



**MEMORANDUM**  
**on the**  
**HUNGARIAN NEW CONSTITUTION**  
**OF 25 APRIL 2011**

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## ***Introduction***

The President of the Republic of Hungary, Pál Schmitt signed Hungary's new constitution on 25 April 2011 after the Hungarian Parliament approved it by an overwhelming majority. The ceremony took place at the President's Sandor Palace office in Budapest.

This new Hungarian Constitution has stirred much debate in Europe. An impartial analysis of the text suggests that Hungary's new Supreme Law could surprise a secularist and postmodern Europe. However, the new Constitution's content should not be considered innovative with regard to European constitutional practice.

In large part, critics of the new Constitution<sup>1</sup> argue the document stems from Christian ideals and thought, as its Preamble references Christianity. It is also criticized for its choice to protect the right to life and human dignity from the moment of conception, as well as the marriage and family, and prohibits practices aimed at eugenics. Symbolically, the preamble of the Constitution starts with a deeply emblematic pledge, declaring the Hungarian people "*proud that one thousand years ago [its] King, Saint Stephen, based the Hungarian State on solid foundations, and made [the] country a part of Christian Europe.*"<sup>2</sup> Additionally, the opposition objects to Parliament's rapid adoption of the text, accusing the government of having been marginalized during the whole process of reform. Since 1988, the need of a new Constitution has become more pressing. Several Governments have failed to pass a new one, and the amending process has progressively intensified. Effectively, the Constitution has been amended about ten times in the last months of 2010. Thanks to the two-thirds majority held by the ruling centre-right coalition of the Hungarian Civic Union (Fidesz) and the Christian Democratic People's Party (KDNP), recently, the National Assembly has been finally able to draft and adopt a new comprehensive fundamental text.

In any case, it is not the end of the matter. Several legal issues arising from the adoption of the new text will be addressed with organic laws (which require two-thirds majority) to implement a number of constitutional provisions. It will be the case, for example, of pension system, taxation, protection of national heritage, protection of families, electoral system, incompatibility of the MPs, National Central Bank, Constitutional Court, political parties procedures, and so on. Without considering that the same constitutional court will evidently intervene in the effective implementation of the new provisions.<sup>3</sup>

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<sup>1</sup>The ECLJ's analysis is based upon an English translation of the draft Constitution, Fundamental Law of Hungary, *available at* [http://tasz.hu/files/tasz/imce/alternative\\_translation\\_of\\_the\\_draft\\_constitution.pdf](http://tasz.hu/files/tasz/imce/alternative_translation_of_the_draft_constitution.pdf). Further modifications were approved after the adoption of the final version of the text.

<sup>2</sup>Fundamental Law of Hungary, National Avowal of Faith, *supra* note1, at 1 (emphasis added).

<sup>3</sup>KATALIN KELEMEN, NUOVA COSTITUZIONE UNGHERESE ADOTTATA E PROMULGATA (Diritti Comparati) (2011)

Nevertheless, apart from the further internal adjustments, this new Constitution has raised a number of critics through Europe, focusing mainly on the national, religious and moral values underlying the text, such as the references to Christianity, as well as criticizing the new balance of power in favor of the Parliament and to the detriment of the Constitutional Court which gained a lot of influence during the post-communist transitional period.

Objectively, there are a few basic premises undergirding this new Constitution. First, it rejects communism's atheistic vision of society, which the Hungarian citizenry has never fully embraced. It equally rejects the post-modern vision of society. Secondly, with regard to the separation of powers doctrine, the text attempts to properly redress the previous imbalance of governmental power. Both of these goals comply with democratic European standards. In sum, the new Hungarian Constitution seeks to ensure European values: peace, democracy, human rights, and the rule of law, while the new Constitution tries in the meantime to "take up with its national History and its values again. It is a Constitution of "national reshaping".

The opposition's objections to the constitutional process appear to be largely ideologically predetermined. Moreover, they have gone far as to distort the evaluation provided by authoritative European institutions, such as the Venice Commission<sup>4</sup>. Those opposing the new Constitution have called for Europe's rejection of the Hungarian reform, labeling it as anti-democratic and discriminatory.

Hungary's new Constitution, to some extent, relies on Christian and traditional inspired values, and as such, Hungary can be said to have rejected the post-modern model of society. Hungary is not alone in rejecting this model, thus indicating that the post-modern model of society is no longer compulsory in Europe. Significantly, the political leaders of Germany, the United Kingdom, and France have recently asserted in nearly identical terms that "multiculturalism" has failed.<sup>5</sup>

Not surprisingly, then, those who promote a post-modern society (and primarily, the coalition of multicultural and secularist advocates, as well as pro-abortion and LGBT lobbies) find Hungary's new Constitution dangerous and unacceptable. These lobbies are trying to force Hungary to amend its new text, as they have succeeded in the past to cancel the draft Slovakian concordat. Specifically, the EU<sup>6</sup> forced the Slovakian government to renounce its ratification of a treaty with the Holy See aimed at, *inter alia*, guarantying and protecting the conscientious freedom of medical practitioners. More recently, the same coalition failed to impose their view on the European Court concerning the removal of the crucifix from Italian public classroom walls. Hungary is one of the 21 European States which lent its support for the right to display the crucifix before the European Court. The new Hungarian Constitution, adopted by an overwhelming majority, shows that the post-modern model of society is not compulsory or irresistible.

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<sup>4</sup> Which is the Council of Europe's advisory body on constitutional matters.

<sup>5</sup> Angela Merkel, speech to members of the Junge Union, Potsdam, 16 October 2010; David Cameron, speech to the Munich Security Conference, 5 February 2011; Nicolas Sarkozy, interviewed on Paroles de Français (TF1), 11 February 2011.

<sup>6</sup> More precisely, the EU organ known today as the "Fundamental Right Agency" (FRA).

In the following sections, the main points raising criticism will be discussed, in the light of the European and International legal standards, in particular:

- ❖ THE VALUES IN THE NEW HUNGARIAN CONSTITUTION (PART A)
  - The Rejection of the National Socialist and Communist Dictatorship
  - The Nation based on ethnic origin
  - The Reaffirmation of the Underlying Christian Values of the Hungarian State and Society
  - The Cooperation between Church and State
  - The protection of the right to life and human dignity from the moment of conception
  - Protection of the family and the institution of heterosexual marriage
  - The condemnation of practices aimed at eugenics
- ❖ THE LEGAL QUESTIONS ARISING FROM THE NEW HUNGARIAN CONSTITUTION (PART B)
  - The Venice Commission Opinion on the New Constitution of Hungary
  - The general concerns expressed by the Venice Commission
  - The role and significance of the *actio popularis* in *ex post* constitutional review
  - The role and significance of the preliminary (*ex ante*) review among the competences of the Constitutional Court.

## **PART A: THE VALUES IN THE NEW HUNGARIAN CONSTITUTION**

### **I. The Rejection of the National Socialist and Communist Dictatorship:**

During a press conference on his recent visit to Hungary, the United Nations Secretary-General Ban Ki-moon recognized the remarkable transformation the country has seen over the past two decades. Hungary has moved “from communism to democracy, from the Warsaw Pact to modern Europe.”<sup>7</sup> Today Hungary is an example for the rest of the contemporary states which are in the middle of a transition to democracy, especially in the Middle East area.

Unlike other communist countries, Hungary was not completely cut off from the West under communism. Hungary maintained privileged ties with liberal democracies, particularly with West Germany.<sup>8</sup> Therefore the preamble of Hungary’s new Constitution simply emphasizes the constitutional heritage of the country when it states that:

We do not recognize the suspension of our historical Constitution due to foreign occupation. We declare that no statutory limitation applies to the inhuman crimes committed against the Hungarian nation and its people under the national socialist and communist dictatorships.

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<sup>7</sup> U.N. Secretary-General, Remarks at joint press conference with President of Hungary (18 April 2011), [http://www.un.org/apps/news/infocus/sgspeeches/statments\\_full.asp?statID=1148](http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=1148).

<sup>8</sup> DUPRÉ C., *Importing the law in post-communist transitions*, Hart Publishing, 2003, at 5.

We do not recognize the legal continuity of the 1949 Communist “Constitution”, which laid the foundation for tyranny, and hence we declare it to be invalid.

...

We proclaim that the self-determination of our State, lost on 19 March 1944, was restored on 2 May 1990, with the formation of our first freely-elected representative body.

Such statements cannot be considered anti-democratic. To demonstrate, Hungary’s constitutional premises parallel other state constitutions which espouse similar democratic ideals:

*A. The democratic standards of European public law*

The Hungarian Constitution provides democratic standards similar to those provided by constitutions of other post-communist states, such as Croatia and Poland:

The Croatian constitution recognizes the death of and freedom from communism:

the ‘millenary identity of the Croatian nation [...] founded on the historical right of the Croatian nation to full sovereignty, manifested [...] on the threshold of historical changes, marked by the collapse of the communist system and transformations of the European international order, the Croatian nation reaffirmed its millenary statehood by its freely expressed will at the first democratic elections (1990)’.<sup>9</sup>

Article 13 of Polish constitution forbids anti-democratic government forms:

‘Political parties and other organizations whose programmes are based upon totalitarian methods and the modes of activity of nazism, fascism and communism, [...] shall be forbidden’<sup>10</sup>

More generally speaking, on a sub-constitutional level, countries of Central and Eastern Europe have adopted various forms of “lustration laws”. After the fall of various European Communist states between 1989–1991, the term came to refer to governments’ policies of “mass disqualification of those associated with the abuses under the prior regime” (for example, the Czechoslovakian law of 4 October 1991, and the Polish Law passed by the Sejm on 28 May 1992). These laws excluded participation of former communists, especially communist secret police informants, successor politicians, and even in civil service positions. The European Court of Human Rights has accepted these exclusions as a legitimate means of “transitional justice”<sup>11</sup>.

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<sup>9</sup> The Constitution of the Republic of Croatia, 22 December 1990, CODICES database, Venice commission, available at:

<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

<sup>10</sup> The Constitution of the Republic of Poland, 2 APRIL, 1997, CODICES, cit.

<sup>11</sup> On the concept of transitional justice, see JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE (Cambridge University Press) (2004).

### *B. The European Convention on Human Rights*

Under the margin of appreciation given to the various Member States in the Council of Europe, the European Court of Human Rights has permitted national authorities to close the door to their past communistic eras (even when condemning those Member States). For example, in *Ždanoka v. Latvia*, the Grand Chamber upheld Latvia's decision to disqualify the applicant from holding political office in the Latvian parliament as well as other municipal positions. The applicant brought her claims under Articles 3, Protocol No. 1 (right to free elections), 10 (Freedom of expression), and 11 (Freedom of assembly and association) of the European Convention on Human Rights. Latvia had disqualified the applicant because of her political militancy in the Communist Party of Latvia during the Soviet period. In upholding Latvia's decision, the Grand Chamber underscored Latvia's historical context and its specific need to protect democracy from subversive political activities:

While such a measure may scarcely be considered acceptable in the context of one political system, for example in a country which has an established framework of democratic institutions going back many decades or centuries, it may nonetheless be considered acceptable in Latvia in view of the historico-political context which led to its adoption and given the threat to the new democratic order posed by the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime.<sup>12</sup>

### *C. The European and international law system*

The international law system has not only accepted departures from Communist regimes, but has encouraged it. The Parliamentary Assembly of the Council of Europe (PACE) has explicitly provided measures to dismantle the heritage of former communist totalitarian systems. To quote the imperative resolution 1096 of 1996,

The dangers of a failed transition process were manifold. At best, oligarchy will reign instead of democracy, corruption instead of the rule of law, and organised crime instead of human rights. At worst, the result could be the “velvet restoration” of a totalitarian regime, if not a violent overthrow of the fledgling democracy.<sup>13</sup>

That is way Assembly recommended that “member states dismantle the heritage of former communist totalitarian regimes by restructuring the old legal and institutional systems...”

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<sup>12</sup> *Ždanoka v. Latvia* [GC], no. 58278/00, § 133, ECHR 2006-IV. For a comment of this decision, see PECORARIO A., *Il rovescio del giudizio della Grand Chamber, in tema di violazione dell'art. 3 primo protocollo e degli articoli 10 e 11 della convenzione, svela la complessità della transizione lettone*, in “Associazione italiana costituzionalisti” (May 2006).

<sup>13</sup> Parliamentary Assembly of the Council of Europe (PACE), Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems, ¶3, available at <http://assembly.coe.int/Main.asp?link=http%3A//assembly.coe.int/Documents/AdoptedText/ta96/ERES1096.htm>

#### *D. Conclusion*

The new Hungarian Constitution's mild rejection of Hungary's communist heritage completely aligns with the constitutional and sub-constitutional provisions existing in European public law, as well as democratic standards in the international system.

### **II. Nation based on ethnic origin**

It is necessary to add a comment on another related question that has raised concerns, summed up in the concept of "Nation based on ethnic origin". Article D of the new text states that:

Hungary, guided by the notion of a single Hungarian nation, shall bear responsibility for the fate of Hungarians living outside its borders, shall foster the survival and development of their communities, shall support their endeavours to preserve their Hungarian identity, and shall promote their cooperation with each other and with Hungary.

This provision has been strongly criticized, mainly by the neighboring States; Hungary has been accused of political expansionism. It could concern around 500.000 people living today mainly in Slovakia and Romania, on the territories lost by Hungary at the Treaty of Trianon in 1920. This is a very sensitive issue, and still "a gaping wound". This provision may be seen as a dangerous reopening of the "Pandora Box", leading to new local tensions. It may be the case. It may also be an instrument for pacification like in Ireland, where the double citizenship system is rather seen as a solution than a problem. Indeed, Art. 2 of Irish Constitution is very similar, by stating that "the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural affinity and heritage".<sup>[1]</sup> This provision is also similar to the famous Israeli Law of Return, of 5 July 1950 granting to the every member of the Jewish diaspora the right to return to Israel and to citizenship.

### **III. The Reaffirmation of the Underlying Christian Values of the Hungarian State and Society**

One of the most criticized aspects of Hungary's new Constitution is its reaffirmation of Christian values which undergird the Hungarian State and society. The Preamble implicitly rejects national socialist and communist dictatorships by declaring itself "proud that one thousand years ago [its] King, Saint Stephen, based the Hungarian State on solid foundations, and made [the] country a part of Christian Europe."<sup>14</sup> Hungary further declares its desire to honor "the achievements of [its] historical Constitution and [honors] the Holy Crown, which embodies the constitutional continuity of the Hungary and the unity of the nation".<sup>15</sup> Moreover, Hungary explicitly "acknowledges the role that Christianity has played in preserving [the] nation".<sup>16</sup>

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<sup>14</sup> Fundamental Law of Hungary, National Avowal of Faith, *supra* note 1, at 1 (emphasis added).

<sup>15</sup> *Id.* at 2 (emphasis added).

<sup>16</sup> *Id.* at 1 (emphasis added).

Again, a comparison with other European states shows that several states also highlight their Christian heritages in their respective constitutions.

A. *The democratic standards of European public law*

A large number of European States acknowledge foundational Christian values within their societies.

The Preamble of the Irish Supreme Law states:

In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ . . . Do hereby adopt, enact, and give to ourselves this Constitution.<sup>17</sup>

Similarly, Article 13 of the Bulgaria's constitution designates Eastern Orthodox Christianity as Bulgaria's official religion: "Eastern Orthodox Christianity shall be considered the traditional religion in the Republic of Bulgaria".<sup>18</sup> Article 2 of Norway's constitution provides similarly: "The Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same".<sup>19</sup> Likewise, Greece's constitution declares that that the Eastern Orthodox Church of Christ is the prevailing religion in Greece:

The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions.<sup>20</sup>

B. *The European Convention of Human Rights*

In a number of cases, the European Court of Human Rights has recognized the legitimacy and importance of Christian values which underlie European States and their societies. For example, in the *Otto-Preminger-Institut v. Austria*, a case regarding the seizure of a film which, in the opinion of the Government, was outrageous for the Roman Catholic religion, the European Court of Human Rights granted a wide margin of appreciation to the national authorities, recognizing that "*the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans*".<sup>21</sup>

Recently in the "crucifix case", *Lautsi v. Italy*, the Court reaffirmed the same principle establishing that, "by prescribing the presence of crucifixes in State-school classrooms . .

<sup>17</sup> Constitution of Ireland, 1 July 1937, CODICES, cit.

<sup>18</sup> Constitution of the Republic of Bulgaria, 12 July 1991. CODICES, cit.

<sup>19</sup> The Constitution of the Kingdom of Norway, 17 May 1814, CODICES, cit.

<sup>20</sup> 2001 Syntagma [Syn.] [Constitution] § 2, Art. 3, ¶ 1 (Greece).

<sup>21</sup> *Otto-Preminger-Institut v. Austria*, no. 13470/87, 20 Sept. 1994, § 56, Series A295-A.



. the regulations confer on the country's majority religion preponderant visibility in the school environment."<sup>22</sup> This preponderant visibility is justified "in view of the place occupied by Christianity in the history and tradition of the respondent State . . . ."<sup>23</sup>

### C. *The European and international law system*

As explained in the *Guidelines for Review of Legislation Pertaining to Religion and Belief* ("Guidelines") adopted the Venice Commission in 2004, "[l]egislation that acknowledges historical differences in the role that different religions have played in a particular country's history are permissible so long as they are not used as a justification for ongoing discrimination".<sup>24</sup>

The aim of the Hungarian Constitution is not to create grounds for discrimination, but rather to "preserve the intellectual and spiritual unity of [the Hungarian] nation," also recalling the role of Christianity.<sup>25</sup>

The Hungarian Constitution merely follows in the footsteps of the Council of Europe, considering that the Council's statute reaffirms Europe's spiritual and moral heritage:

Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy. . . .<sup>26</sup>

Similarly, the Treaty of Lisbon, establishing the European Union, declares reliance in part on a religious heritage:

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law . . . .<sup>27</sup>

Moreover, Article 4 of the Treaty of Lisbon announces that "[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities. . . ."<sup>28</sup>

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<sup>22</sup> *Lautsi v. Italy* [GC] no. 30814/06, § 71, 18 March 2011.

<sup>23</sup> *Id.* (citing *Folgerø and Others v. Norway* [GC], no. 15472/02, § 89, ECHR 2007 VIII).

<sup>24</sup> OSCE and the Venice Commission, Advisory Panel of Experts on Freedom of Religion and Belief of the ODIHR, *Guidelines for Review of Legislation Pertaining to Religion and Belief* [hereinafter "*Guidelines*"], at 10 (July 2004), available at [http://www.osce.org/publications/odihr/2004/09/12361\\_142\\_en.pdf](http://www.osce.org/publications/odihr/2004/09/12361_142_en.pdf). These Guidelines were adopted by the Venice Commission at its 59<sup>th</sup> Plenary Session (Venice, 18-19 June 2004).

<sup>25</sup> See Fundamental Law of Hungary, National Avowal of Faith, *supra* note 1, at 1.

<sup>26</sup> Statute of the Council of Europe, E.T.S. No. 1, preamble, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>.

<sup>27</sup> Treaty of Lisbon, C 306, Vol. 50, Preamble to the Treaty on European Union and Comments (17 December 2007), available at <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty.html>.

<sup>28</sup> *Id.* art. 4, ¶ 2.

#### D. Conclusion

Those provisions of Hungary's new Constitution which reaffirm Christian values are not unique in Europe. These provisions are in accordance with the European Law and legal traditions. Thus, that Hungary's national identity is marked by the Christianity presents no conflict.

#### IV. The Cooperation between the Church and State

Article VI of the new Hungarian Constitution affirms that,

[i]n Hungary the State and the churches shall be separated. Churches shall be independent. For the attainment of community goals, the State shall cooperate with the churches.<sup>29</sup>

This provision has also stirred much criticism from secularists. Once again, those criticisms are not objectively justified and reflect an ideological bias against the sovereign choice of the Hungarian people. To the contrary, European and International law do not require pure secularism. Moreover, the European landscape presents a colorful variety of solutions with which to achieve an appropriate relationship, as well as cooperation, between Church and State.

##### A. *The democratic standards of European public law*

A small number of States explicitly indicate secularism as a distinguishing feature of their legal system in their Constitution. For example, the First article of the French Constitution requires that, "France shall be an indivisible, secular, democratic and social Republic".<sup>30</sup> Similarly, article 2 of the Turkish Constitution states that "the Republic of Turkey is a democratic, secular and social State".<sup>31</sup>

On the other hand, many states establish state churches in their constitutions. For example, article 4 of the Danish Constitution, affirms that "the Evangelical Lutheran Church shall be the Established Church of Denmark, and as such shall be supported by the State",<sup>32</sup> while in the United Kingdom, the Head of State is also the Head of the Church. Additionally, some seats of the House of Lords are reserved to the Ecclesiastics of the Anglican Church.

Another series of constitutions establishes some form of compromise. For example, Article 7 of the Italian Constitution provides that, "[t]he State and the Catholic Church are, each within its own order, independent and sovereign. . ."<sup>33</sup>

Similarly, Article 16 of Spain's constitution states that "there shall be no State religion. The public authorities shall take the religious beliefs of Spanish society into account and

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<sup>29</sup> Fundamental Law of Hungary, *supra* note 1, art. 6, cl. 2.

<sup>30</sup> Constitution of October 4, 1958, CODICES, cit.

<sup>31</sup> The Constitution of the Republic of Turkey, 7 November 1982, CODICES, cit.

<sup>32</sup> The Constitutional Act of Denmark, 5 June 1953, CODICES, cit.

<sup>33</sup> The Constitution of the Italian Republic, 22 December 1947, CODICES, cit.

shall in consequence maintain appropriate co-operation with the Catholic Church and the other confessions”.<sup>34</sup>

The European continent, thus, exhibits a wide variety of governmental models, some secular and some sectarian in nature. The European Court of Human Rights has always afforded great respect to these relationships.

### B. *The European Convention of Human Rights*

In *Folgerø and Others v. Norway*,<sup>35</sup> the Grand Chamber of the Court decided whether Norway violated Convention principles by providing instruction in the Christian faith to primary school students. In its analysis of the applicants’ claims brought under Article 1 of Protocol No. 1, the Grand Chamber held that Christianity could occupy a prominent position in school curriculum:

[T]he fact that knowledge about Christianity represented a greater part of the Curriculum for primary and lower secondary schools than knowledge about other religions and philosophies cannot, in the Court’s opinion, of its own be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination (see, mutatis mutandis, *Angelini v. Sweden* (dec.), no 1041/83, 51 DR (1983). In view of the place occupied by Christianity in the national history and tradition of the respondent State, this must be regarded as falling within the respondent State’s margin of appreciation in planning and setting the curriculum.<sup>36</sup>

Thus, Member States may freely emphasize one religion over others due to the place that one religion holds in the State’s “national history and tradition”.

Additionally, for secular Member’s States, the Grand Chamber of the Court acknowledged the importance of this specific tradition in its 2003 decision, *Refah Partisi v. Turkey*.<sup>37</sup> In this case, the Grand Chamber decided that Turkey acted legitimately and proportionately<sup>38</sup> when it dissolved the political party, *Refah Partisi*, particularly in light of the importance of secularism to Turkey’s constitutional framework.<sup>39</sup> In sum, the Grand Chamber agreed with the Turkish constitutional Court’s finding<sup>40</sup> that Turkey’s

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<sup>34</sup> Constitution of Spain, 31 October 1978, CODICES, cit.

<sup>35</sup> *Folgerø and Others v. Norway* [GC], no. 15472/02, § 89, ECHR 2007 VIII.

<sup>36</sup> *Id.* § 89.

<sup>37</sup> *Refah Partisi v. Turkey*, [GC] nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II.

<sup>38</sup> *Id.* §§ 67, 135

<sup>39</sup> The Court concluded that Turkey’s interference was necessary in a democratic society because it met a “pressing social need” and was “proportionate to the aims pursued.” *Id.* at § 135. The interference met a pressing social need because the danger of Refah seizing power was tangible and immediate, because Refah could have implemented its anti-democratic regime if it seized power in the next election. *Id.* at § 110. Also, the interference was proportionate to the aims pursued since the economic penalties alleged by Refah were speculative and the penalty of the individual members refraining from political activity was merely temporary. *Id.* at § 134.

The Court noted that the margin of appreciation for Turkey is limited in regard to dissolution of political parties since Article 11 is to be construed strictly in its application to political parties. *Id.* at § 100. However, the Court found that Turkey was within its margin of appreciation when it dissolved Refah. *Id.* at § 110.

<sup>40</sup> *Id.* § 40.

Constitution forbade political parties from actively seeking to end democracy. In analyzing why Refah's goals conflicted with a democratic society, the Court stated that "there can be no democracy without pluralism."<sup>41</sup> Refah's desire to implement an Islamic regime directly conflicted with a democratic society. As the Grand Chamber noted, "freedom of thought, conscience, and religion is one of the foundations of a "democratic society" within the meaning of the Convention."<sup>42</sup> In so doing, the Grand Chamber recognized Turkey's right to self-determination, even where secularism is the prevailing governmental system. As the Turkey's Constitutional Court explained in its prior decision, "'Secularism, which is also the instrument of the transition to democracy, is the philosophical essence of life in Turkey."<sup>43</sup> Thus, the Court upheld the Constitutional Court's decision: "Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considers that the Constitutional Court was justified in holding that Refah's policy of establishing sharia was incompatible with democracy . . . ."<sup>44</sup>

In short, the Court's decision in *Refah Partisi* indicates that, under the Convention, there is a required balancing between freedom of political speech and freedom of association. Political parties are permitted to suggest changes to the fundamental democratic system of a state as long as they use democratic means to implement those changes and as long as the change itself is compatible with fundamental democratic principles. The "necessary in a democratic society" element requires this balancing. If a political party crosses the line of posing a threat to democracy, then the Convention cannot be used as a protection for those anti-democratic activities and ideals. Therefore, the Court rejected Refah's desire to claim freedoms protected by a document enacted through democratic means and committed to the protection of democracy when Refah's obvious goal was to stifle democracy.

Finally, in *Sahin v. Turkey*, when analyzing whether Turkey's regulation of the Islamic headscarf at a public university was "necessary in a democratic society" under Article 9, the Grand Chamber explained the impossibility of discerning a *uniform* conception of religion in society throughout Europe, and, thus, why member states must be given a wide margin of appreciation in these matters:

Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given *special importance*. . . . *It is not possible to discern throughout Europe a uniform conception of the significance of religion in society . . . and the meaning or impact of the public expression of a religious belief will differ according to time and context*. . . . Rules in this sphere will consequently vary from one country to another according to *national traditions* and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. . . . Accordingly, *the choice of the extent and form* such regulations should take must inevitably be left up to

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<sup>41</sup> *Id.* at § 89.

<sup>42</sup> *Id.* at § 90.

<sup>43</sup> *Id.* § 40 (quoting the Constitutional Court of Turkey).

<sup>44</sup> *Id.* § 125.

a point to the State concerned, as it will depend on the specific domestic context. . . .<sup>45</sup>

### C. *The European and international law system*

European and international law also recognize and encourage the above-mentioned variety in the regulation of the relations between Church and State. For example, the Treaty of Lisbon (in Article 17 of the Treaty on the Functioning of the European Union) states that, “[t]he Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.”<sup>46</sup> Recognizing their identity and their specific contribution, the Union undertook to maintain an open, transparent and regular dialogue with churches and religious associations, highlighting the essential role that they play in a pluralistic society for the common good.

### D. *Conclusion*

Accordingly, the new Hungarian constitutional text is fully compatible with European practices on Church and State relationships. Moreover, this new Constitution takes steps which surpass the examples cited herein to protect individual rights: First, it explicitly provides for a separation between Church and State. Second, the document neither refers to nor designates a specific religion or denomination as many Member States in the Council of Europe do.<sup>47</sup> Rather, the new Constitution only refers to churches generally.

Should the idea that the “State shall cooperate with the churches,” be considered a crime? This governmental paradigm reflects a balanced, and inclusive approach toward religion, and simultaneously excludes any anti-religious bias.

## V. **The protection of the right to life and human dignity from the moment of conception**

The new constitution is not only based upon democratic principles generally as set forth in its National Avowal of Faith, but under Freedoms and Responsibilities, Article II grants to individuals specific protections which espouse values and which respect human life. For example, Article II protects a foetus’ right to life, which begins at conception:

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<sup>45</sup>*Sahin v. Turkey* [GC], no. 44774/98, § 109 ECHR 2005-XI (internal citation omitted) (emphasis added).

<sup>46</sup>Treaty of Lisbon, Treaty on the Functioning of the European Union *supra* note 27, art. 17.

<sup>47</sup>For example, sixteen of the forty-seven Member States of the Council of Europe are confessional states or specifically mention a relationship with a specific religion in their constitutions or founding documents: Andorra (Catholic); Armenia (Armenian Apostolic Church); Bulgaria (Eastern Orthodox Christianity); Cyprus (Greek Orthodox Church); Denmark (Evangelical Lutheran Church); Georgia (Apostle Autocephalous Orthodox Church of Georgia); Greece (Eastern Orthodox Church of Christ); Iceland (Evangelical Lutheran Church); Italy (Catholic Church); Liechtenstein (Roman Catholic Church); Malta (Roman Catholic Apostolic Religion); Norway (Evangelical Lutheran Religion); Poland (Roman Catholic Church); Spain (Catholic Church); Macedonia (Macedonian Orthodox Church); United Kingdom (church of England and Church of Scotland).

Human dignity shall be inviolable. Everyone shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.<sup>48</sup>

Article II's explicit protection for human life and dignity has created an inexplicable scandal among some "post-modern" advocates. However, a comparison to other European states' similar protections demonstrates that Hungary's democratic choice is fully legitimate.

A. *The democratic standards of European public law*

Hungary is not alone in providing strong protection for human life and dignity. As many are aware, Catholic countries have specially undertaken a respectful approach toward human life.

Thus, article 40 of Ireland's constitution states that, "

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.<sup>49</sup>

Similarly, Article 38 of Poland's constitution binds the Republic to "ensure the legal protection of the life of every human being".<sup>50</sup>

B. *The European Convention of Human Rights*

The European Convention of Human Rights ("Convention") declares protection for human life. Article 2 of the Convention states that, "[e]veryone's right to life shall be protected by law."<sup>51</sup> The European Court has never ruled that the unborn shall not—in principle—benefit from this protection, which derives from the general responsibility of the States to defend the lives of their people. To the contrary, in the *Vo v. France*, for example, the Grand Chamber of the Court ruled that States have the authority to determine when the right to life begins.<sup>52</sup> Human Rights treaties provide a floor of protection, not a ceiling. Therefore, the States can regulate their legal system to enhance the internal level of protection of fundamental rights; and simultaneously, they cannot give less protection than the Convention provides. In a recent decision, *A. B. C. v. Ireland*, the Grand Chamber of the Court decided there is no fundamental right to abortion stemming from the European Convention under Article 8.<sup>53</sup> In that case, the Court acknowledged the "right to life of the unborn"<sup>54</sup> as a legitimate concern to be taken into account. Even considering the broad European consensus on abortion, the Court held that Ireland "struck a fair balance between the conflicting rights and interests" at stake; as

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<sup>48</sup> Fundamental Law of Hungary, *supra* note 1, art. II.

<sup>49</sup> Constitution of Ireland, 1 July 1937, CODICES, cit.

<sup>50</sup> The Constitution of the Republic of Poland, 2 APRIL, 1997, CODICES, cit.

<sup>51</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, art. 2, cl. 1, 213 U.N.T.S. 221, 230 (Eur.) [hereinafter ECHR].

<sup>52</sup> *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII.

<sup>53</sup> *A, B and C. v. Ireland* [GC], no. 25579/05, §§ 214, 233, 16 December 2010 (selected for publication)

<sup>54</sup> *Id.* § 233.

to the first two applicants, although Ireland prohibited abortion for health and well-being reasons, it permitted women to travel outside the state to obtain an abortion for those reasons.<sup>55</sup> In its analysis, the Court did not waiver on granting Ireland a *broad* margin of appreciation, considering “the acute sensitivity of the moral and ethical issues raised by the question of abortion,”<sup>56</sup> and “the profound moral views of the Irish people as to the nature of life.”<sup>57</sup>

#### D. *The European and international law system*

The protection of life and human dignity enshrined in the Hungarian constitution is also completely in line with international law. Suffice it to recall the United Nation Convention on the Rights of the Child (“Rights of the Child Convention”). This Convention dates back to 1989 and it “is the first legally binding international instrument to incorporate the full range of human rights—civil, cultural, economic, political and social right”.<sup>58</sup>

The Preamble to the United Nations Convention on the Rights of the Child explicitly recognizes that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth...”<sup>59</sup> Further, Article 6 affirms that “States Parties recognize that every child has the inherent right to life,” and that they “shall ensure to the maximum extent possible the survival and development of the child.”<sup>60</sup>

#### E. *Conclusion*

Hungary unequivocally based its new constitution on the principle of human dignity. Hungary chose the most solid foundations for its governmental institution. Those who attack the new provisions of this constitution which protect human life from conception are, in reality, using human rights as a weapon *against* human dignity. Use of human rights in this manner directly conflicts with the logic of European and international law and values.

### VI. **Protection of the family and the institution of heterosexual marriage**

Article K of the new Fundamental Law of Hungary, in relevant part, preserves marriage:

(1) Hungary shall protect the institution of marriage, understood to be the conjugal union of a man and a woman based on their independent consent; Hungary shall also protect the institution of the family, which it recognises as the basis for survival of the nation.

(2) Hungary shall promote the commitment to have and raise children.<sup>61</sup>

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<sup>55</sup> *Id.* § 237.

<sup>56</sup> *Id.* at 233 (emphasis added).

<sup>57</sup> *Id.* 241 (emphasis added).

<sup>58</sup> UNICEF, *Convention on the Rights of the Child*, <http://www.unicef.org/crc/> (last visited 13 May 2011).

<sup>59</sup> U.N. Convention on the Rights of the Child, preamble, 20 Nov. 1989, 1577 U.N.T.S. 27531.

<sup>60</sup> *Id.* at art. 6.

<sup>61</sup> Fundamental Law of Hungary, *supra* note 1, art. K.

A. *The democratic standards of European public law*

Forty-one of the forty-seven Member States of the Council of Europe limit marriage to the conjugal union of a man and a woman. Among them, there are some States which constitutionally define marriage as a union between one man and one woman. For example, Poland's constitution provides in its Article 18 that, "marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."<sup>62</sup> Likewise, the Ukrainian constitution establishes that, "[m]arriage is based on the free consent of a woman and a man."<sup>63</sup> Latvia's constitution also provides that "the State shall protect and support marriage—a union between a man and a woman, the family, the rights of parents and rights of the child."<sup>64</sup> Considering such examples, the provisions in Hungary's new constitution are a far cry from revolutionary,

B. *The European Convention of Human Rights*

Article 12 of the European Convention on Human Rights, guarantees only to "men and women of marriageable age" the right to marry and to found a family.<sup>65</sup> Recently, in *Schalk and Kopf v. Austria*, the Court held that the European convention does not impose an obligation on Member States to afford the right to marry to same-sex couples.<sup>66</sup> The Court further affirmed that the Austrian government had not discriminated against the couple when it prohibited two men from contracting a marriage. As the Court explained, "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another."<sup>67</sup> Moreover, the Court "reiterate[d] that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society."<sup>68</sup> Notably, the Court disagreed that there was any European consensus on this issue, with only six of the forty-seven member states allowing same sex marriage.<sup>69</sup>

C. *The European and international law system*

Article 23 of the United Nation International Covenant on Civil and Political Rights, establishes that, "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State."<sup>70</sup> This Article further recognizes "[t]he right of men and women of marriageable age to marry and to found a family . . . ."<sup>71</sup>

Additionally, the European Union leaves such matters within its member states' discretion. Article 9 of the Charter of Fundamental Rights of the European Union,

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<sup>62</sup> The Constitution of the Republic of Poland, 2 APRIL, 1997, CODICES, cit.

<sup>63</sup> Constitution of Ukraine, 28 June 1996, CODICES, cit.

<sup>64</sup> Constitution of the Republic of Latvia, 15 February 1922, CODICES, cit.

<sup>65</sup> ECHR, *supra* note 51, § 12.

<sup>66</sup> *Schalk and Kopf v. Austria*, no. 30141/04, § 63, 24 June 2010 (selected for publication).

<sup>67</sup> *Id.* § 62.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* § 58.

<sup>70</sup> International Covenant on Civil and Political Rights, art. 23, cl. 1, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], available at <http://www2.ohchr.org/english/law/ccpr.htm#art23>.

<sup>71</sup> *Id.* at art. 23, cl. 2.



although not explicitly addressing the institution of traditional marriage, simply establishes that “[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.”<sup>72</sup>

#### D. Conclusion

While some radical pro-LGBT lobbies may not appreciate the new Hungarian constitution, it is the sovereign and legitimate choice of the Hungarian people. This choice, which includes protecting life from conception, is especially justified by the serious demographic problem that Hungary suffers regarding an exceedingly low fertility rate— around 1.3 children per woman.

### VII. Prohibition of practices aimed at eugenics

Article III of the new Hungarian constitution, in relevant part, establishes that, “[p]ractices aimed at eugenics, the use of the human body or its parts for financial gain, or human cloning shall be prohibited.”<sup>73</sup>

#### A. The democratic standards of European public law

The tone of this new Hungarian constitutional provision is not novel in European practice. For example, Article 24 of Serbian constitution establishes that “cloning of human beings shall be prohibited”.<sup>74</sup> Similarly, Article 119 of the Federal Constitution of the Swiss Confederation states that “All forms of cloning and interference with genetic material of human reproductive cells and embryos is prohibited”.<sup>75</sup>

#### B. The European Convention of Human Rights

The European Convention on Human Rights does not directly address eugenics and cloning, but the Council of Europe’s *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*, better known as “Convention of Oviedo,”<sup>76</sup> establishes some key provisions that protect life: “the interests and welfare of the human being shall prevail over the sole interest of society or science” (art.2); “where the law allows research on embryos in vitro, it shall ensure adequate protection of the embryo [being] the creation of human embryos for research purposes is prohibited” (art. 18).

Article III of the new Hungarian constitution fully harmonizes with the European Convention on Human Rights and the Convention of Oviedo. The European Court of Human Rights has always considered that the “desire to artificially procreate” is not guaranteed by article 12. In 2007, the Court recalled that “article 12 of the convention

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<sup>72</sup> Charter of Fundamental Rights of The European Union, 2000 O.J. (C 364/01), art. 9, available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

<sup>73</sup> Fundamental Law of Hungary, *supra* note 1, art. III, cl. 3.

<sup>74</sup> Constitution of Serbia, 8 November 2006, CODICES, cit.

<sup>75</sup> Federal Constitution of the Swiss Confederation, 18 April 1999, CODICES, cit.

<sup>76</sup> Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*, Oviedo, 4 April 1997, available at, <http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm>.

does not guarantee a right to procreation.”<sup>77</sup> The Court consistently interprets this provision as “not . . . guarant[ying] a right to adopt or otherwise integrate into a family a child which is not the natural child of the couple concerned.”<sup>78</sup> The Court has recognized this on several occasions.<sup>79</sup> There is not a subjective right to procreate; there is only a protection against State interference in the freedom of couples to exercise their natural ability to have children by themselves.<sup>80</sup>

### C. *The international law system*

Generally, international law has heavily regulated eugenics practices. In an important resolution on human cloning,<sup>81</sup> the European Parliament, regarding the United Kingdom’s proposal to permit medical research using embryos created by cell nuclear replacement (so-called “therapeutic cloning”), “consider[s] that ‘therapeutic cloning’, which involves the creation of human embryos solely for research purposes, poses a profound ethical dilemma, irreversibly crosses a boundary in research norms and is contrary to public policy as adopted by the European Union”.<sup>82</sup> Consequently, the European Parliament called on the UK Government to review its position on human embryo cloning,<sup>83</sup> and repeated its call to each Member State “to enact binding legislation prohibiting all research into any kind of human cloning within its territory and providing for criminal penalties for any breach”.<sup>84</sup>

At its 82<sup>nd</sup> plenary meeting on 8 March 2005, the General Assembly of the United Nations enacted a Declaration on Human Cloning.<sup>85</sup> In its Declaration, the Assembly, aware of the ethical concerns that certain applications of rapidly developing life sciences may raise with regard to human dignity, human rights and the fundamental freedoms of individuals, solemnly declared that “Member States are [...] called upon to adopt the measures necessary to prohibit the application of genetic engineering techniques that may be contrary to human dignity.”<sup>86</sup>

### D. *Conclusion*

In the light of these comparative materials established by various international bodies, we can conclude that criticism of Hungary’s stance on eugenics appears to be unjustified and aimed at imposing a postmodern ideology.

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<sup>77</sup> *S. H. v. Austria* (dec.), no. 57813/00, § 4, 15 November 2007.

<sup>78</sup> *X and Y v. United Kingdom*, (dec.) no. 7229/75, 15 December 1977, D.R. 12, p. 32.

<sup>79</sup> *Margarita Šijakova and others v. The former Yugoslav Republic of Macedonia* (Dec.), no. 67914/01, 6 March 2003 (“the right to procreation is not covered by Article 12 or any other Article of the Convention”).

<sup>80</sup> *X and Y. v. United Kingdom*, *supra* note 78.

<sup>81</sup> European Parliament resolution on human cloning Thursday, 7 September 2000, Strasbourg, *available at* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2000-0376+0+DOC+XML+V0//EN&language=EN>.

<sup>82</sup> *Id.* § 2 (emphasis added).

<sup>83</sup> *Id.* § 3.

<sup>84</sup> *Id.* § 4 (emphasis added).

<sup>85</sup> United Nations Declaration on Human Cloning, G.A. Res. 59/280, U.N. Doc. A/RES/ 59/280 (8 March 2005).

<sup>86</sup> *Id.* at Annex ¶ (c) (emphasis added).

## PART B: THE LEGAL QUESTIONS ARISING FROM THE NEW HUNGARIAN CONSTITUTION

### *Introduction*

Along with debates around the values affirmed in the text, the adoption of the new Hungarian constitution also brought to the forefront a few legal issues which date back to the very early history the country.

The first and only written Constitution of the Republic of Hungary was adopted on 20 August 1949. From 1988 on, the idea of preparing a new constitution emerged in Hungary. This new foundational document was supposed to establish a multiparty system, a parliamentary democracy, and a social market economy. However, a new constitution could not be drafted and, in 1989, the National Assembly adopted a comprehensive amendment to the 1949 Constitution (Act XXXI of 23 October 1989). Although previous governments had already attempted to draft a new constitution, adoption had never been successful. The Preamble of the Constitution as amended in 1989 states that the Constitution shall remain in force until the adoption of a new Constitution.<sup>87</sup>

Since 1989, the 1949 Constitution of the Republic of Hungary has been amended several times, beginning in 1990. Due to the two-thirds majority held by the ruling centre-right coalition, the amending process of the Constitution progressively intensified. As of late, the Constitution has been amended about ten times in the last months of 2010. Finally, the National Assembly initiated a project to rewrite the Constitution altogether.

These modifications have drawn the European institutions' attention. On 21 February 2011, the Deputy Prime-Minister and Minister of Public Administration and Justice of Hungary, Mr. Tibor Navracsics, requested that the Venice Commission prepare a legal opinion on three particular issues arising in the drafting of a new constitution for the Republic of Hungary.<sup>88</sup> On 7-8 March 2011, a working group of the Venice Commission traveled to Hungary in order to meet with Hungarian authorities, including the Ad-Hoc Committee in charge of the drafting of the constitution, and civil society. The mandate of the Venice Commission was not to examine every aspect of the new constitution, but rather to give its legal opinion on three specific issues arising in the context of preparing the text. The Commission also addressed some general concerns.

The analysis here follows same framework as in Part A, *supra*, notwithstanding the procedural criticisms expressed by the Commission. Notably, the ECLJ disagrees with some media reports which portrayed the Venice Commission's analysis as a rejection by the European communities of Hungary's reform as constitutionally invalid. This is untrue.

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<sup>87</sup> Venice Commission, Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, Op. 614/2011, CDL-AD(2011)001 (adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011)), available at <http://www.conjur.com.br/dl/relatorio-comissao-veneza-questoes.pdf>.

<sup>88</sup> Id.

We will analyze the constitutional amendment of November 2010 which has reduced the powers of the Constitutional Court. On this specific point, we conclude that this new shift in the balance of constitutional powers is logical and perfectly in line with European democratic standards as those standards have matured over time.

The first question addressed to the Commission asked, “[T]o what extent may the incorporation in the new Constitution of provisions of the EU Charter of Fundamental Rights enhance the protection of fundamental rights in Hungary and thereby also contribute to strengthening the common European protection of these right”.<sup>89</sup> The Venice Commission found that updating the scope of human rights protection and seeking to adequately reflect, in the new Fundamental Law of Hungary, the most recent developments in the field of human rights protection, as articulated in the EU Charter, is a “legitimate aim and a signal of loyalty towards European values”.<sup>90</sup> The Commission then advised against Hungary’s incorporation of the EU Charter of Fundamental Rights into its constitution. The Commission believed this would result, *inter alia*, in problems of interpretation and overlapping competences between domestic ordinary courts, the national Constitutional Court and the European Court of Justice. The Commission went on to state that, “[t]he substantive provisions of the EU Charter can however be used as a source of inspiration for the national constitutionally guaranteed human rights.”<sup>91</sup> However, it also noted that particular attention should be paid in this context to the conformity of the domestic protection of human rights with the ECHR and other binding international human rights treaties.

### **I. The role and significance of the preliminary (ex ante) review among the competences of the Constitutional Court**

The Commission answered the following two questions:

- *Who is entitled to submit a request for preliminary review?*

and

- *What is the effect of a decision passed by the Constitutional Court in a preliminary review procedure on the legislative competence of the Parliament?”*<sup>92</sup>

The Venice Commission began by noting that “there is no common European standard as regards the initiators and the concrete modalities of this review. States decide, in accordance to their own constitutional traditions and specific needs, which organs, and to what extent, are authorized to conduct an a priori review and who should have the right to initiate it.”<sup>93</sup> The Commission concludes by stating that,

[i]n order to avoid over-politicizing the mechanism of constitutional review, the right to initiate the *ex ante* review should be limited to the President of the country. The review should take place only after the adoption of the law in parliament and before its enactment and, for international treaties, before their ratification. In addition, wider non-

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* ¶ 11.2.

<sup>93</sup> *Id.* ¶ 35.

binding *ex ante* review could be conducted, if needed, by a parliamentary committee or by independent bodies or structures.<sup>94</sup>

## II. The role and significance of the *actio popularis* in *ex post* constitutional review

Finally, the Commission explained that the future constitution's removal of the *actio popularis* (which would avoid the danger of overburdening the Constitutional Court and the misuse of the remedies before it) would not infringe European constitutional standards.<sup>95</sup> The authorities had explained that, in Hungary, the Constitutional Court receives approximately 1600 petitions per year; anyone, including those holding no legal interest, may seek constitutional review of a legal norm under an *actio popularis* system.<sup>96</sup> The Venice Commission opined that it was nonetheless advisable, particularly in light of Hungary's constitutional heritage, to implement other mechanisms of constitutional review to avoid "repercussions on the scope and efficiency of the control."<sup>97</sup> For example, the Commission suggested retaining "limited elements of *actio popularis*" by providing an "indirect access mechanism through which individual questions would reach the Constitutional Court for adjudication via an intermediary body (such as the Ombudsman or other relevant bodies)."<sup>98</sup> In addition, the Venice Commission recommended that

the system of preliminary requests by ordinary courts be retained. The planned extension of the constitutional complaint to review also *individual acts*, in addition to normative Acts, is a necessary compensation for the removal of *actio popularis* and therefore a highly welcome development.<sup>99</sup>

## III. The general concerns expressed by the Venice Commission

As is evident from the above discussion, the Venice Commission has not rejected Hungary's reform. First, any such rejection would have infringed the sovereignty of the Country. To the contrary, this project has been considered as a step forward by many. In short, there is no "constitutional emergency" in Hungary. While the Venice Commission has expressed some general concerns which Hungary may take into consideration, the bulk of criticism by opposition to the reform amounts to no more than pure political propaganda.

### (1) *The "Goulash soup"*

The most serious concern regards the procedural ground. The Venice Commission argued that the Hungarian government lacked transparency, failed to adequately consult with the opposition, and rushed the constitutional process.

Effectively, the procedural shortcomings of the reform process, including the limited timeframe for implementation, have opened the door to criticism. The Economist argues

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<sup>94</sup> *Id.* ¶75.2.

<sup>95</sup> *Id.* ¶ 64.

<sup>96</sup> *Id.* ¶¶ 55-59.

<sup>97</sup> *Id.* ¶ 65.

<sup>98</sup> *Id.* ¶ 66.

<sup>99</sup> *Id.* ¶ 75(3).

the process should not be like “Goulash soup,” stating that “[a] constitution ought to be above political horse-trading. Input from all parties should give it greater legitimacy, making it harder to alter. Yet over the past year the government has marginalised and alienated the opposition.”<sup>100</sup> The radical nationalist *Jobbik* voted against the supreme law while the Socialists and green party, *Politics Can Be Different* (LMP) boycotted the vote. Hungary’s new supreme law will take effect on January 1, 2012. The main opposition, the Socialist Party, requested by letter that President Pal Schmitt not sign Hungary’s new constitution. The Socialists, as well as the LMP, have even refused to participate in the parliamentary debate, saying that the law served “to cripple and rob people and attempt to curb the constitution and democracy”.<sup>101</sup>

In an interview with *The Wall Street Journal* on 19 April 2011, Tibor Navracsics, the deputy prime minister, denied that the process had been rushed. A new constitution has been a goal of successive Hungarian governments since 1989. The debate has been an ongoing one for the past 20 years. In the April 2010 election campaign, this government’s key pledge centered on drafting and implementing a new constitution. Formal consultation started soon after the elections, in June of last year. All of Hungary’s opposition parties, numerous experts, and civil society groups were invited to participate. The majority did so and provided invaluable input. In addition, the government conducted an unprecedented public consultation exercise. Questionnaires were sent to eight million voters. More than one million responses were incorporated in the drafting process.<sup>102</sup>

In any case, beyond the natural defensive explanation provided by the Hungarian government, it is astonishingly ironic to hear some voices from the European institutions explaining to a democratic State how a constitution should be democratically developed and adopted. The “European Constitution” has been largely imposed over European peoples, even against popular will explicitly expressed through referendum. As Mr von Krempach explains in the Blog, *Turtle Bay and Beyond*, on

[t]he first attempt, the so-called ‘Constitutional Treaty of the EU’, was subject to a referendum in only four of the 27 Member States: while Spain and Luxembourg voted ‘yes’, the outcome was negative in France and the Netherlands. And what happened next? A new draft Treaty with identical substance was adopted—the sole difference being that the word ‘Constitution’ was not used any more. This new draft was subject to a referendum only in one of 27 Member States (Ireland), and when the outcome of that referendum was negative, Ireland was pressed . . . to repeat the poll as many times as was necessary to get to a yes.<sup>103</sup>

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<sup>100</sup> *Goulash soup, The new constitution is being rushed through with limited consultation*, THE ECONOMIST (7 April 2011), available at <http://www.economist.com/node/18530690>.

<sup>101</sup> Socialists call on president Schmitt not to sign constitution, MTI.hu, Hungarian News Agency, April 26, 2011.

<sup>102</sup> *Hungary Rejects German Criticism of New Constitution*, The Wall Street Journal, 19 April 2011.

<sup>103</sup> J.C. von Krempach, Former Belgian Prime minister annoyed over Hungary’s new Constitution, TURTLE BAY AND BEYOND, INTERNATIONAL LAW, POLICY, AND INSTITUTIONS BLOG (19 April 2011), <http://www.turtlebayandbeyond.org/2011/abortion/former-belgian-prime-minister-annoyed-over-hungarys-new-constitution/>.

Mr von Krempach also explained that “23 new constitutions have been enacted in Eastern and Central Europe since 1990, and only 10 of these were subject to a popular referendum in the country concerned, whereas 13 were adopted by the legislative body alone.”<sup>104</sup> He wondered why the absence of a referendum is suddenly problematic now when it never has been in the past. Moreover, as von Krempach further elaborated, “[i]f one takes a look beyond Eastern Europe, one will not avoid noticing that neither the US Constitution, nor the German Grundgesetz, nor the Austrian Constitution have ever been subject to any popular vote—yet these texts enjoy a high reputation and nobody would doubt their legitimacy.”<sup>105</sup>

(2) *The role of the Hungarian Constitutional Court in the context of the Visegrad Four.*<sup>106</sup>

In large part, the Venice Commission opinion on Hungary’s new constitution rejected the limitation of powers of the Constitutional Court as a result of a constitutional amendment in November 2010. According to this amendment, the Constitutional Court may assess the constitutionality of legislative acts related to the central budget, central taxes, stamp duties and contributions, custom duties and central requirements related to local taxes exclusively in connection with the rights to life and human dignity, the protection of personal data, the freedom of thought, conscience and religion or with rights related to the Hungarian citizenship. Also, the Court may only annul these legislative acts in case of violation of the abovementioned rights.<sup>107</sup>

This last remark of the Venice Commission is not confined to the procedural aspects of the reform; it refers to the relationship between constitutional organs, namely the doctrine of separation of powers. Yet, the question of separation of powers must be addressed in context, considering crucial historical and cultural aspects of Hungary’s post-communist constitutional evolution. From this perspective, the reorganization of the Constitutional Court’s legal competences falls in line with the other key accomplishments of the democratic transition.

From the early stages of the democratic transition from communism, a majority of states in Central and Eastern Europe decided to grant relevant powers to newly established constitutional courts. This transition of power reflected the pressure from international organizations that desired to showcase these new constitutions as an important element in

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> The Visegrád Group, also called the Visegrád Four or V4, is an alliance of four Central European states – the Czech Republic, Hungary, Poland and Slovakia—for the purposes of cooperation and furthering their European integration. The Group’s name in the languages of the four countries is Visegrádská čtyřka or Visegrádská skupina (Czech); Visegrádi Együttműködés or Visegrádi négyek (Hungarian); Grupa Wyszehradzka (Polish); and Vyšehradská skupina or Vyšehradská štvorka (Slovak). It is also sometimes referred to as the Visegrád Triangle, since it was an alliance of three states at the beginning—the term is not valid now, but appears sometimes even after all the years since the dissolution of Czechoslovakia in 1993. The Group originated in a summit meeting of the heads of state or government of Czechoslovakia, Hungary and Poland held in the Hungarian castle town of Visegrád[2] on 15 February 1991 (not to be mistaken with Vyšehrad, a castle in Prague, the capital city of the Czech Republic, or with the town of Višegrad in Bosnia and Herzegovina). The Czech Republic and Slovakia became members after the dissolution of Czechoslovakia in 1993. All four members of the Visegrád Group became part of the European Union on 1 May 2004. From Wikipedia.org

<sup>107</sup> The Constitution of the Republic of Hungary, Art. 32/A. CODICES database, Venice commission, available at: <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

the departure from communist systems. As observed by Huntington, Linz, Stepan, O'Donnell, Lipset and Whitehead,<sup>108</sup> the assistance of international organizations was the most important characteristic of these constitutional transitions, highly different, from this point of view, to the proceedings of democratization of South America, Eastern Asia and, lastly, Africa and Middle East.<sup>109</sup> Another reason can be found in the fact that the Constitutional Courts (with the exception of Yugoslavia and Poland) were new organs and their members were considered less compromised with the soviet system.<sup>110</sup>

Many Jurists have explained that, in the context of Central and Eastern Europe, Hungary was a specific case. First of all, as says Catherine Dupré, “Hungary probably embodied the mildest form of communism in Central and Eastern Europe and the Kádár regime with its “goulash communism” had significantly relaxed the dogmas of Moscow.” Unlike some other communist countries, Hungary under communism was not completely cut off from the West. It managed to maintain privileged links with liberal democracies and with West Germany, in particular. As a result, “one can consider that Hungary was more or better prepared for the change of regime.”<sup>111</sup>

What is more, from a juridical point of view, the Hungarian Constitutional Court can be considered as one of the most powerful judicial organs of the entire region. To explain, this Court's interpretation of human dignity stands as a prominent bulwark.

The Hungarian interpretation of human dignity—“imported” from German constitutional case law since the case 8/1990 (focused on individuality and autonomy).<sup>112</sup> When the Hungarian Court, especially in the early stages of the transition, encountered a conflict between two incompatible rights, it has always emphasized the autonomy of the individual. In fact, the very function of human dignity and the general personality right is to protect individual autonomy in the absence of a specific right in the 1989 Constitution.

The picture of human beings in their society, namely the ideological message that individualism is good and state is bad, to use the words of Radoslav Procházka, reflected the general spirit of transition from communism. This led to the Constitutional Court's self-appointment as an “agent of social change” engaged with the other constitutional

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<sup>108</sup> S.P. HUNTINGTON, *THE THIRD WAVE, DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (University of Oklahoma Press, 1991); O'DONNELL-SCHMITTER-WHITEHEAD, *TRANSITION FROM AUTHORITARIAN RULE* (The Johns Hopkins University Press, Baltimore-London 1986); J.J. LINZ, *AN AUTHORITARIAN REGIME: THE CASE OF SPAIN*, IN *CLEAVAGES, IDEOLOGIES AND PARTY SYSTEMS* (E. ALLARD, Y. LITTUNEN) (Helsinki 1964); J.J. LINZ, A. STEPAN (1996): *DEMOCRACY AND ITS ARENAS*. In: J.J. LINZ, A. STEPAN: *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION* 3-15 (Baltimore, London: Johns Hopkins University Press); G. O'DONNELL, *ON THE STATE, DEMOCRATIZATION AND SOME CONCEPTUAL PROBLEMS (A LATIN AMERICAN VIEW WITH GLANCES AT SOME POST-COMMUNIST COUNTRIES)*, in *WORLD DEVELOPMENT* 21, pp. 1355-69 (1993); S.M. LIPSET, *The Social Requisites of Democracy Revisited*, *AMERICAN SOCIOLOGICAL REVIEW*, Vol. 59, Feb. 1994, at. 1-22.

<sup>109</sup> On the recent wave of democratization in Middle East, see A. PECORARIO, *Fuoco sopra e sotto il Medio Oriente; Se prevarranno i partiti fondamentalisti; I generali e il Medio Oriente and La Rivolta araba arriva in Asia: il peso costituzionale della Turchia*, *diritticomparati.it* (April 2011).

<sup>110</sup> C. OFFE, *Il tunnel, l'Europa dell'Est dopo il comunismo* 37-38 (Roma, 1993).

<sup>111</sup> C. DUPRÉ, *IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS* 5 (Hart Publishing, 2003).

<sup>112</sup> Hungarian constitutional court decision 8/1990 of 23 April 1990. A summary of this decision is available in the CODICES database of the Venice commission at: [http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1990-s-001?fn=document-frameset.htm\\$f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1990-s-001?fn=document-frameset.htm$f=templates$3.0)



organs in the battle for accomplishing a specific “transitional political agenda.” In this sense, as Prochazka opined, the judicial review was a sort of “decommunisation tool” and mission of the Court was to “carrying the politics through the transition by building the fundamentals of constitutional law and practice.”<sup>113</sup> Something that, anyway, was not extraneous to the other similar institution in the region.<sup>114</sup> Considering the Hungarian context, the current critics toward this rebalancing of power are not totally groundless. But in the same time, we have to notice that Constitutional Courts know very well how to progressively extend their competency.

### ***Conclusion***

In sum, the Hungarian government should not be criticized for having attempted to redress the balance of powers of the constitutional organization of the State. The Hungarian Constitutional Court held powers which were much more extensive than those of any other court in the region. The same can be said about the leeway it was granted in adjusting adjudicative functions to its own liking. Accordingly, the Hungarian Court “emerge[d] as the most assertive negative legislator in the region and as a true co-leader in the process of Hungary’s legal and social transformation.”<sup>115</sup> Possibly, the legal (and political) self-promotion of the Constitutional Court as a leader of the transition served the early stages of the transition; it was a necessity to become familiar with the new paradigms of democracy and market society at that time.

However, the transition occurs only once. In the words of this powerful judicial body in a 1992 decision, “transitional specifics may not be relied upon as a default device legitimizing measures that would not be constitutionally perfect under ‘normal’ circumstance”.<sup>116</sup> After the emergency season, the political powers must go back to Parliament and Government, namely those organs which, through the different mechanism of the representative system, are expression of the popular sovereignty. What is more, the disputed amendment of November 2010 establishes that the Constitutional Court may assess the constitutionality of legislative acts related to a list of topics exclusively in connection with the rights to life and human dignity. As noted in the above-mentioned study of Catherine Dupré, after the collapse of communism, the genesis of the new legal order in Hungary was determined by massive Western involvement and an unprecedented movement of export/import of law. Indeed, it explains how the circumstances of the transition and the background of the importers determined the choice of German case law as a model and how the Court used it to construct its own version of the right to human dignity. Basically, the Hungarian Constitutional Court will continue to do what it has always done, but in a more balanced institutional organization of the separation of powers.

Thus, the Hungarian government, according to whom the new constitution “enshrines a classic separation of powers between Hungary’s legislature, executive and judiciary. The

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<sup>113</sup> R. PROCHÁZKA, *MISSION ACCOMPLISHED: ON FOUNDING CONSTITUTIONAL ADJUDICATION IN CENTRAL EUROPE* (Budapest, New York 2002).

<sup>114</sup> W. SADURSKI, *RIGHTS BEFORE COURT, A STUDY OF CONSTITUTIONAL COURTS IN POST-COMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* (Springer 2005).

<sup>115</sup> R. PROCHÁZKA., *supra* note 113, at 29.

<sup>116</sup> Hungarian constitutional Court, decision 11 of 5 March 1992.

Constitutional Court will become the court of last resort for citizens. It will no longer be able to rule on tax and budgetary issues, which will rightly remain the preserve of an elected parliament”.<sup>117</sup>

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<sup>117</sup> Hungary Rejects German Criticism of New Constitution, cit.