petition, Article 7 (4) APC would have introduced the new (so-called) administrative high court among the administrative courts, however - highlighted by the President of the Republic - it did so unconstitutionally, by an act to be adopted with a simple majority and without the amending of Act CLXI of 2011 on the organization and administration of the courts (which is a cardinal act[84] to be adopted by a two-thirds majority)[85]. Furthermore, the President of the Republic highlighted that the relevant Articles authorize the Budapest-

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[79] The complete statistics of the Constitutional Court in 2017 are available in Hungarian: https://alkotmanybirosag.hu/ugyforgalmi-es-statisztikai-adatok?ev=2017

[80] The summaries of the following cases can be found in Hungarian on the official website of the Constitutional Court: https://alkotmanybirosag.hu/kozlemenyek?ev=2017

[81] The Act was promulgated on 1 March 2017 and entered into force on 1 January 2018. *Cf.* Act I of 2017 on the Administrative Procedure Code (APC).

[82] *Cf.* the operative part of the decision.

[83] Based on Article 24 (2) (a) of the FL, the HCC shall examine any Act adopted but not promulgated for its conformity with the FL (*ex ante* review). Article 6 (2) and (4) FL define who can petition for *ex ante* review and under para. (4) it is laid down that: "If the President of the Republic considers the Act or any of its provisions to be in conflict with the Fundamental Law and no examination under Paragraph (2) has been conducted, he or she shall send the Act to the Constitutional Court for an examination of its conformity with the Fundamental Law."

[84] See fn. 8.

[85] 1/2017. (I. 17.) AB [3] - [4].

Capital Regional Court as an administrative high court with powers which have previously been determined as the exclusive competence of the Budapest-Capital Administrative and Labor Court by the Media Act[86] (which is also a two-thirds majority act)[87]. It is also stated that the procedure for litigation regarding the administrative activities of electoral commissions is determined by the challenged provisions as an exclusive competence of the court acting as an administrative high court (Budapest-Capital Regional Court)[88]. The petition was upheld by the HCC, stating that the challenged Articles of the APC violate the FL[89]. Following an extensive examination of the relevant legal history, the HCC found that the challenged provisions of the APC violated legal certainty as well as the FL provisions on cardinal acts and on the regulation of courts[90]. In addition, it was also determined that the powers and exclusive competences established by a two-thirds majority act cannot be amended by a simple majority[91].

In 7/2017. (IV. 18.) AB, at the request of the Commissioner for Fundamental Rights, the HCC found that the local government ordinance of Ásotthalom 2/2014. (IV. 30.), laying down provisions for the fundamental rules of community coexistence proclaimed in November 2016, had violated the FL and Section 7/B of the ordinance was annulled retroactively[92]. According to the provisions annulled by the HCC, the activities of the muezzin in the public areas would have been forbidden as well as wearing of a burqa and chador and the carrying out of any kind of propaganda activity presenting the institution of marriage as not a community of life between a man and a woman[93]. According to the decision, local governments cannot issue ordinances directly affecting or restricting

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[86] *Cf.* Article 164 (2), Act CLXXXV of 2010.
[87] 1/2017. (I. 17.) AB [7] - [8].
[88] 1/2017. (I. 17.) AB [9].
[89] 1/2017. (I. 17.) AB [14].
[90] 1/2017. (I. 17.) AB [23] - [42].
[91] 1/2017. (I. 17.) AB [41].
[92] *Cf.* the operative part of the decision.
[93] *Cf.* the petition of the Commissioner for Fundamental Rights.

fundamental rights[94] based on the FL, which clearly states that "*the rules for fundamental rights and obligations shall be laid down in an Act.*"[95] The HCC draws attention to the fact that the local government ordinance directly affecting or restricting fundamental rights would lead to the exercise of fundamental rights by different conditions at the local level[96]. According to the decision, the annulled provisions aimed at the direct restriction of several fundamental rights, including freedom of conscience and religion, and freedom of expression[97]. The annulled provisions partially restricted the practice of the Muslim religion and the expression of religious beliefs of individuals. In addition, it defined further restrictions beyond the limits of the freedom of expression as defined by the relevant act[98].

In 12/2017. (VI.19.) AB, the HCC stated that certain provisions of the Act on National Security Services (National Security Act, NSA) violated judicial independence and the fundamental right to privacy - both protected by the FL -; therefore, the HCC annulled these provisions from 29 June 2018[99]. The President of the *Curia*[100] (as petitioner) requested to establish that the provisions of NSA concerning the national security checks of judges and the procedure for reviewing such national security checks violated the FL and requested the HCC to annul these provisions[101]. The NSA was amended in 2013, and the petitioner emphasized that before the amendment the national security checks of judges who authorize secret information collection or decide on classifying sensitive information had to and should have been carried out. However, the

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[94] 7/2017. (IV. 18.) AB [28].

[95] *Cf.* Article I FL.

[96] 7/2017. (IV. 18.) AB [28].

[97] 7/2017. (IV. 18.) AB [29].

[98] 7/2017. (IV. 18.) AB [29].

[99] *Cf.* the operative part of 12/2017 (VI. 19.) AB.

[100] As from the entry into force of the FL, the Supreme Court became the *Curia* with the reintroduction of an archaic Hungarian name for the institution.

[101] 12/2017. (VI.19.) AB [4].

new rules related to national security checks after the amendment reflected a conceptual change[102] as the new provisions set out when national security checks are not to be initiated[103]. While Members of Parliament are generally unaffected by national security checks, the judiciary is not. According to the petitioner, the regulations provide for arbitrariness in choosing subjects for national security checks, and the attacked provisions violate legal certainty, the principle of the distribution of powers, the right to a lawful judge, and the principle of judicial independence, and through these violations the FL itself is violated[104]. In deciding the case, the HCC has considered the hypothetical or real national security interests and the fundamental rights violations raised by the petitioner[105] and found the petition substantiated. The HCC stated that the challenged parts[106] of the NSA violated the FL therefore are to be annulled. The HCC emphasized that the protection of national security interests is not only a constitutional purpose, but also a state obligation, however the challenged provisions may create an opportunity to abuse of power, which is incompatible with judicial independence[107].

In 19/2017. (VII.18.) AB, at the request of members of the judiciary, the HCC annulled the *Curia* decision for uniformity of law[108] 2/2016 (published on 3 November 2016)[109]. The reason for the annulment was that the *Curia*, in its decision, did not interpret but

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[102] 2/2017. (VI.19.) AB [2].

[103] Only the President of the *Curia* and President of the National Office for the Judiciary were specified as exceptions from these rules. *Cf.* 12/2017. (VI.19.) AB [2].

[104] 12/2017. (VI.19.) AB [4], [8], [12].

[105] 12/2017. (VI.19.) AB [44].

[106] *Cf.* the operative part of 12/2017 (VI. 19.).

[107] 12/2017. (VI.19.) AB [42] and [86].

[108] Ensuring the uniformity of judicial practice is the responsibility of the *Curia*. In carrying out this duty, the *Curia* shall issue decisions ensuring the uniformity of law. The relevant provisions are contained in Arts. 36-44 of the Act CLXI of 2011 on the organization and administration of the courts.

[109] *Cf.* the operative part of 19/2017 (VII. 18.) AB.

modified the provisions of the Criminal Code concerning the sexual violence against those under the age of twelve committed by their relatives or their foster parents[110]. It should be emphasized that the Constitutional Court has annulled the resolution *pro futuro* in order to protect the FL, ensuring adequate time for the *Curia* to take the necessary measures to maintain the consistency of judicial practice and uniformity of law[111]. According to the petition, the decision of the *Curia* violated the FL as it contravened the provisions of the Criminal Code to the disadvantage of the perpetrator when it maximized the term of imprisonment to fifteen years instead of ten[112]. The HCC found the petition substantiated and stated that there is no interpretation of the Criminal Code that would support the challenged provisions of the *Curia*'s decision. The HCC emphasized that if the legislator considers the revision of the Criminal Code to be justified, there is no obstacle for the National Assembly as the lawmaker to take into consideration the solutions proposed by the *Curia*[113].

In 20/2017. (VII. 18.) AB, in a constitutional complaint procedure[114], the HCC stated that the rule of law is not a check of the judicial independence, but an assurance and judicial decisions must be taken by statutory instruments in force[115]. The HCC stated: the court that ignores the law misuses its own independence, which may cause a violation of the right to a fair trial[116]. The underlying problem causing fundamental rights violation was found to be that the court having the power to issue a final decision based its judgment on existing judicial practice that was contrary to existing legal provisions[117]. In HCC's view, the judicial process that ignored legislation in force violated the fundamental right to a fair trial and the

110 19/2017. (VII.18.) AB [4] - [5].
111 19/2017. (VII.18.) AB [33].
112 19/2017. (VII.18.) AB [4] - [5].
113 19/2017. (VII.18.) AB [32].
114 *Cf.* the chapter on the system of constitutional complaints.
115 20/2017. (VII.18.) AB [23].
116 20/2017. (VII.18.) AB [23].
117 20/2017. (VII.18.) AB [6] and [19] - [20].

court acted arbitrarily when it took into account judicial practice based on legal provisions which had previously been repealed by the legislator instead of relying on existing legal provisions[118]. The HCC also stated that a court judgment which, without justification, ignores the law in force is arbitrary and incompatible with the principle of the rule of law[119]. In view of the above, the HCC established the violation of the FL and annulled the judgment.

In 20/2017. (VII. 18.) AB, the HCC stated that in criminal proceedings, authorities should respect the right of the defendants to have their innocence presumed, but this shall not affect the freedom of the press[120]. It does not violate the FL if the media report is accompanied by a picture illustration, in which the person concerned can be seen handcuffed and led on a *lunge line* before the final judgment[121]. In the underlying case[122] the petitioner filing for review requested that the *Curia* declare that: his personality rights to the protection of his image have been violated by the use of images taken without his permission[123]. The *Curia* declared that the right to publicize an event of public interest prevails over the right of the petitioner to protect his image[124]. The petitioner hereon submitted a constitutional complaint to the HCC, in which he requested the annulment of the *Curia*'s decision, referring to a violation of the FL[125]. In the view of the petitioner, depicting him as handcuffed and led on a lunge line before the final judgment, made him look as if he was guilty[126].

Relying also on the case law of the European Court of Human Rights, in reviewing the petitioner's arguments, the HCC emphasized that providing information on a criminal case affecting a

118 20/2017. (VII.18.) AB [29].
119 20/2017. (VII.18.) AB [23].
120 3313/2017. (XI. 30.) AB [58].
121 3313/2017. (XI. 30.) AB [54] - [62].
122 *Cf.* 3313/2017. (XI. 30.) AB [1] - [15].
123 3313/2017. (XI. 30.) AB [5].
124 3313/2017. (XI. 30.) AB [16].
125 3313/2017. (XI. 30.) [1] and [17] - [20].
126 3313/2017. (XI. 30.) AB [55].

broad spectrum of society falls under the freedom of the press and the use of coercive measures in criminal proceedings in the abstract does not violate the presumption of innocence[127]. The pre-trial detention of the petitioner was considered as a commonly-known fact in the instant case and the physical coercive measures were applied in relation to said detention as protocol measures. It could not be established that their goal was to present the petitioner as guilty to the public[128]. Therefore, the HCC declared that the judicial decision challenged by the petition is not in violation of the FL and thus rejected the constitutional complaint.

33/2017. (XII. 6.) AB examined a normative order issued by the President of the National Office for the Judiciary and challenged by a constitutional complaint. It was declared that several provisions of the order, regarding rules of judicial integrity, namely concerning the lawful, unexceptionable operation of the court free from any undue influence and appropriate judicial behavior, violated the provisions of the FL; thus certain provisions of the order were annulled[129]. According to the petitioner (judge), the order imposed obligations on the judges, the violation of which may even result in the termination of the judicial office[130]. Thus, he alleged that it is in violation of the FL as under the relevant rules of the FL the rights and obligations of judges can only be established by Act, and as such only by a cardinal act[131]. According to the challenged order, the President of the National Office for the Judiciary may also issue not only compulsory orders, but non-compulsory recommendations as well in determining behavioral requirements for judges and judicial staff, and in the event of a violation of these regulations, proceedings might be instituted against the judges[132]. The HCC has found that a document without binding power, *i.e.* excluded from constitutional review, cannot define behavioral requirements that

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127 3313/2017. (XI. 30.) AB [58].

128 3313/2017. (XI. 30.) AB [61].

129 *Cf.* the operative part of 3313/2017 (XI. 30.) AB.

130 33/2017. (XII. 6.) AB [7].

131 33/2017. (XII. 6.) AB [7].

132 33/2017. (XII. 6.) AB [1] - [10].

may affect judicial independence[133]. Therefore certain parts of the text have been annulled.

In 34/2017. (XII. 11.) AB, the HCC stated that press reports about a press conference of public figures on public affairs in such a way that the press reports are factual as to how exactly the event went down, do not contain an assessment, and indicate the source of the statements, is not considered a rumor. This is also the case if the person affected by said reporting of facts can refute the facts possibly damaging his reputation, or the opportunity to respond is provided to them[134]. The HCC annulled the decision underlying the case[135]. The operator of an online news agency petitioned the HCC in this matter[136]. Upon reviewing the petition, the HCC found that the commentary of public events reported to the public is an essential element of the media activity, having a central role in the evolution of democratic publicity[137]. The HCC emphasized: the primary constitutional obligation of the press is to disclose information of public interest, including the statements of the public figures and nobody can be held responsible for the accomplishment of their duties contained in the FL[138]. However, according to the HCC, exemption of the press from liability is not absolute: it is necessary to examine whether the journalist reports to the public on the statements made by other persons are exact, also clearly indicating the source of the remarks without their own assessment, and whether the opportunity to respond is provided[139].

In 36/2017. (XII. 29.) AB, the HCC determined that the requirement under the FL is that the criteria of fair trial shall also apply in the process of registration for churches[140]. Before this HCC decision based on a constitutional complaint, the National Assembly

133 33/2017. (XII. 6.) AB [104].
134 34/2017. (XII. 11.) AB [50].
135 *Cf.* the operative part of 34/2017 (XII. 11.) AB.
136 34/2017. (XII. 11.) AB [1].
137 34/2017. (XII. 11.) AB [41].
138 34/2017. (XII. 11.) AB [50].
139 34/2017. (XII. 11.) AB [48].
140 36/2017. (XII. 29.) AB [60].

had 60 days to decide on the recognition of a church, however there was no legal consequence for failure to comply with the deadline. Consequently, in the absence of such a decision, the religious organization applying for a church status did not have the opportunity to appeal[141]. In its decision, therefore, the HCC found a violation of the FL caused by legislative omission and called on the National Assembly to carry out their legislative duty to remedy the situation[142].

CONCLUSIONS

As mentioned in the introduction, 2017 can be considered to be a year of constitutional consolidation in Hungary. Anomalies following the entry into force of the Fundamental Law came to an end, and international disputes surrounding the new constitutional system calmed down. Based on the Constitutional Court's practice following the 1989 Hungarian regime change, the Fundamental Law of Hungary created not only a stable constitutional framework, but also a catalog of values which faithfully reflects Hungarian constitutional traditions on which the Hungarian constitutional system rests. Quoting László Trócsányi's words, "*besides respecting universal values, the legitimate aspirations of the states is to protect their national, inherited constitutional features and identity.*" Nevertheless, after the entry into force of the FL, many provisions received skepticism both in the field of national and international politics. However, by the year of 2017 it became clear that the FL established a stable and secure framework for the Hungarian constitutional system.

After the entry into force of the HCCA there was skepticism in many respects as well. By the year of 2017, it has also been assured that the new system of HCC works and the institution of constitutional complaint is successful. In particular, it is important to emphasize the Constitutional Court's identity decision, which was adopted on one of the most important issues affecting today the

141 36/2017. (XII. 29.) AB [61].

142 Decision 36/2017. (XII. 29.) AB [63].

European constitutional space: the issue of constitutional identity and sovereignty. This HCC decision filled the void left by the *Lisbon*-decision in 2010 and answered open questions on the relationship between the European Union legal order and Hungarian constitutional rules.

Overall, taking into account the consolidation already mentioned and the jurisprudence of the Constitutional Court, despite the unchanged constitutional framework in the year of 2017, we can witness the development of the constitutional system accomplished by the HCC, a phenomenon which is perhaps best described by Bertrand Mathieu - quoted by László Trócsányi - as saying that "officially, nothing moves, but everything changes".

ABSTRACTS / RÉSUMÉS

2017 could be considered as the year of constitutional consolidation within the Hungarian constitutional system. Seven years before, Hungary's new Fundamental Law (FL) was adopted by the National Assembly on 18 April 2011 and the first years of the new Constitution were not free of conflicts. However, by 2017, the anomalies following the entry into force of the Fundamental Law came to an end, and international disputes around the new constitutional system were over. Following the adoption of the FL, a number of constitutional changes took place in the Hungarian constitutional system, which required a longer period of solidification. One of the most significant changes introduced was the reform of the system of constitutional complaints, introducing the so-called "German" model (*Urteilsverfassungsbeschwerde*) as one of the options for the complaint which can be stated to be successful by 2017. Another important factor which should be emphasized is that, at the beginning of 2017, a landmark HCC decision was made [22/2016 (XII. 5.) AB] on the definition of constitutional identity as part of the European integration. This so-called "*Identity*-decision" is crucial as the HCC introduces an "identity test" in the protection of the constitutional identity of Hungary along with formulating a "sovereignty test" as well.

L'année 2017 pourrait être considérée comme celle de la consolidation constitutionnelle au sein du système constitutionnel hongrois. La nouvelle Loi fondamentale (LF) hongroise a été adoptée par l'Assemblée nationale il y a sept ans, le 18 avril 2011, et les premières années de la nouvelle Constitution n'ont pas été sans conflits. Cependant, en 2017, les anomalies

qui avaient suivi l'entrée en vigueur de la LF ont pris fin, de même que les polémiques internationales autour du nouveau système constitutionnel. L'adoption de la LF a été suivie d'un certain nombre de changements constitutionnels dans le système constitutionnel hongrois, qui ont demandé une période plus longue de consolidation. L'un des changements les plus importants a été la réforme du système des plaintes constitutionnelles, qui a introduit le modèle dit "allemand" (*Urteilsverfassungsbeschwerde*) comme l'une des options concernant la plainte, dont on peut dire qu'il a été un succès en 2017. Un autre élément important qui mérite d'être souligné est le fait que, au début de l'année 2017, la Cour constitutionnelle hongroise (CCH) a rendu une décision importante [22/2016 (XII. 5.) AB] concernant la définition de l'identité constitutionnelle en tant que part de l'intégration européenne. Cette décision, dite "décision sur l'identité", est capitale dans la mesure où la CCH introduit un "critère d'identité" dans la protection de l'identité constitutionnelle de la Hongrie tout en formulant aussi un "critère de souveraineté".

F. Vogin