Memory Laws and the Rule of Law

Rule of Law Backsliding and Memory Politics in Hungary

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Introduction of the institutional framework of constitutional democracy and transitional justice in Hungary – Liberal constitutionalism as a victim of the authoritarian efforts of Viktor Orbán's Fidesz party after the 2010 parliamentary elections – The legal governance of history contributing to the backsliding of democracy and the rule of law – Use of memory politics for the newly established authoritarian regime's own political purposes – Transitional justice measures to help reconcile society and consolidate democracy – The current Hungarian government's attitude towards public discussion of history

INTRODUCTION

The starting point of this article is that the backsliding of democracy and the rule of law in Hungary concluded in an authoritarian regime, which uses memory politics for its own political purposes. While attempting to understand the main reasons for backsliding, the article also investigates how the initial measures to deal with previous dictatorial regimes during the country's once pioneering democratic transition have helped to reconcile society with its past, which is necessary to consolidate democracy. The main research question is whether, among other factors – such as the lack of deep democratic traditions – the undemocratic liberal legal constitutionalism of the elite who lead the democratic

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transition, and the lack of participatory elements have also contributed to the backsliding and to the illiberal populist government's manipulation of memory for its own political purposes. The article proceeds as follows: first, it discusses the characteristics of the Hungarian constitutional transition, including measures dealing with the past; this is followed by a description of the democratic backsliding and memory politics of the illiberal populist governments since 2010. The concluding part elaborates the possible reasons for the backsliding and the memory policy, with particular emphasis on the question of how much the undemocratic legal governance of history has contributed to this.

Transitional constitutionalism and transitional justice after 1989[1]

Hungary was one of the first and most thorough political transitions after 1989, which provided all the institutional elements of a liberal constitutional democracy with checks and balances and guaranteed fundamental rights, governed by the rule of law. Hungary also represents the first, and probably the model case of constitutional backsliding from a fully-fledged liberal democratic system first to an illiberal one, then later towards a more autocratic regime.

In 1989 the illegitimate legislature, which had not been democratically elected, enacted comprehensive modifications to the 1949 Constitution, after peaceful negotiations between the representatives of the Communist regime and their democratic opposition. This process is, in the literature, called 'post-sovereign' or 'pacted constitution-making'.[2] The concepts with which to transform the 1949, Stalin-inspired Rákosi Constitution into a rule of law document were delineated in 1989 in the so-called 'round-table negotiations' by participants of the Opposition Round-table and representatives of the state party (the Hungarian Socialist Workers' Party). Afterwards, the illegitimate Parliament sealed the comprehensive amendment to the Constitution, which entered into force on 23

[1]Throughout the article, when describing Hungarian measures of transitional constitutionalism and transitional justice, I rely on the following previous works of mine: 'Transitional Justice, Transitional Constitutionalism and Constitutional Culture', in G. Jacobsohn and M. Schor (eds.), *Comparative Constitutional Theory* (Edward Elgar 2018) p. 372; 'The Evolution and Gestalt of the Hungarian Constitution', in A. von Bogdandy et al. (eds.), *The Max Planck Handbooks in European Public Law*, Vol. II: Constitutional Foundations (Oxford University Press 2023); and G. Halmai and K.L. Scheppele (eds.), *Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary* (2014), http://fundamentum.hu/sites/default/files/amicus_brief_on_the_fourth_amendment.pdf, visited 15 December 2023.

[2]*See* respectively A. Arato, *Post Sovereign Constitutional Making. Learning and Legitimacy* (Oxford University Press 2016) and M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2009).

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October 1989, the anniversary of the 1956 Revolution, and which was until 2011 – with smaller and bigger changes – the basic document of the 'constitutional revolution'. Despite its name, it was very much a compromise between the elites of the former state party and its democratic opposition, without any participation from the people themselves.

Many authors criticised the transitional nature of the Hungarian constitution-making of 1989. Bruce Ackerman stated in 1992: 'the constitutional guarantees of a liberal rule of law state can be established only if a new constitution is adopted, and the possibility to adopt a new basic law fades as the time passes'.[3] He argued that there would have been a possibility, and indeed a need, to adopt a new constitution in Hungary at the beginning of the political transition, which would have solved the legitimacy deficit of the 'system change', similar to the one carried out with respect to the German Basic Law (*Grundgesetz*) of 1949. The transitional constitution, not being democratically adopted, also increased the importance of the Constitutional Court, as a 'counter-majoritarian' institution. The Court, led by László Sólyom, followed an activist approach to the interpretation of the Constitution. This was laid down in the concept of the 'invisible Constitution', elaborated in Sólyom's concurring opinion on a decision on the death penalty:

> The Constitutional Court must continue its effort to explain the theoretical basis of the Constitution and of the rights included in it and to form a coherent system with its decisions, which as an 'invisible Constitution' provides for a reliable standard of constitutionality beyond the Constitution, which nowadays is often amended out of current political interest; therefore this coherent system will probably not conflict with the new Constitution to be adopted or with future Constitutions.[4]

Therefore Sólyom argued that the text of the 1989 Constitution and the jurisprudence of the Constitutional Court made a new constitution unnecessary.

The pacted and transitional nature of constitutionalism very much determined the way in which the past was dealt with by transitional justice measures, such as doing justice through trials, lustration, and access to the files of the secret police of the previous regime.

Doing justice: retroactivity and the rule of law

In the negotiated transition of Hungary (and similarly in Poland), the old regime retained sufficient power to avoid members of the former regime being punished,

[3]B. Ackerman, *The Future of Liberal Revolution* (Yale University Press 1992). Andrew Arato also claims that in Hungary the constitution-making process was incomplete: *see* A. Arato, 'What I Have Learned: Concluding Remarks', 26 *South African Journal on Human Rights* (2010) p. 134.

[4]Decision 23/1990 (X. 31.) AB.

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whilst not necessarily excluding the past being dealt with in other ways. In contrast, as Michel Rosenfeld argues, in cases of a violent rupture, 'the demands of political justice might be reconciled with those of constitutionalism by confining the operation of political justice to the revolutionary period separating the *ancien* regime from the new constitutional order'.[5] This is the guaranatee that the pursuit of revenge against those who were responsible for the oppressive regime will not undermine the very idea of a democratic transition.

Similarly, Ruti Teitel claims that trials 'are well suited to the representation of historical events in controversy' and are 'needed in periods of radical flux'.[6] András Sajó observes that if Teitel is right then perhaps there was no radical flux, especially in the 'negotioted transitions' of Poland and Hungary, at least not radical with regard to the past.[7] The fact that in those countries repression had been less severe than in either East Germany from the very beginning or in Czechoslovakia after 1968 was also one of the reasons for the lack of radical change.[8] But whatever legal choices of transitional justice a state may or may not choose in dealing with the past, many academics argue that, in one form or another, dealing with the past is at least a moral – if not necessarily a constitutional or international – obligation of every state that claims to be governed by the rule of law. But there are, of course, also arguments against every kind of post-Communist restitution and retribution. The most radical among them concludes that one should target everybody or nobody, and because it is impossible to reach everybody, nobody should be punished and nobody compensated.[9]

Following this pattern, the preamble of the constitutional amendment of 1989 calls for 'a peaceful transition to the rule of law state based upon a multi-party system, parliamentary democracy and social market economy'.[10] Despite this constitutionalised commitment to transition, the constitution does not provide expressly for settling accounts with the past. The main reason for this was an unspoken agreement between the participants of the National Round-table that there would be no prosecution of the Communist leaders of the previous regime. After the first free election in spring

[5]*See* M. Rosenfeld, 'Dilemmas of Justice', 1 *East European Constitutional Law Review* (1992) p. 20.

[6]*See* R. Teitel, 'Transitional Justice as Liberal Narrative', in A. Sajó (ed.), *Out of and Into Authoritarian Law,* (Kluwer Law International 2003) p. 6.

[7]A. Sajó, 'Erosion and Decline of the Rule of Law in Post-Communism: An Introduction', in Sajó (ed.), *supra* n. 6, p. xix.

[8]This is the argument of Ruth Kok, compering Hungary with its 'Gulash-communism' as the 'happiest barrack in the camp' on the one hand and Czechoslovakia and Eastern Germany on the other: *see* R. Kok, *Statutory Limitations in International Criminal Law* (Martin Nijhoff 2007) p. 210.

[9]*See* J. Elster, 'On Doing What One Can: An Argument Against Post-Communist Restitution and Retribution', 1(2) *East European Constitutional Review* (Summer 1992) p. 15-17.

[10]Act No. 20 of 1949, as amended by Act No. 31 of 1989.

1990, some members of the democratically elected Parliament terminated this agreement by submitting a draft law on retroactive justice measures against the previous Communist leaders and collaborators.

This law concerned the prosecution of criminal offences committed between 21 December 1944 and 2 May 1990. The law provided that the statute of limitations started over again as of 2 May 1990 (the date that the first elected parliament took office) for the crimes of treason, voluntary manslaughter, and infliction of bodily harm resulting in death – but only in those cases where the 'state's failure to prosecute said offences was based on political reasons'. The President of Hungary, Árpád Göncz, did not sign the Bill, but instead referred it to the Constitutional Court.

In its unanimous decision, 11/1992 (III. 5) AB, the Constitutional Court struck down parliament's attempt at retroactive justice as unconstitutional for most of the reasons that the president's petition identified. The court ruled that the proposed law violated legal security, a principle that should be guaranteed as fundamental in a constitutional rule-of-law state. In addition, the Court argued, the language of the law was vague, because, among other things, 'political reasons' had changed so much over the long time frame covered by the law and the definition of the crimes themselves had changed during that time, too. By retroactively changing the statute of limitations, the basic principles of criminal law – that there shall be no punishment without a crime and no crime without a law – were clearly violated. The Court also asserted that the only sorts of changes in the law that might apply retroactively were those changes that worked to the benefit of the defendants. In sum, the court declared the law to be unconstitutional by citing the constitutional provisions that Hungary was a constitutional rule-of-law state and that there could be no punishment without a valid law in effect at the time.[11]

In early 1993, in order to circumvent the concern of the Constitutional Court on retroactive effect, the parliament opted to rely on crimes under international law enacted another law, which penalised a mixture of international and common crimes, including violation of personal freedom and terrorist acts, as common crimes, whose retroactive application had already been found unconstitutional by the Constitutional Court. Therefore, responding to the President of the Republic's repeated request for preliminary review the Court found again that regarding the effect of statutory limitations on common crimes the statute of limitation had run out. However, the judges developed a possible line of argument that would enable the prosecution of international crimes. For this reason, the decision relied on Article 7(1) of the Constitution, which stated that 'the legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the

[11]The English translation of the decision has been published in L. Sólyom and G. Brunner, *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court* (University of Michigan Press 2000) p. 214-228.

country's domestic law with the obligations assumed under international law'. According to the Court's interpretation, customary law, *jus cogens*, and general principles of law became part of the Hungarian legal system automatically, without any implementing legislation. Crimes against humanity and war crimes are 'undoubtedly part of customary international law; they are general principles recognized by the community of nations', the Court declared.[12] As a result, the problem of statutory limitation is resolved. The Court stated that there is no contradiction between Article 57(4) guaranteeing the unconditional internal application of the *nullum crimen* principle and Article 7(1) of the Constitution, about the generally recognised principles of international law, and these provisions are to be interpreted in relation to each other.[13] Perpetrators of crimes concerning the 1956 revolution falling within the purview of the Convention could be constitutionally prosecuted, because Hungary had ratified the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

After parliament re-enacted the law, the Court found the new text still to be contrary to the language of the Convention and hence quashed it, but declared that:

> with the nullification of the law there is no obstacle preventing the state from pursuing the offender of war crimes and crimes against humanity as defined by international law . . . It is international law itself which defines the crimes to be persecuted and be punished as well as all the conditions of their punishability.[14]

As a result of the Constitutional Court's interpretations the prosecutors investigated 40 potential cases of shootings into crowds by the regime's armed forces during the 1956 Revolution and finally issued indictments in nine of them. Finally, relying on international customary law, the courts found only three persons guilty in such cases, which were regarded as violations of common Article 3 of the Geneva Convention and hence crimes against humanity.

The crucial question for the Court was the determination of the existence of a non-international armed conflict in 1956. It became accepted that the events following the Soviet intervention on 4 November 1956 constituted an international armed conflict, though there was disagreement between the courts on the question of whether the hostilities in the period between the outbreak of the revolution on 23 October and 4 November reached the threshold of non-international armed conflict. In a case decided in 1998, the Supreme Court ruled that in this period of time the hostilities did not reach the level of non-international armed conflict,[15] but the Review

[12]Decision 53/1993, section V.
[13]*Supra* n. 10.
[14]Decision 56/1996, section II.(1).
[15]Decision No. 1344/1998/3, 5 November 1998.

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Bench of the Supreme Court overturned this decision with the argument that 'during this time, the armed forces waged war against the overwhelming majority of the population'.[16] This interpretation became the basis of all further judgments by Hungarian courts in the so called 'volley cases', in every criminal act perpetrated by the armed forces.

Following a challenge to one of these decisions, the European Court of Human Rights (ECtHR) determined that the judgment of the Hungarian Supreme Court violated the principle of non-retroactivity:

> The Hungarian criminal courts focused on the question whether common Article 3 was to be applied alone or in conjunction with Protocol II. Yet this issue concerns only the definition of the categories of persons who are protected by common Article 3 and/or Protocol II and the question whether the victim of the applicant's shooting belonged to one of them; it has no bearing on whether the prohibited actions set out in common Article 3 are to be considered to constitute, as such, crimes against humanity.[17]

While revisiting the case, the Review Bench of the Hungarian Supreme Court did not even attempt to prove the existence of widespread and systemic attack in furtherance of state policy, holding instead that a professional soldier at the time of the revolution was necessarily engaged in the commission of crimes against humanity. In other words, the Constitutional Court simply interpreted the crimes defined in the Hungarian Criminal Code as identical to the category of crimes against humanity in international law – to which the statute of limitation does not apply. The case proved that the direct use of customary international law in domestic criminal proceedings, as envisaged by the Constitutional Court, is highly problematic – especially if the provisions relating to the same crime are different in their wording.[18] As Tamás Hoffmann argues, 'the Hungarian judiciary proved unable to apply international criminal law, which led to a series of contradictory judgments that left the general populace confused'.[19]

[16]Decision No. X. 713/1999/3, 28 June 1999.

[17]Case of Korbély against Hungary, Grand Chamber, App No. 9174/02, 19 September 2008.

[18]One possible explanation for this could be the continental legal education, which focuses upon domestic and black-letter law. *See* J. Wouters, 'Customary International Law Before National Courts. Some Reflections From a Continental European Perspective', 4 *Non-State Actors and International Law* (2004) p. 31-32.

[19]T. Hoffmann, 'Trying Communism through International Criminal Law? – The Experiences of the Hungarian Historical Justice Trials', in K. Heller and G. Simpson (eds.), *The Hidden Histories of War Crimes Trials* (Oxford University Press 2013) p. 229.

Lustration: mild screening of public officials[20]

The Hungarian lustration law was also adopted after a long hesitation, early in 1994, towards the end of the first elected government's term of office. Similarly to the Polish case, it included a compromise solution to the issue of secret agents of the previous regime's police. The law set up panels of three judges whose job it would be to go through the secret police files of all of those who currently held a certain set of public offices (including the president, government ministers, members of parliament, constitutional judges, ordinary court judges, some journalists, people who held senior posts in state universities or state-owned companies, as well as a specified list of other senior government officials[21]). Each of these groups of people would have to undergo background checks in which their files would be scrutinised to see whether they had a role subject to lustration[22] in the ongoing operation of the previous surveillance state. If so, then the panel would notify the person about the evidence, giving him or her a chance to resign from public office. Only if the person chose to stay on would the panel publicise the information. If a person contested the information found in the files prior to disclosure, he or she could appeal to a court, which would then conduct a review of evidence in camera and make a judgment in the specific case. If the person accepted an adverse judgment and chose to resign, then the information would remain secret.

Being already in effect and after reviewing the first set of members of Parliament, the law was challenged by a petition to the Hungarian Constitutional Court. In its decision handed down in December 1994[23] the Court declared unconstitutional those parts of the 1994 law that required 'background checks on individuals who hold key offices'. The reasoning of the decision outlined key principles of the rights of privacy of the individuals whose pasts were revealed in the files as well as the rights of publicity for information of public interest. These are the most important principles declared by the Court in the judgment:

[20]This and the next section rely on my earlier work in G. Halmai, 'Lustration and Access to the Files in Central Europe', in V. Dvorakova and A. Milardovic (eds.), *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe* (Series of Politial Research Centre Forum Book 5 2007) p. 17.

[21]Altogether about 10.000–12.000 posts. *See* K. Williams and B. Fowler, *Explaining Lustration in Eastern Europe: 'A Post-Communist Politics Approach* Sussex European Institute Working Paper No. 62 (2003) p. 6-7.

[22]The law classified the following activities as lustratable: carrying out activities on behalf of state security organs as an official agent or informer, obtaining data from state security agencies to assist in making decisions, or being members of the (fascist) Arrow Cross Party.

[23]60/1994 (XII. 24) AB. *See* the English translation of the decision in Sólyom and Brunner, *supra* n. 11, p. 306-315.

> The court declares that data and records on individuals in positions of public authority and those who participate in political life – including those responsible for developing public opinion as part of their job – count as information of public interest under Article 61 of the Constitution if they reveal that these persons at one time carried out activities contrary to the principles of a constitutional state, or belonged to state organs that at one time pursued activities contrary to the same.

(Article 61 of the Hungarian Constitution provides an explicit right to access and disseminate information of public interest.)

The lustration decision was delicate not only politically (since the lustration process was already underway in a recently elected government where many of the top leaders had held important positions in the state party regime),[24] but also constitutionally, because it represented the clash of two constitutional principles: the rights of public access to legitimately public data by everyone (including those who were spied on), and the rights of informational self-determination of individuals (in this case, the spies). Although both principles had been upheld in strong form before the lustration case, that case pitted the two principles against each other.

Taking the whole range of issues, from the continued secrecy of the security apparatus files to the constitutionality of the lustration process, the Constitutional Court attempted to balance various interests. First, the Court held that the maintenance of this vast store of secret records was incompatible with the maintenance of a state under the rule of law, since such records would never have been constitutionally compiled in the first place in a rule-of-law state. But the fact that the records now existed posed other problems, including the freedom of access to information in the files both by an interested public and by individuals whose names appeared in the files either as subjects or as the agents. Disclosing the files to an interested public would also mean disclosing information of great personal importance to the individuals mentioned. Since individuals have a personal right of self-determination under the Hungarian Constitution, what is left of the claim of public freedom of access to information in determining what can be disclosed from the security apparatus files?

To resolve these questions, the Court made an important distinction. It held that public persons have a smaller sphere of personal privacy than other individuals in a democratic state. As a result, more information about such public persons may be disclosed from the security files than would be permitted in the case of persons not holding influential positions, so conflicts between privacy and freedom of information should be resolved differently for the two classes of

[24]For example, the Prime Minister and the Speaker of the Parliament in the term between 1994–98 were both ministers before 1989, and they had standing under the legal regulations of the time as persons who regularly received informational briefings from the secret police.

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persons. With this, the Court handed back the problem back to the Parliament as a 'political issue', with instructions that the Parliament can neither destroy all the records nor maintain the absolute secrecy of them, since much of what they contain is information of public interest.

The Court found that the Parliament had more remedial work to do on other parts of the law before it could pass constitutional standards. The specific list of persons to be lustrated also needed to be changed because it was unconstitutionally arbitrary. In particular, the Court found that the category of journalists to be lustrated was simultaneously too broad (by including those who produced music and entertainment programs) and too narrow (by excluding some clearly influential journalists who worked for the private electronic media). Either all journalists, and other public figures who influence public opinion while doing their job, must be lustrated or none of them, the Court held. Both options are constitutional, but the Parliament cannot pick and choose people from homogenous groups. On the other hand, the Court did not find the extension of the lustration process to journalists in the private media to be a violation either of the freedom of the press or a violation of the informational self-determination of journalists. Instead, all those who, in the words of the 1994 law, 'participate in the shaping of the public will' are acceptable candidates for lustration, as long as all those in the category are similarly included. Extending lustration to officials of universities and colleges and to the top executives of full or majority state-owned businesses was declared unconstitutional, however, as the Court found that these persons 'neither exercise authority nor participate in public affairs'. A separate provision allowing members of the clergy to be lustrated was struck down for procedural reasons, because the applied procedures did not include as many safeguards as those applied to others.

The decision of the Constitutional Court demonstrates that lustration laws can have two goals, depending on the historical moment of the democratic change. At the beginning of the transition, full lustration might have served to mark the irreversibility of the change and the ritual cleansing of society. But more than five years after the 'rule-of-law revolution', the better constitutional goal, at least for the Constitutional Court, may be found in specifying the circle of freedom of information through a rule of law lustration. The past behaviour of those people who are now holding a public office, or are otherwise prominent in public political life are appropriate subjects for the public community to know. The lustration of the prominent representatives of the state is constitutionally reasonable, but the publicity of the full list of agents is not, the Constitutional Court argued.[25]

[25]For a more detailed analysis of the Hungarian lustration *see* G. Halmai, 'Vergangenheitsbewältigung im Kontext posttotalitärer Gesellschaften in Ost-Mittel-Europa', in W.S. Kissel and U. Liebert (eds.), *Perspektiven einer europäischen Erinnerungsgemeinschaft: nationale Narrative und transnationale Dynamiken seit 1989* (LIT Verlag Münster 2010) p. 245.

Access to the secrets of the previous regime

The constitutional aspect of access to the secret files of the Communist regime is the right to freedom of information of public interest, which is never an absolute right, because legitimate state secrets or right to personal date or privacy in general can always limit this right. As shown in the case of the Hungarian statutory regulation, lustration was very much treated together with the problem of the access to the files of the previous regime's secret police both by the victims and the general public. These issues usually are regulated separately in the other countries. Within the Eastern-Central European region there are different models of accessibility. The Hungarian solution (and the Polish one too) provided limited access to the victims, the most important limit being the name of the spy, which in these models was not disclosed to the victims. The unified Germany, as the very first country in the region to open the state archives of the secret police, provided unlimited access to victims concerning the data on the agent, as well to government agencies to request background checks on their employees. The law enacted by the Hungarian Parliament in 2003, besides following the German way by providing access to victims on their files, except the names of their spies, also opened the files to the general public concerning the data of public figures. The widest access is provided by the similar statutory regulation in the Czech Republic and Slovakia, where – with the necessary protection of third persons' personal data – the secret police files are accessible to everyone.

The Hungarian Constitutional Court's decision on the constitutionality of the 1994 lustration law also stated that the legislative attempts to deal with the problem of the files were constitutionally incomplete because they failed to guarantee that the rights of privacy and informational self-determination of all citizens would be maintained. In its decision the Court declared that Parliament had created a situation of unconstitutionality by omission, because the law had not yet secured the right to informational self-determination, and first of all the right of people to see their own files.[26] The new law enacted in 1996 did create a 'Historical Office', to take control of all the secret police files and make them accessible to citizens who are mentioned in those files. Individuals are finally able to apply to the office in order to see their files, and such access must be granted, as long as the privacy and informational self-determination of others is not compromised. The Historical Office's purpose was to put into effect the prior decisions of the Constitutional Court.

[26]Since this is an unusual power of the Hungarian Court, it deserves some explanation. The Court can declare Parliament to be in violation of the Constitution by failing to enact a law that it is required by the Constitution or by a law to enact.

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Constitutional 'counter-revolution' and political justice without rule of law since 2010

After 2010 Hungary, according to Prime Minister Orbán's self-definition, became an 'illiberal democracy',[27] with a new Constitution – called Fundamental Law – enacted exclusive with the votes of the governing party. Characterising the results of the 2010 elections as a 'revolution of the ballot boxes', Orbán's intention with this revolution was to eliminate any kind of checks and balances, and even the parliamentary rotation of governing parties, as well as the institutional guarantees of fundamental rights by dismantling the independence of the Constitutional Court and the ordinary judiciary.[28] This had nothing to do political constitutionalism, as advocated by Richard Bellamy, Jeremy Waldron, Akhil Amar, Sandy Levinson, and Mark Tushnet. Each of those scholars, who differ from one another significantly, emphasises the role of elected bodies instead of courts in implementing and protecting the Constitution, but none of them rejects the main principles of constitutional democracy, as illiberal populist like Orbán do.

The Fundamental Law has also led to measures of 'bad political justice',[29] in which politics wins out over justice – through ordinary national criminal law. It is hard to tell what part of the failure of Hungary is thanks to the failed transitional justice measures, and what role the general backsliding of democracy played here. Viktor Orbán's governments after 2010 certainly wanted to abolish liberal constitutionalism, including the rule of law guarantees of their new transitional justice measures for political justice laid down in the text of the Fundamental Law.

Unlike the 1989 Constitution, the 2011 Fundamental Law of Hungary, has much to say about the country's dictatorial past and the new constitution-making majority's intention to deal with it.[30] The preamble, entitled 'National Avowal', starts by saying, 'We deny any statute of limitation for the inhuman crimes

[27]Based on Fareed Zakaria's use of term 'illiberal democracy' (F Zakaria, *The Future of Freedom. Illiberal Democracy at Home and Abroad* (W.W. Norton and Company 2003) it was PM Orbán of Hungary, who first characterised his regime proudly as such in his speech at the 28th Bálványos Summer Open University and Student Camp, 28 July 2014. Tusnádfürdő (Băile Tuşnad), http://www.miniszterelnok.hu/prime-minister-viktor-orbans-speech-at-the-29th-balvanyos-summer-open-university-and-student-camp/, last visited 11 December 2023.

[28]About the 'constitutional counter-revolution' in Hungary after 2010, *see* G. Halmai, 'Perspectives on Global Constitutionalism' (Eleven 2014) p. 121-176.

[29]Here I refer to 'bad' political justice, using the terminology of Ellen Lutz and Caitlin Reiger who – citing J.N. Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press 1964) – distinguish between 'bad' political trials, in which politics gains the upper hand over justice, and 'good' political trials, which reflect a desire for public accountability: *see* E.L. Lutz and C. Reiger, 'Introduction', in E.L. Lutz and C. Reiger (eds.), *Prosecuting Heads of State* (Cambridge University Press 2009) p. 10-11.

[30]About the Fundamental Law new approach of dealing with the past *see* M. Könczöl, 'Dealing with the Past in and around the Fundamental Law of Hungary', in U. Belavusau and

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committed against the Hungarian nation and its citizens under the national socialist and Communist dictatorships.' If 'inhuman crimes' refers to war crimes and crimes against humanity, then the denial of a statute of limitations complies with effective international law, namely Article 29 of the International Criminal Court, adopted in July 1998 in Rome about the non-applicability of statutory limitations. However, it is in breach of the prohibition on retroactive effect, emphasised in earlier decisions of the Hungarian Constitutional Court, if it refers to less serious crimes than the Fundamental Law.

The preamble of the Fundamental Law declares that 'We date the restoration of our country's self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected organ of popular representation was formed.' In so doing, it fails to acknowledge that war crimes and crimes against humanity in this period could have been committed not only by foreign occupying forces and their agents during World War II, but also by extreme right-wing 'free troops' and the security forces of the independent Hungarian state, not only against 'the Hungarian nation and its citizens', but also against other peoples. Nor does it acknowledge that the continuity of Hungary's statehood was not interrupted: restrictions were placed on government agencies' freedom to act, but the government was not shut down. Miklós Horthy, the Regent of Hungary, remained in his office and Parliament sat and regularly passed Bills introduced by the government. The Hungarian state leadership did not declare the termination of legal continuity, but cooperated with the occupying powers. With this statement the Fundamental Law does not acknowledge the acts and failures that give cause for self-criticism. It only holds to account the – reputed or genuine – injuries caused to the Hungarian people by foreign powers, and does not wish to acknowledge the wrongs committed by the Hungarian state against its own citizens and other peoples.[31]

In April 2013, as part of the Fourth Amendment to the Fundamental Law, the government adopted Article U, which supplements detailed provisions on the country's Communist past and statute of limitations in the body text of the Constitution. This new article, passed after 23 years of solid democracy and a working system of the rule of law, revisits the settlements made during the immediate transition from Communist dictatorship to democracy by reopening possible cases against former Communist officials.[32]

A. Gliszczynska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History* (Cambridge University Press 2017) p. 246.

[31] *See* a critical account the Fundamental Law of Hungary: A. Arato et al. (eds.), *Opinion on the Fundamental Law of Hungary*, https://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf, visited 15 December 2023.

[32] A shortened version of the following has been published as G. Halmai, 'Memory Politics in Hungary: Political Justice without Rule of Law', *Verfassungsblog*, 10 January 2018, https://

New Article U first states the obvious: that a government based on the principles of rule of law and separation of powers and the prior Communist regime are diametrically opposed and irreconcilable. This truism is followed by a mix of: (i) verbal exorcisms of the pre-1989 Hungarian Communist Party and its satellite organisations; (ii) authorisation of adverse treatment of Communist-period leaders; and (iii) rules that reopen the statute of limitations covering serious crimes committed during the Communist period that had not been subject to prosecution on account of political motives.

Article U(1) labels the pre-1989 Communist Party (the Hungarian Socialist Workers' Party) and its satellite organisations that supported the Communist ideology as 'criminal organisations' whose leaders carry a liability that is 'without a statute of limitations'. In sections 7 and 8, however, that general exclusion of the use of a statute of limitations is contradicted by provisions that define a mechanism for the interruption and tolling of the statute of limitations for Communist-period crimes that had not been prosecuted. The way it refers to 'criminal organisations' makes it neither a term of art nor a definition of a legal construct in Hungarian penal law. The Fundamental Law uses a different term (*bűnöző szervezet*) from the Hungarian criminal law (*bűnszervezet*), to which it attaches criminal penalties. (Both terms translate into 'criminal organisation' in English, but one carries criminal liability and the other is undefined in law.) It is, therefore, unclear what legal effects are intended by this term in the Fundamental Law.

Furthermore, the Fundamental Law includes a very broad and general liability for a number of past acts, including destroying post-World War II Hungarian democracy with the assistance of Soviet military power; the unlawful persecution, internment, and execution of political opponents; the defeat of the 1956 October Revolution; destroying the legal order and private property; creating national debt; 'devastating the value of European civilisation'; and all criminal acts that were committed with political animus and which, for purely political motives, had not been prosecuted by the criminal justice system. As with the term for criminal organisation, however, the sort of 'liability' referred to the new Article U(1) does not have any formal legal reference anywhere else in Hungarian law. The liability in this section, like *bűnüző szervezet* in the preceding section, *sounds* legal but does not directly reference any other provision in Hungarian law. Its purpose and meaning are undefined and so its legal effects are unclear.

This elusive liability of all political organisations that have been deemed to be the legal successors of the pre-1989 Communist Party is extended by a separate

verfassungsblog.de/memory-politics-in-hungary-political-justice-without-rule-of-law/, visited 15 December 2023.

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paragraph. This states that the successor parties should share the liabilities of these predecessors as well, because they have shared in the unlawfully accumulated assets of their predecessors. But it is impossible to tell which parties and organisations are singled out by this designation, as there are no standards for determining which organisations count as successors.

Article U(2) and U(3) call for the remembrance of the Communist past and create a new Committee of National Memory for this purpose. The Committee, while conducting scientific research, can make judgements on historical facts, without any possibility of judicial recourse.[33] Moreover, in the decade of its existence it has been unable to contribute in any way to social reconciliation, as truth commissions have been doing in many transitional societies.[34] New Article U(4) provides that former Communist leaders are public persons in respect of their past political actions and as such must tolerate public scrutiny and criticism, except for deliberate lies and untrue statements, as well as disclosure of personal data linked to their functions and actions. New Article U(5) provides grounds for new legislation that reduces the pensions and other benefits of specific leaders of the Communist dictatorship. This provision appears to contradict Constitutional Court decision 43/1995, which held that people could not be denied pension payments after they had paid, as they were required to do, into the state pension scheme. But that decision, together with all others made prior to the coming into force of the Fundamental Law, has been annulled by the Fourth Amendment.[35]

Articles U(6)–(8) relate to the tolling and interruption of the statute of limitations for specific serious crimes that are not time barred according to Article U(1). But there is no law that defines which crimes are serious enough to justify removal of all time limitations on prosecutions and which are subject to the newly reset clock for prosecutions. Exactly these sorts of extension of the statute of limitations were declared unconstitutional by decision 11/1992 of the Constitutional Court.

[33] *See* the critique of the law establishing the Committee by the Társaság a Szabadságjogokért (Hungarian Civil Liberties Union): https://tasz.hu/cikkek/nem-jogallami-a-nemzeti-emlekezet-bizottsagarol-szolo-torveny, visited 15 December 2023.

[34] On the different approaches to truth and reconciliation commissions *see* E. Kirs, 'Possible Models for the Regulation of Simultaneous Functioning of Truth and Reconciliation Commissions and Criminal Courts', in M. Matheson and D. Momtaz, *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts* (Brill 2010) p. 821.

[35] This annulment applied even to decisions of the Constitutional Court, which relied on provisions of the 1989 Constitution identical to provisions in the Fundamental Law. In this respect this 'general override' rule is even more detrimental to the principles of constitutionalism than the override clause of an Israeli Basic Law to be introduced by the new Netanyahu government in early 2023, because the latter only provides override possibility to the Knesset against particular decisions of the Supreme Court in a case-by-case basis. *See* R. Weill, 'The High Stakes Israeli Debate over the Override', *Verfassungsblog*, 25 November 2022, https://verfassungsblog.de/the-high-stakes-israeli-debate-over-the-override/, visited 15 December 2023.

The new constitutional provision, introduced by the Fourth Amendment, therefore seeks directly to reverse this prior Constitutional Court decision. But the Fourth Amendment provides that 'Constitutional Court rulings given prior to the entry into force of the Fundamental Law are hereby repealed. This provision is without prejudice to the legal effect produced by those rulings.' The legal effect of the 1992 decision was to bar the statute of limitations from being reset at the time of the transition. So in this case both the legal effect and the decision itself are reversed.

To reverse course after 23 years puts those who may be prosecuted long after the fact at a very distinct disadvantage. More than two decades is a very long period of time after which to question the legal framework of the statute of limitations for the types of criminal acts under consideration. Such provisions may not fall foul of the time-honoured doctrine of *nullum crimen sine lege*, but they may nonetheless constitute violations of rights to due process of law.

What could be the purpose of reopening these cases now through a removal of the statute of limitations, other than to weaken Fidesz's political rival, the Socialist Party, as successor of the Communist Party? New Article U(9) eliminates one potential purpose, which is to compensate the victims of the Communist period. This provision specifically rules out any new laws that might provide compensation to individuals for harms caused to them during the very period that will be reexamined through these cases.[36]

This failure by the courts in the late 1990s to apply international criminal law to punish ordinary soldiers, let alone Communist political leaders, for the events of 1956 may be one of the reasons that led the government elected in 2010 to change course in dealing with the past. The already-described changes in the National Avowal and Article U of the new Fundamental Law, which legitimise the circumvention of the statute of limitation, were even preceded by a statutory effort to return to domestic criminal law. Law No. CCX of 2011 on the Punishability and the Exclusion of the Statute of Limitations of Crimes against Humanity and on the Prosecution of Certain Crimes Committed during the Communist Dictatorship was – not coincidentally – enacted after the Office of the General Prosecutor declined to initiate proceedings against Béla Biszku, the last living Communist leader, who had played a key role as a Minister of Interior between 1957 and 1961 in the reprisals against the participants of the 1956 revolution.[37] The new law, referred to in the media as 'Lex Biszku', explicitly authorised the Hungarian courts to prosecute him by translating the definition of

[36]For a detailed critical assessment of the entire amendment *see* Halmai and Scheppele, *supra* n. 1.

[37]The prosecution argued that the acts alleged to have been committed by Biszku did not amount to grave breaches of the Convention and therefore were subject to the statute of limitations: Office of the General Prosecutor, No. NF. 10718/2010/5-I., 17 December 2010.

crimes against humanity of the Nuremberg Statute into Hungarian, without defining the contextual elements of crimes against humanity and also criminalising the violation of common Article 3 of the Geneva Conventions in contravention to the *nullum crimen* principle.[38] Moreover, the law introduces the category of 'Communist crimes' and declares that the commission or aiding and abetting of serious crimes such as voluntary manslaughter, assault, torture, unlawful detention and coercive interrogation is not subject to statute of limitations when committed on behalf, with the consent of, or in the interest of the party state. This provision clearly replicates the one that was found unconstitutional by the Constitutional Court in 1992. On this basis the law could have been challenged before the Constitutional Court, but because it entered into force on 1 January 2012 – the same day that the 'popular action' was abolished, according to which a person without any personal interest could challenge any law – no-one was any longer entitled to file a petition to the Court.

Based on the new law, Béla Biszku was convicted, as the only person under it being a member of the interim executive committee of the Communist Party which set up a special armed force in order to 'maintain order' and act with force against civilians if need be. The most violent acts committed by this special force were the shooting in December 1956 of unarmed people in Budapest and the town of Salgótarján, the latter incident being especially bloody, with 46 victims. In May 2014, the first instance court found Biszku guilty of aiding and abetting war crimes, as well as for denying crimes committed by the Communist regime in an interview prior to the criminal procedure. The 92 years old man was sentenced to five years and six month in prison, with the possibility of appeal.[39] In June 2015 the appellate court declared the original verdict null and void because 'the original ruling was so unsubstantiated that no meaningful decision could be reached based on it'.

The new first instance court decision, issued in December 2015, acquitted the defendant regarding the most serious charge. According to this verdict Biszku was responsible neither for the shootings in Budapest nor in Salgótarján. He was found guilty only of complicity and two unrelated petty crimes: abuse of ammunition; and denial of the crimes of the Communist regime. For these minor crimes he was sentenced to two years' imprisonment suspended for three years. In the reasoning the judge emphasised that the subject of the charge was the defendant's responsibility regarding the two demonstrations, and his role as

[38]On the Hungarian application of crimes under international law around the Biszku case *see* R. Varga, 'Application of Crimes under International Law in Hungary (Observations around the Biszku-Case)', 7 *Iustum Aequum Salutare* (2011) p. 193.

[39]'Hungary 1956 Revolt: Béla Biszku Jailed for War Crimes', *BBC News*, 13 May 2014, https://www.bbc.com/news/world-europe-27398373, visited 15 December 2023.

Minister of Interior in the revenge actions of the Kádár-regime based on public perceptions. During the proceedings, the court did not find any evidence of a central fire order to shoot into the masses.[40]

Conclusion: possible reasons for the backsliding and its memory policy

The Hungarian Constitutional Court in the 1990s interpreted the rule of law to require certainty, as opposed to the German and the Czech courts, which interpreted it to require substantive justice by sentencing or lustrating those responsible for the crimes committed during the previous regime despite formal rule of law requirements.[41] These distinct approaches by the three countries seemed to correspond to the very type of their transitions, which reflected the character of the previous regime. Due to the relatively mild character of the Communist regime and the negotiated/pacted nature of the transition, in Hungary the elite assumed that there was no desire for harsh substantive justice measures, while the hard-core dictatorship in East Germany and in Czechoslovakia after 1968 required a different solution. The two approaches of formal and material (substantive) justice say nothing about the success of the efforts to carry out justice. Since the Hungarian population seemed not to be receptive towards legal constitutionalism in general,[42] and the very formalistic

[40]The verdict was still not final, because the prosecution appealed for a heavier judgment, while the defendant asked for total acquittal, but after the verdict was made public the defendant died.

[41]About the different approaches of the interpretation of rule of law in Central Europe, *see* J. Priban, 'From "Which Rule of Law?" to "The Rule of Which Law?": Post-Communist Experiences of European Legal Integration', 1(2) *Hague Journal on the Rule of Law* (2009) p. 337. The dilemma of successor justice faced by these courts forms part of a rich dialogue on the nature of law; H.L.A. Hart and Lon Fuller's debate on transitional justice wrestles with the relationship between law and morality, between positivism and natural law. Defending positivism *see* H.L.A. Hart, 'Positivism and the Separation of Law and Morals', 71 *Harvard Law Review* (1958) p. 593. Fuller rejected Hart's abstact formulation of the problem, and instead focused on postwar Germany. Arguing that Hart's opposition to selective tampering elevates rule-of-law considerations over those of substantive criminal justice, Fuller justified tampering to preserve the morality of law: *see* L.L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart', 71 *Harvard Law Review* (1958) p. 630.

[42]According to some authors, the potential of democracy in Hungary following the transition in 1989–90 (and also in the other new democracies of Central Europe) was diminished by technocratic, judicial control of politics, and the treasure of civic constitutionalism, civil society and participatory democratic government as a necessary counterpoint to the technocratic machinery of legal constitutionalism was lost. *See* this argument in P. Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge 2013). Also Wojciech Sadurski argued that legal constitutionalism might have a 'negative effect' in new democracies and might lead to the perpetuation of the problem of both weak

approach of the rule of law in particular, which treated the legal order of the Communist regime as valid, the populist government of Viktor Orbán after 2010 was able to change this approach, and seek 'bad' political justice and revenge.

Unfortunately, during the once pioneering democratic transition of Hungary, the initial measures of transitional justice could not help to reconcile society and consolidate democracy. Maybe transitional justice as a substitute idealism for trying to invigorate a new democratic regime without strong democratic traditions was doomed to fail and turn to political justice without any guarantees from the rule of law. The current Hungarian government's attitude towards public discussion of history, similar to that of the Polish one, reflects these illiberal populist regimes' attitude towards individual rights.[43] In Hungary, apart from laws, the main signs of this 'renationalised' public discourse are the creation of government-loyal research institutes, museums, newly written school textbooks, the constant airing of national history themes on public media, renaming of streets, the construction and deconstruction of monuments.[44] But unfortunately the Hungarian and the Polish examples are not unique; the legal governance of history shapes the public understanding of the past in other parts of the world as well.[45]

This also leads to the question, who is to blame for this politicised memory governance without rule of law guarantees? One possible response is that politics has failed 'the people', who were only choosing an option that they were offered, and not the other way around.[46] This applies first and foremost to would-be autocrats, such as Viktor Orbán, who always used populist arguments to fulfil his nationalistic, authoritarian aims, but also those benevolent liberal democratic parties and leaders who imposed their liberal ideas on the people – who were either not interested or not ready to accept them.

For many, the failure of traditional Western liberal democratic constitutionalism in a number of post-Communist countries – the 'new Member States' of the EU – particularly in Hungary and Poland, can be explained by the characteristics

political parties and civil society. *See* W. Sadurski, 'Transitional Constitutionalism: Simplistic and Fancy Theories', in A. Czarnota et al. (eds.), *Rethinking the Rule of Law after Communism* (CEU Press 2005) p. 9.

[43]On one important aspect of the Polish memory politics towards ethnic minorities *see* U. Belavusau, 'Rule of Law in Poland: Memory Politics and Belarusian Minority', *Verfassungsblog*, 21 November 2017, https://verfassungsblog.de/rule-of-law-in-poland-memory-politics-and-belarusian-minority/, visited 15 December 2023.

[44]*See* several examples in N. Berend, 'Renationalized History and Antisemitism in Hungary', 16 *Israeli Journal of Foreign Affairs* (2022) p. 216.

[45]*See* U. Belavusau and A. Gliszczynska-Grabias (eds.), *Law and Memory* (Cambridge University Press 2017).

[46]*See* K.L. Scheppele, 'The Party's Over', in M. Graber et al. (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) p. 495.

of the democratic transition, being led by a liberal elite, which used undemocratic tools of legal constitutionalism. These critics claim that the undemocratic way in which the most important political (and economic) issues of the transition were resolved – such as dealing with the past – and which were also subject to the constitution-making process, has led to them becoming legal issues (legalisation). They have been taken out of the political arena, with no serious public debates or popular control (depoliticisation).[47] The liberal nature of this process is due to the fact that the anti-Communist elite wanted to copy the Western idea of both economic and political liberalism, without being sure that the population was aware of the institutional consequences of political liberalism, or – if they were aware –without knowing how many of them would have opted for political (or economic) liberalism.[48]

This undemocratic legalism or legal constitutionalism after the democratic transition – not by chance called the 'rule of law revolution' by the first Constitutional Court[49] – was used against the explicit or assumed public opinion, either referring to provisions of the new comprehensively amended Constitution of 1989, or even in the absence of constitutional rules for institutional approaches allegedly more coherent with the Constitution. This happened in the case of transitional justice as well. Without having specific survey results, it became evident that in the first years of the democratic transition, transitional justice measures – such as retroactive justice, lustration, compensation and access to the files of the previous secret police – were important issues for the general public to face in terms of the Communist past.[50] Therefore, critics of the liberal legalist approach of the Constitutional Court – both party politicians and academics – were always aware of this problem. The historian Ferenc Horkay Hörcher, who

[47] *See* C. Mudde, 'Populism in Europe: An Illiberal Democratic Response to Undemocratic Liberalism', 56(4) *Government and Opposition* (2021) p. 577 at p. 585. The democratic critique of constitutionalism is not limited to the region, and not even only to Europe, but is part of the broader theory of deliberative constitutionalism challenging traditional constitutionalism in the name of democracy. *See* R. Levy et al. (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press 2018); M. Loughlin, *Against Constitutionalism* (Harvard University Press 2022), and R. Gargarella, *The Law as a Conversation Among Equals* (Cambridge University Press 2022). Arguing for constitutionalism by reviewing by the books of Loughlin and Gargarella, *see* M. Tushnet, 'Review Essay: For Constitutionalism', Harvard Public Law Working Paper No. 23-47, 4 September 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4209674, visited 15 December 2023.

[48] *See* a critique of the first rights after the transition by J. Szacki, *Liberalism after Communism* (CEU Press 1995), and after the start of the backsliding again by I. Krastev and S. Holmes, *The Light that Failed, A Reckoning* (Pegasus Books 2020).

[49] *See* 11/1992. (III. 5.) AB decision.

[50] *See* K. Péter, 'Igazságtétel', 5/3 *Beszélő Online* (1992), http://beszelo.c3.hu/cikkek/igazsagtetel, visited 15 December 2023.

was close to MDF, the first democratically elected governing party, has struck a very critical tone towards the attitude of the constitutional justices. He argues that the Constitutional Court interdicted the implementation of the Antall government's first plans for retroactive justice concerning the previous regime, arguing that 'legal security based on objective and formal principles enjoys primacy over a sense of substantive justice that is always partial and subjective'. By refusing to stray from a strict notion of legal continuity, says Horkay, the Constitutional Court produced the regime transition's justice deficiency, forgoing the possibility of satisfying popular perceptions and the needs of truth and justice from the very start, and thereby alienating large masses from the ideal of constitutionalism.[51]

For all these reasons, there is currently no significant support for any change of the rule of law situation and the memory politics in Hungary. During the 2022 parliamentary election this support even increased, despite the Orbán government's immoral stance towards Putin's war, and continued exclusionary, nationalistic, homophobic, autocratic ideas, and aims to misuse the memory of the past.

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[51] *See* F. Horkay Hörcher, 'Az értékhiányos rendszerváltás. Jogelméleti és politikai filozófiai megfontolások' [A regime transition devoid of values. Legal theory and political philosophy considerations], 1 *Fundamentum*, (2003) p. 62 at p. 64. Later, Horkay saw these neglected values and principles manifested in the 2011 Fundamental Laws and especially their chapter entitled National Creed. *Cf.* F. Horkay Hörcher, 'A Nemzeti hitvallásról' ['On the National Creed'], in A. Jakab and A. Körösényi (eds.), *Alkotmányozás Magyarországon és máshol* [*Constitution-making in Hungary and Elsewhere*] (MTA TKPTI, Új Mandátum Kiadó 2012) p. 286.

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