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Historicism or Art Nouveau in Constitutional Interpretation? A comment on Zoltán Szente's *The Interpretive Practice of the Hungarian Constitutional Court—A Critical View*

*By Gábor Attila Tóth**

Zoltán Szente provides *German Law Journal* readers with thoughtful and interesting analysis on the interpretive practice of the Hungarian Constitutional Court (hereinafter HCC). His article offers an enlightening list of strengths, but even more so weaknesses of the interpretative methodology of the HCC. According to Szente's conclusion, regarding the 1990–2010 period, the HCC's reasoning can be classified as eclectic: Neither the Constitution nor its decisions contained clear and convincing guidelines for constitutional interpretation; justices applied most of the well-known interpretive techniques and approaches; and, what is more, they frequently used different methods for similar cases. These findings explain why the title of his study includes precisely that it is a "critical view."

Although Szente's article contains both a lucid and accurate description of the different elements of the constitutional interpretation and a strong evaluative, critical component, his discussion lacks adequate references to a normative ground for the evaluation. Why should justices interpret a constitution coherently? What are the criteria of coherence? In what way can we distinguish different cases from similar cases? What are better and worse legal justifications and judgments? The author convinced me that in several cases the HCC used its interpretive power arbitrarily. But the question remains: What would have been the correct judicial methodology and the right judicial answers? I raise these questions because I share the view that a critical analysis on matters of constitutional interpretation cannot escape value judgments on the intrinsic or instrumental worth of the interpretive approaches.

In this short comment I do not try to express a normative view on constitutional interpretation that might be a proper basis for a critical analysis.[1] Instead, I continue Zoltán

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[1] *See* GÁBOR ATTILA TÓTH, TÚL A SZÖVEGEN, ÉRTEKEZÉS A MAGYAR ALKOTMÁNYRÓL [BEYOND THE TEXT: AN ESSAY ON THE HUNGARIAN CONSTITUTION] (2009), where I argued that interpretive sources—e.g., the text of the Constitution, original intent of the framers, traditional meaning of the text, precedents, comparative law, and dogmatics—offer interpretive alternatives at most, but do not provide justices with right answers. I believe that with the help of a moral reading, justices may find the best interpretation of constitutional norms, including not only substantive, but also procedural rules.

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Szente's story, ending in 2010 when the HCC lost its independence and a substantial part of its definitive powers.[2] First, replacing his tag, I argue that HCC's interpretive practice between 1990 and 2010 can be called "art nouveau" rather than a mere eclecticism since it was a crucial contribution to the transition to modern constitutionalism in Hungary. Second, I show that both the 2010–2011 cutting back of the HCC's competences and the Interpretation Clause of the new Constitution—adopted in 2011, called the Fundamental Law—aim to impede the HCC's interpretive activity. The constitution-making majority tried to turn Hungarian constitutional adjudication from a kind of art nouveau into a mythical historical interpretation.

A. Part I

I. In Praise of Imperfection

The HCC seemed to be the most important institutional guaranty of constitutionalism, on account of its decisions favoring human rights and principles of the rule of law in Hungary. Due to the establishment of a one-chamber legislature, the 1989 constitutional system lacked a limiting upper house. Because Hungary remained a unitary state, it could not realize the vertical separation of powers doctrine of federalist states. The country adopted a parliamentary system in which the executive and legislative powers are intertwined and the president has strictly limited competencies, even regarding his veto powers. As in other Central and Eastern European countries, the Hungarian form of judicial protection of the Constitution was closer to the concentrated German model—with only one supreme body's jurisdiction to review legislation—than to the diffuse U.S. judicial review.[3] The HCC was institutionally separated from the ordinary court system and had unique, *erga omnes* constitutional interpretative authority. Hence, the real constitutional checks on the powers of the parliament were the fundamental rights recognized by the Constitution and the HCC that interpreted and protected those rights.

As Szente points out, the HCC found concepts and values beyond the text of the Constitution and was more or less consistent in following its own precedents and values. With the help of the necessity and proportionality principles imported from Strasbourg and Karlsruhe, the HCC effectively protected fundamental rights.[4] The decision on the abolition of the death penalty—the argument for which was partly based upon human dignity—served as an example for the Ukrainian, Lithuanian, Albanian, and South-African

[2] Kriszta Kovács & Gábor Attila Tóth, *Hungary's Constitutional Transformation*, 7 EUR. CONST. L. REV. 183 (2011).

[3] Schnutz Rudolf Dürr, *Comparative Overview of European Systems of Constitutional Justice*, 5 VIENNA J. INT'L CONST. L. 159, 163 (2011).

[4] Jeremy McBride, *The Necessity Test in the Jurisprudence of the Hungarian Constitutional Court and the European Court of Human Rights*, *in* THE CONSTITUTION FOUND? THE FIRST NINE YEARS OF HUNGARIAN CONSTITUTIONAL REVIEW ON FUNDAMENTAL RIGHTS 118 (Gábor Halmai et al. eds., 2000).

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Constitutional Courts.[5] The HCC established a post-Rawlsian conception of state neutrality and declared a broad protection of freedom of conscience and religion.[6] The HCC adopted a Dworkinian conception of equal dignity and affirmative action.[7] Adopting the actual malice standard and the imminent lawless action test from the case law of the Supreme Court of the United States, the HCC ensured robust protection against freedom of speech violations.[8]

Although the HCC claimed that its activism was limited to fundamental rights, it decisively shaped the institutional setting. It was the HCC that identified the Hungarian constitutional system with that of a parliamentary democracy and not a presidential system of governance.[9] As an important example, with the help of interpretive techniques mentioned by Zoltán Szente, the Court, reading restrictively the rights of the President of the Republic, solved the scope-of-authority conflicts that had emerged between the president and the prime minister.[10]

The HCC had a Janus-faced constitutional adjudication, however, because the application of moral and legal principles was sometimes a bitter failure, as Szente also points out, especially when the majority of the HCC was not able to escape from intolerant social attitudes or governmental expectations. The HCC, for example, never clashed with the legislature in order to support women's rights.[11] Despite several petitions, the problems relating to the exclusion and discrimination of Roma have remained absolutely hidden.[12] Before the 2010 elections, the Court almost paralyzed the legislation; after these elections, it did not hinder the unprecedented flow of acts and amendments violating constitutional principles and fundamental rights.

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[5] *See* Alkotmánybíróság [AB - Hungarian Constitutional Court] Oct. 24, 1990, 1990 ABH 88; *S v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

[6] For a critical view, see Renáta Uitz, *Aiming for State Neutrality in Matters of Religion, The Hungarian Record*, 83 U. DET. MERCY L. REV. 761 (2006).

[7] Kriszta Kovács, László Trócsányi & Gábor Attila Tóth, *Fundamental Rights in the Jurisprudence of the Constitutional Court*, *in* TWENTY YEARS OF THE HUNGARIAN CONSTITUTIONAL COURT 41 (Péter Paczolay ed., 2009).

[8] *See* Alkotmánybíróság [AB - Hungarian Constitutional Court] May 18, 1992, 1992 ABH 167; Brandenburg v. Ohio, 395 U.S. 444 (1969); Alkotmánybíróság [AB - Hungarian Constitutional Court] June 21, 1994, 1994 ABH 219; New York Times v. Sullivan, 376 U.S. 254 (1964). *See also* László Sólyom, *Zum Geleit zu den Entscheidungen des Verfassungsgerichts der Republik Ungarn*, *in* VERFASSUNGSGERICHTSBARKEIT IN UNGARN (Georg Brunner & László Sólyom eds., 1995); András Sajó, *Hate Speech for Hostile Hungarians*, 3 E. EUR. CONST. REV. 82, 84–87 (1994).

[9] Alkotmánybíróság [AB - Hungarian Constitutional Court] Sept. 26, 1991, 1991 ABH 246.

[10] COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 310 (Norman Dorsen et al. eds., 2d ed. 2010).

[11] Kriszta Kovács, *Think Positive: Preferential Treatment in Hungary* 5 FUNDAMENTUM 46, 54–57 (2008).

[12] Gábor Attila Tóth*, Unequal Protection: Historical Churches and Roma People in the Hungarian Constitutional Jurisprudence*, 51 ACTA JURIDICA HUNGARICA 122 (2010).

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II. An Illustration: Importing from Germany

The similarities of the two constitutional systems and legal traditions explain the dominant influence of the case law of the Federal Constitutional Court of Germany (hereinafter FCCG) on the Hungarian constitutional jurisprudence. László Sólyom argues that this kind of reception has come to be to be a judicial convention in Hungary and there is no reason to give it up.[13]

My sketch of the German import starts with procedural solutions. Due to great ambitions to protect human rights and missing clear procedural rules from the Act on HCC, in the early decisive years the HCC borrowed techniques from German law in order to widen its own decision-making competences by for example declaring "verfassungskonforme Auslegung" or "verfassungsmäßiger Inhalt."[14] Since the Act on the HCC did not contain a rule on the application of "einstweilige Anordnung," the HCC elaborated temporary injunctions on a case-by-case basis.[15]

The case law of the FCCG impressively influenced the insights of the fundamental rights dogmatics. Several landmark decisions of the HCC echoed the Lüth-ruling's famous wording on "Wertesystem" and the obligation of all state authorities to ensure fundamental rights actively.[16] The HCC placed human dignity, together with the right to life, as the highest constitutional principle and unrestricted individual right in the center of its jurisprudence.[17] Although the Hungarian constitution did not include such a right as the right to free development of personality in the Article 2(1) of the Basic Law of Germany, the HCC regarded the right to human dignity to mean a "general right to personhood" which may be relied upon at any time by both the HCC and other courts for the protection of an individual's autonomy when none of the enumerated fundamental rights are applicable for a particular set of facts.[18] The HCC also adopted the right to informational

[13] LÁSZLÓ SÓLYOM, PÁRTOK ÉS ÉRDEKSZERVEZETEK AZ ALKOTMÁNYBAN [PARTIES AND INTEREST GROUPS IN THE CONSTITUTION] 8 (2004).

[14] TWENTY YEARS OF THE HUNGARIAN CONSTITUTIONAL COURT 23 (Péter Paczolay ed., 2009).

[15] Alkotmánybíróság [AB - Hungarian Constitutional Court] May 18, 1992, 1992 ABH 167.

[16] *Id.*; Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 400/51, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 198 (Jan. 15, 1958) (Ger.).

[17] CATHERINE DUPRÉ, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS: THE HUNGARIAN CONSTITUTIONAL COURT AND THE RIGHT TO HUMAN DIGNITY 65 (2003).

[18] *See* Alkotmánybíróság [AB - Hungarian Constitutional Court] Apr. 17, 1990, 1990 ABH 42; Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 253/56, 6 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 32 (Jan. 16, 1957) (Ger.); Alkotmánybíróság [AB - Hungarian Constitutional Court] Nov. 5, 1991, 1991 ABH 272; Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 17/87, 79 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 256 (Jan. 31, 1989) (Ger.);

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self-determination from the 1983 census case of the FCCG.[19] Similarly, the constitutional conception of property rights was based upon the "verfassungsrechtlicher Eigentumsschutz."[20]

Instead of listing other elements imported from German law, let me mention two cases to illustrate that at times the HCC, instead of following the precedents of the FCCG, delivered rulings at variance with these.

Although it seems that the HCC reproduced the reasoning of the FCCG's cannabis decision, it reached a completely different conclusion. In the FCCG's view, the criminalization of the occasional consumption of a small amount of certain prohibited drugs does not violate the prohibition of disproportionate state interference since "the legislator empowered the authorities prosecuting crime to dispense with the imposition of punishment or the prosecution of the criminal offense. In this way, the legislator took into account the insignificance of the unlawfulness and the low level of the perpetrator's culpability."[21] Nevertheless, the HCC rejected the application of a differentiated approach in the case of the constitutional examination of the negative social effects of drugs. Thus, the HCC ruled that the application of a system of criminal sanctions not allowing exceptions is proportionate in itself. Moreover, the HCC annulled several provisions of the Criminal Code, which resulted in ordering—partly with immediate effect—the punishment of the consumer's acts in a case in which the legislator did not consider the application of criminal sanctions necessary.[22]

My second example is the judgment on the Act on Registered Partnerships which was adopted by the Parliament with the aim of establishing nearly equal status of homosexuals and stabilizing the legal status of many cohabiting heterosexual couples. The judgment

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Alkotmánybíróság [AB - Hungarian Constitutional Court] Dec. 18, 1995, 1995 ABH 376; Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 690/65, 28 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 191 (Apr. 28, 1970) (Ger.).

[19] *See* Alkotmánybíróság [AB - Hungarian Constitutional Court] Apr. 9, 1991, 1991 ABH 40; Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 209/83, 65 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 1 (Dec. 15, 1983) (Ger.).

[20] *See* Alkotmánybíróság [AB - Hungarian Constitutional Court] Dec. 21, 1993, 1993 ABH 373; Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 5/80, 69 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 272 (July 16, 1985) (Ger.); *See* PÁL SONNEVEND, EIGENTUMSSCHUTZ UND SOZIALVERSICHERUNG: EINE RECHTSVERGLEICHENDE ANALYSE ANHAND DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS UND DES UNGARISCHEN VERFASSUNGSGERICHTS (2007). For a critical view, see András Sajó, *How the Rule of Law Killed Welfare Reform*, 3 E. EUR. CONST. REV. 31 (1996).

[21] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvL 43/92, 90 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 145, 146 (March 9, 1994) (Ger.).

[22] Alkotmánybíróság [AB - Hungarian Constitutional Court] Dec. 13, 2004, 2004 ABH 690.

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refers several times to a ruling of the FCCG.[23] However, the HCC's reasoning is rather similar to the rejected objections of the German petitioners according to whom registered partnership empties the institution of marriage. Contrary to this, the rule formulated in the *ratio decidendi* of the FCCG decision provides that the constitutional protection of marriage "does not hinder the legislator in establishing such rights and obligations for the partnership of homosexuals as are identical or very similar to it." According to the reasoning, "the conception of the special protection of marriage which points to the apprehension of such partnerships in their difference to marriage and vesting less rights in them cannot be justified."[24] Consequently, the German decision approved the act that aimed at equalizing the status of homosexuals.

The Hungarian act promoting equality, on the contrary, was found to be unconstitutional by reason of the conventional conception of marriage. In terms of heterosexuals, the judges held the act unconstitutional as it did not separate adequately the status of registered partnership from the institution of marriage.[25] Adoption, the right to use the spouse's name, the waiting period before registration, and other differences were proved to be unsatisfactory in protecting the so-called "essential content" of marriage. As for homosexual couples, the judgment implicitly established the category of "separate and unequal." Even though the decision theoretically acknowledged that the registered partnership of homosexuals is not *per se* unconstitutional, it did not approve the challenged regulation. Apart from the fact that homosexual couples may not get married, when it comes to regulating their registered partnership "the differences flowing from the nature" of such relationship and marriage must be maintained. This means that in registered partnership cases the reasons for equal treatment must be shown, not that there is a compelling interest in unequal treatment.[26]

As a consequence, between 1990 and 2010 the HCC constantly referred to the achievements of modern constitutional jurisdiction and international human rights law.[27] Unquestionably, the FCCG had the most significant impact on the HCC: The latter often used, but sometimes misused, the former's precedents. Even though its record was far

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[23] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvL 43/92, 105 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 313 (July 17, 2002) (Ger.)

[24] *Id.* ¶ 98.

[25] Alkotmánybíróság [AB - Hungarian Constitutional Court] Dec. 15, 2008, 2008 ABH 1203.

[26] *Id.*

[27] *See, e.g.*, Alkotmánybíróság [AB - Hungarian Constitutional Court] Nov. 18, 1998, 1998 ABH 333; Alkotmánybíróság [AB - Hungarian Constitutional Court] May 8, 2000, 2000 ABH 61; Alkotmánybíróság [AB - Hungarian Constitutional Court] Apr. 22, 2008, 2008 ABH 514.

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from outstanding, the HCC became a globally respected member of the family of constitutional courts.[28]

B. Part II

Now I describe briefly the main elements of the 2010–2011 cutting back of the HCC's competences and explain the Interpretation Clause of the Fundamental Law in order to demonstrate how the constitution-making majority made efforts to change the HCC's interpretive authority and activity.

I. Curtailing the Court

After the inaugural sitting of the newly elected 2010 parliament, the majority changed the constitutional regulation of the nomination process for constitutional justices. Under the new rule, justices can be nominated by a parliamentary committee whose members are appointed from and by the parties, according to their share of seats in parliament. Consequently, even in the nomination process there is no longer a need for consensus. The parliamentary majority is able to nominate candidates without working together with the opposition. After this constitutional change, the majority soon afterwards nominated and elected two new justices.[29]

When the HCC declared a freshly introduced ninety-eight percent retroactive tax obligation unconstitutional,[30] the ruling coalition responded by a restriction of the competences of the HCC, so that it could not review the constitutionality of certain financial and tax measures. The aim of modifications of the constitutional rules on taxation was to override settled constitutional case law. As the Venice Commission clearly pointed out, restricting the HCC’s competence runs counter to the aim of enhancing the protection of fundamental rights in Hungary.[31]

Finally, in 2011 there was one further amendment to the 1989 Constitution. The amendment enlarged the membership of the HCC from eleven to fifteen, adding up to four

[28] For a comparative study, see CONSTITUTIONAL JUSTICE, EAST AND WEST, DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE (Wojciech Sadurski ed., 2002).

[29] Kovács & Tóth, *supra* note 2, at 193.

[30] Alkotmánybíróság [AB - Hungarian Constitutional Court] Oct. 26, 2010, 2010 ABH 900.

[31] *Draft Opinion of the European Commission for Democracy Through Law (Venice Commission) on the Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary*, CDL (2011) 016, ¶ 10 (Mar. 17, 2011) [hereinafter *Draft Opinion of the European Commission*].

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justices to the bench—five new justices were elected to fill vacant seats, thus in total, seven new justices were elected within one year.[32]

The 2011 Fundamental Law affirms that the HCC is composed of fifteen members.[33] The previously changed nomination rules concerning the members of the HCC are also maintained, and, therefore, the two-thirds majority has absolute freedom to nominate and elect judges. The president of the HCC will no longer be elected by his fellow justices but by parliamentary majority.

While the Fundamental Law retains most of the competences of the HCC, the changes are considerable. The *ex post* review of the unconstitutionality of legislation is restricted. Previously, every person was entitled to bring an action for constitutional review of a normative provision after its adoption. The Fundamental Law abolishes this kind of *actio popularis*. As an improvement, however, it introduces a German-type constitutional complaintwith significant limiting differences—making it possible to complain not only against a normative Act but also against the violation of a fundamental right through a court decision either based on or without authorization of a normative act.[34] In this way, the mechanism of individual complaint related to a concrete case includes the possibility to challenge the unconstitutional judicial interpretation and application of a legal norm.

The limitation of the HCC's competences with regard to financial matters has not been repealed. According to the Article 37(4) of the Fundamental Law, "as long as state debt exceeds half of the Gross Domestic Product," the HCC may review and annul:

> The Acts on the central budget, on the implementation of the budget, on central taxes, on duties and on contributions, on customs duties, and on the central conditions for local taxes as to their conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or in connection with the rights related to

[32] Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions*, *in* CONSTITUTION FOR A DISUNITED NATION: ON HUNGARY'S 2011 FUNDAMENTAL LAW 255 (Gábor Attila Tóth ed., 2012).

[33] A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] Art. 24(4), (Apr. 25, 2011), *available at* http://mkab.hu/rules/fundamental-law.

[34] Kriszta Kovács & Gábor Attila Tóth, *Aufstieg und Krise: Wirkung der deutschen Verfassungsgerichtsbarkeit auf Ungarn*, *in* KAMPF UND KONSENS IM VERFASSUNGSRECHT. INTERDISZIPLINÄRE UND VERGLEICHENDE PERSPEKTIVE AUF DIE ROLLE UND FUNKTION VON VERFASSUNGSGERICHTEN (Christian Boulanger, Uwe Kranenpohl & Michael Wrase eds., forthcoming 2013).

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> Hungarian citizenship, and it may only annul these Acts for the violation of these rights.[35]

Competence concerning every kind of ex post constitutional review is therefore restricted in such a way that the HCC has the power to overview and annul budgetary and tax measures only in special circumstances and with regard to a limited part of the Fundamental Law.[36]

II. The Interpretation Clause of the Fundamental Law

The Interpretation Clause in Article (R)3 reads as follows: "The provisions of the Fundamental Law shall be interpreted in accordance with its objectives, the National Avowal contained therein and the achievements of our historical constitution."[37] This means that the HCC is required to interpret the Fundamental Law in the light of the National Avowal of Faith and the historical constitution.

The *National Avowal* is a lengthy preamble of the Fundamental Law that has foundations in religious and historical considerations, which is unusual in a neutral, secular state. The National Avowal places special emphasis on values such as family, nation, loyalty, faith and love, and is dominated by religious references. It was written in the spirit of the Catholic faith. This is what the reference to Saint Stephen and the Holy Crown of St. Stephen implies: "We are proud that one thousand years ago, our King Saint Stephen established the Hungarian State on solid foundations and led our country to become part of Christian Europe" and "we acknowledge the nation-preserving role of the Christian faith." The National Avowal explicitly mentions "the Holy Crown, which embodies the constitutional continuity of the state and the unity of the nation." In this way the Fundamental Law not only recalls the historical role of Christianity in founding the Hungarian State, but expresses that the present Hungarian constitutionalism is based upon the traditional Christian faith. As a consequence it breaks with the solution applied in the 1989 Constitution, which remained neutral as to competing moral convictions, world-views and interests.

The National Avowal recognizes the glorious chapters of Hungarian history, but does not acknowledge the acts that give cause for self-reflection. It holds to account the injuries caused by foreign powers, and does not recognize the wrongs committed by the Hungarian

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[35] A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] Art. 37(4), (Apr. 25, 2011), *available at* http://mkab.hu/rules/fundamental-law.

[36] For more on this, see Christian Boulanger & Oliver W. Lembcke, *Between Revolution and Constitution: The Roles of the Hungarian Constitutional Court*, *in* CONSTITUTION FOR A DISUNITED NATION: ON HUNGARY'S 2011 FUNDAMENTAL LAW 279 (Gábor Attila Tóth ed., 2012); Kovács & Tóth, *supra* note 2.

[37] A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] Art. R(3), (Apr. 25, 2011), *available at* http://mkab.hu/rules/fundamental-law.

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state against its own citizens and other peoples.[38] Moreover, the National Avowal negates the post World War II era, including 1989, by declaring that the country lost its autonomy on 19 March 1944 and this autonomy "was restored on 2 May 1990 with the opening session of the first freely elected national assembly."

As regards the *historical constitution*, there is no clear definition what the "achievements of the historical constitution" are. This concept brings a certain vagueness into constitutional interpretation. The Venice Commission characterized this as a "lack of clarity and consistency" among the elements of principles of constitutional interpretation.[39]

The Fundamental Law suggests that the historical constitution is coupled with the Holy Crown. The holy crown doctrine was introduced by the scholar and theologian István Werbőczy, who retrospectively codified it in his work Tripartitum (1517), which was a de facto law-book until 1848. According to his teaching, the king and the equal noblemen were somehow united in the holy crown. Thus, the holy crown was the symbol of the community of nobles. During the nineteenth century the holy crown doctrine served as a protector of the Throne and the Altar, and therefore became a notion targeted by reformists and revolutionaries. Late nineteenth century legal historicism breathed new life into the doctrine. What law historians declared to be an ancient Hungarian idea was mostly their intellectual creation: A romantic, nationalist, self-defensive ideology of the noblemen. In addition, the holy crown doctrine allowed for "a kingdom without a king," thus legitimizing Governor Miklós Horthy's authority between 1920 and 1944. This period added revisionist significance to the crown, after the Trianon peace treaty had reduced the territory of Hungary to one-third of what it was previously. Consequently, the holy crown doctrine prefers a mystic "membership" to constitutional patriotism, the ancient territory of the Hungarian Kingdom to the current borders of the state, and noble privileges to the republican traditions of 1946 and 1989.[40]

Importantly, the National Avowal is not only a solemn declaration; it has normative interpretive strength due to Article R and the above cited Interpretation Clause.[41] As a

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[38] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY]; The Fundamental Law of Hungary Avowal of National Faith (Apr. 25, 2011), *available at* http://mkab.hu/rules/fundamental-law ("We are proud that our people have fought in defense of Europe over the centuries and, through their talent and industry, have enriched Europe's common values.").

[39] *Draft Opinion of the European Commission*, *supra* note 31, ¶ 28.

[40] For rival readings of the National Avowal and the holy crown doctrine, *see* Ferenc Horkay-Hörcher, *The National Avowal*, *in* THE BASIC LAW OF HUNGARY: A FIRST COMMENTARY 25–45 (Lóránt Csink, Balázs Schanda & András Zs. Varga eds., 2012); Sándor Radnóti, *A Sacred Symbol in a Secular Country: The Holy Crown*, *in* CONSTITUTION FOR A DISUNITED NATION: ON HUNGARY'S 2011 FUNDAMENTAL LAW 85–110 (Gábor Attila Tóth ed., 2012).

[41] A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] Art. R(3), (Apr. 25, 2011), *available at* http://mkab.hu/rules/fundamental-law.

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consequence, fundamental rights, as well as the basic principles of the relationship between state and churches, shall be interpreted in accordance with the opening creed of the Fundamental Law.[42]

The ideological foundations and the wording of the National Avowal have been the target of serious criticism. As stated by several scholars, the creed raises to a constitutional level the worst traditions of national self-glorification, self-pity and self-justification. Its view of history is anachronistic, Christian-nationalist kitsch; in this way, as a written constitution the Fundamental Law cannot fulfill its integrative function.[43]

In short, then, the Fundamental Law tries to turn Hungarian constitutional adjudication from a kind of art nouveau into a mythical, quasi-originalist interpretation. During the 1989 political transition it was undisputed that Hungary should have an independent and respected Constitutional Court with broad interpretive authority. More than twenty years of constitutional adjudication have proven—despite sometimes inconsistent interpretation of the law—that the HCC served as the most important institution maintaining the constitutional balance of powers in the Hungarian legal system.

The 2010–2011 constitutional transformation, in contrast, can be labeled as a transition away from modernism. A justice or other expounder of the Fundamental Law who either places herself in an originalist position by uncovering the original intent of the drafters and the original meaning of the text, or attempts to use objective teleological argumentation, finds behind the constitutional text little more than mythical histories and ideas far removed from modern constitutionalism.

It seems that any kind of interpretation favorable to human rights, civil equality, democracy, separation of powers, or the rule of law will not prevail, given both the packed and transformed HCC, and the aim of the Fundamental Law to promote unconstitutional tendencies[44] and a mythical historical narrative,[45] rather than integrating the nation as a modern political community.[46]

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[42] For a comparative study, see Liav Orgad, *The Preamble in Constitutional Interpretation,* 8 INT'L J. CONST. L. 714 (2010).

[43] ZOLTÁN FLECK, ET AL., OPINION ON THE FUNDAMENTAL LAW OF HUNGARY pt. 3, ¶ 4 (Andrew Arato, Gábor Halmai & János Kis eds., 2011), *available at* http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf.

[44] Kim Lane Scheppele, *On the Unconstitutionality of Constitutional Change: An Essay in Honor of László Sólyom*, *in* LIBER AMICORUM IN HONOR OF LÁSZLÓ SÓLYOM, 286–310 (Zoltán Csehi, Balázs Schanda, Pál Sonnevend eds., 2012).

[45] Gladly enough, in one case, the HCC interpretation of the "historical constitution" was different from the original aims of the government. The HCC declared that the principle of judicial irremovability is long-standing in Hungarian law, pointing out that judicial protection from arbitrary dismissal had long been guaranteed, starting with the first judiciary act of 1869. *See* Alkotmánybíróság (AB) [Constitutional Court] July 16, 2012, AK.2012.33.17 (Hung.). *See also* Kim Lane Scheppele, *How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Judicial Retirement Age Part I*, VERFASSUNGSBLOG (Aug. 9, 2012),

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http://www.verfassungsblog.de/de/how-to-evade-the-constitution-the-hungarian-constitutional-courts-decision-on-judicial-retirement-age-part-i/#.UcuaGDYo4ic/.

[46] The text of the present article has been finalized before the adoption of the Fourth Amendment to the Fundamental Law, which invalidated all decisions of the HCC which were brought before the Fundamental Law came into force. This Amendment seems to confirm the thesis of this paper.

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