



## ARTICLES

### HISTORICAL MEMORY IN POST-COMMUNIST EUROPE AND THE RULE OF LAW – FIRST PART

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### HISTORY AND INTERPRETATION IN THE FUNDAMENTAL LAW OF HUNGARY

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ABSTRACT: This *Article* focuses on some of the rules of interpretation contained in the Fundamental Law of Hungary (Art. R), which, while not belonging to the class of “memory laws” in the strict sense, make use of certain historically charged concepts. These concepts, examined in the first part of the *Article* in turn, are 1) the “achievements of the historical constitution”, 2) the “constitutional identity”, and 3) the “Christian culture” of Hungary. It is argued that in terms of their substance, these are open to competing historical interpretations. The second part of the *Article* deals with the pragmatic aspect of these provisions, that is, 4) their functions in constitutional interpretation. Based on that, the conclusion summarises 5) the role and motivation of historicising concepts both from the perspective of the constitution-maker and that of constitutional lawyers.

KEYWORDS: fundamental law of Hungary – rule of law – historical constitution – constitutional identity – Christian culture – constitutional interpretation.

#### I. INTRODUCTION

Memory laws as a means of regulating historical memory have seen an unprecedented expansion since the turn of the millennium. Accordingly, theoretical encounters with that current of legislation have been increasingly frequent in the field of legal and politi-

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cal studies.<sup>1</sup> One of the cases arousing attention in recent scholarship has been that of Hungarian law, and the new constitution, the Fundamental Law of 2011, in particular.

The Fundamental Law of Hungary (FL), while not in itself a "memory law" in the narrow sense of the term,<sup>2</sup> contains a considerable amount of historical references clearly aimed at establishing a coherent view of Hungarian history. Thus, it not only falls within the category of "laws affecting historical memory",<sup>3</sup> but can also be regarded as an attempt at radically changing the relationship between (Hungarian) law and memory. The role that the FL plays within a broader current of memory politics has been described, and criticised, in a number of publications<sup>4</sup> since its enactment in 2011.

This Article takes a different perspective by focusing on the ways certain conceptions of history influence the interpretation of passages not explicitly dealing with historical narratives, and yet indirectly linked to them. It does so by looking at some of the rules of interpretation contained in the FL, and to Art. R in particular.<sup>5</sup> These competing interpretations, we shall argue, depend on one's understanding of certain historically charged concepts.

Art. R, section 3, of the FL provides that "[t]he provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic[al] constitution". Section 4, introduced by

<sup>1</sup> For comparative studies, see most recently N. KOPOSOV, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge: Cambridge University Press, 2017; U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory: Towards Legal Governance of History*, Cambridge: Cambridge University Press, 2017, and K. GAUBA, *Rethinking 'Memory Laws' from a Comparative Perspective*, in M.P. SINGH, N. KUMAR (eds), *The Indian Yearbook of Comparative Law 2018*, Singapore: Springer, 2019, 233 et seq.

<sup>2</sup> That is, laws that use state sanctions to protect certain interpretations of historical events or historical narratives. Cf. A. GLISZCZYŃSKA-GRABIAS, G. BARANOWSKI, A. WÓJCIK, *Law-secured Narratives of the Past in Poland in Light of International Human Rights Law Standards*, in *Polish Yearbook of International Law*, 2018, p. 60, quoting Council of Europe, *Memory Laws and Freedom of Expression: Thematic Factsheet*, July 2018, available at rm.coe.int.

<sup>3</sup> Cf. E. HEINZE, *Epilogue: Beyond 'Memory Laws': Towards a General Theory of Law and Historical Discourse*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, cit., p. 413 et seq.

<sup>4</sup> See, e.g., Zs. KÖRTVÉLYESI, *From "We the People" to "We the Nation"*, in G. A. TÓTH (ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, Budapest and New York: CEU Press, 2012, p. 111 et seq.; M. DANI, *The 'Partisan Constitution' and the Corrosion of European Constitutional Culture*, in *LEQS Papers*, no. 68, 2013, available at www.lse.ac.uk; A. CIEGER, *National Identity and Constitutional Patriotism in the Context of Modern Hungarian History*, in *Hungarian Historical Review*, 2016, p. 123 et seq.; K. MIKLÓSSY, H. NYYSSÖNEN, *Defining the New Polity: Constitutional Memory in Hungary and Beyond*, in *Journal of Contemporary European Studies*, 2018, p. 322 et seq.

<sup>5</sup> The FL consists of eight parts: 1) the opening motto, 2) National Avowal, 3) Foundation, 4) Freedom and Responsibility, 5) The State, 6) Special Legal Order, 7) Closing and Miscellaneous Provisions, 8) post-amble. The Articles in 3), 4), and 5)-6) are marked with capital letters, Roman numerals, and Arabic numerals, respectively.

the seventh amendment of the FL, adds that “[t]he protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State”.<sup>6</sup>

In what follows, we shall first give an overview of the “semantic” aspect of the key concepts in these provisions, that is, the competing interpretations of (II) the historical constitution, (III) constitutional identity, and (IV) the Christian culture of Hungary. After that, we shall turn to the “pragmatic” aspect, that is, (V) the appearance of these concepts in the relevant case-law of the Hungarian Constitutional Court. In our conclusion (VI), we shall summarise the possible roles and motivations for using such concepts in constitutional provisions and rules for their interpretation.

## II. HISTORICAL CONSTITUTION

The notion that a “historical constitution” should play a role in interpreting the FL has aroused a good deal of interest, political as well as scholarly, since the publication of the first drafts. Quite clearly, the very term alludes to an image of constitutional continuity, and more specifically, to the discourses focusing on that continuity in the first half of the 20th century.<sup>7</sup>

As for the general notion of continuity, the very title of the new constitution, Fundamental Law, has been explained as the sign of a new constitutional paradigm. As pointed out by one of the chief drafters, József Szájer, MEP, “[t]he Fundamental Law is, as shown by its name, a single document that is the foundation, or from a different, Kelsenian perspective, the summit of our formal legal system. It is part of the constitution, but at the same time less than the constitution”.<sup>8</sup> Given that the FL’s preamble states that constitutional continuity was interrupted “due to foreign occupations”,<sup>9</sup> what the constitution-making (and -naming) act seeks to achieve here is “to revive the rich millennial constitutional tradition of Hungary and restore its continuity”.<sup>10</sup>

<sup>6</sup> Quotations follow the official translation of the consolidated version of 29 June 2018 (incorporating the seven amendments), available at [www.kormany.hu](http://www.kormany.hu).

<sup>7</sup> For an overview of the interwar debates concerning “constitutional continuity”, see G. SCHWEITZER, *Molnár Kálmán és a két világháború közötti alkotmányjogtudomány dilemmái* (*Kálmán Molnár and the Dilemmas of Interwar Constitutional Scholarship*), in *MTA Law Working Papers*, no. 33, 2015, jog.tk.mta.hu.

<sup>8</sup> J. SZÁJER, *Az Alaptörvény és a történeti alkotmány. Csevár Nóra beszélget Szájer Józseffel* (*The Fundamental Law and the Historical Constitution. An Interview with József Szájer by Nóra Csevár*), in *Jogelméleti Szemle*, 2012, no. 4, jesz.ajk.elte.hu.

<sup>9</sup> The relevant text of the preamble (National Avowal) runs as follows: “We do not recognise the suspension of our historic constitution due to foreign occupations. [...] We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; we therefore proclaim it to be invalid. [...] 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. We shall consider this date to be the beginning of our country’s new democracy and constitutional order”.

<sup>10</sup> J. SZÁJER, *Az Alaptörvény és a történeti alkotmány*, cit.

It needs to be emphasised that the text speaks of “achievements” of the historical constitution, thus opening the possibility of a selection, to be made by those interpreting the FL. That, too, has been pointed out by Szájer,<sup>11</sup> thus relativising the “rebuilding” and “reviving” tendencies in constitution-making to some extent.

Post-2011 constitutional scholarship has produced a range of views concerning the actual time limits of the historical constitution.<sup>12</sup> As the FL itself mentions both “foreign occupations” (in connection with the loss of “self-determination” on 19 March 1944) and the communist constitution of 1949, either may serve as the closing date. A further question concerns whether post-1944 (or post-1949) developments may count as “achievements”.<sup>13</sup> Finally, it may be argued that either the democratic transition (in 1990) or the passing of the FL (in 2011) has re-established continuity, and therefore recent legislation or Constitutional Court jurisprudence<sup>14</sup> may also add to these achievements.

Criticism against using the term “historical constitution” has focused on four points: *i*) the impossibility of re-establishing constitutional continuity; *ii*) the incompatibility of the FL with the notion of a historical constitution; *iii*) the undesirable consequences of establishing any link with the pre-1945 constitutional tradition; and finally *iv*) the general lack of clarity as regards the normative content of the term.

*i)* The lack of constitutional continuity is acknowledged, somewhat ambiguously, by the constitution-makers themselves (cf. the reference to the loss of self-determination cited above). The declaration of the invalidity of the previous constitution in the National Avowal seems to be more of a challenge to its political legitimacy than an actual attempt at returning to the pre-1949 *status quo*. Yet, even returning to that constitutional setting would not re-establish continuity.<sup>15</sup> Already the constitutional scholarship of the interwar period perceived the end of constitutional continuity after the abdication of King Charles IV, and Act 1 of 1946 abandoned monarchy for a republican constitution.<sup>16</sup>

<sup>11</sup> *Ibidem*, opposing the “achievements” to the totality of the European “*acquis communautaire*”, which he otherwise mentions as the source of inspiration for coining the term.

<sup>12</sup> For a recent overview, see I. VÖRÖS, *A történeti alkotmány az Alkotmánybíróság gyakorlatában* (*The historical constitution in the jurisprudence of the Constitutional Court*), in *Közjogi Szemle*, 2016, no. 4, p. 44 *et seq.*

<sup>13</sup> See Á. RIXER, *A történeti alkotmány lehetséges jelentéstartalmai* (*The possible meanings of the historical constitution*), in *Jogelmeleti Szemle*, 2011, no. 3, jesz.ajk.elte.hu.

<sup>14</sup> For a similar view, related to the concept of “the unseen constitution”, see the interview with László Sólyom, the first President of the Hungarian Constitutional Court: A. STUMPF, *Sólyom László az új alkotmányról* (*László Sólyom on the New Constitution*), in *Heti Válasz*, 21 April 2011, where Sólyom states that “what can be used of the historical constitution is the unseen constitution, that is, the coherent system of constitutional values and principles built up through the application of our rule-of-law Constitution, which is part of the European constitutional tradition, and is also shaping that tradition”.

<sup>15</sup> For a different conception of continuity, see K. PÓCZA, *Is a Revival Possible? Theoretical Reflections on the Historical Constitution*, in F. HÖRCHER, T. LORMAN (eds) *A History of the Hungarian Constitution: Law, Government and Political Culture in Central Europe*, London, New York: I. B. Tauris, 2018, p. 211 *et seq.*

<sup>16</sup> See G. SCHWEITZER, *Molnár Kálmán és a két világháború közötti alkotmányjogtudomány dilemmái*, cit.

Arguably, then, constitutional continuity would be a fiction, and one without a clear content in terms of specific institutions. The selective function of "achievements" is actually a means for tackling that problem.

*ii)* The claim of its drafters notwithstanding, it has been argued that the FL is a charter constitution replacing the former one, Act 20 of 1949. Even though that latter is declared invalid in the National Avowal, as "the basis for tyrannical rule", the closing provisions state that the "Fundamental Law shall be adopted by the National Assembly pursuant to Sections 19(3)a) and 24(3) of Act XX of 1949", thus making it the formal source of validity for the new constitution. In a substantive sense, the penultimate paragraph of the National Avowal declares that "[o]ur Fundamental Law shall be the basis of our legal order; it shall be an alliance among Hungarians of the past, present and future. It is a living framework which expresses the nation's will and the form in which we want to live". While a charter constitution may, in principle, still be regarded as part of a historical constitution, the two terms are normally used as opposites, and Hungarian constitutional discourses follow that usage.

*iii)* In terms of the consequences of linking the FL to the Hungarian constitutional tradition, it is often pointed out that certain elements of the tradition are simply incompatible with the current constitutional situation. Part of these elements may be summarised by the symbol of the "Holy Crown of Hungary", which has been linked to the tradition of monarchy (as opposed to the republic, cf. Art. B, para. 2), the territorial claims of pre-war Hungary (as opposed to the current borders), and the tradition of an established church (as opposed to the separation of church and state, cf. Art. VII, para. 3).<sup>17</sup> While the text of the FL does not actually grant such an interpretation, as its reference to the Holy Crown restricts its function to embodying "the constitutional continuity of Hungary's statehood and the unity of the nation", the so-called "doctrine of the Holy Crown" is often mentioned in official and unofficial government communications, albeit with an emphasis on the rule-of-law traditions rather than the above elements.<sup>18</sup>

*iv)* In addition to the above points concerning the (possible) substance of the historical reference, a formal issue is also raised. As has been pointed out in almost all comments and contributions on the topic, the lack of clarity may be considered as the most serious problem for interpreting and applying section 3. Opinions range from regarding

<sup>17</sup> See, for each of these points, Z. SZENTE, *The Doctrine of the Holy Crown in the Hungarian Historical Constitution*, in *Journal on European History of Law*, 2013, pp. 109-115, and Z. SZENTE, A 2011. évi Alaptörvény és a történeti alkotmány összekapcsolásának mítosza (The myth of connecting the Fundamental Law of 2011 to the historical constitution), in *Közjogi Szemle*, 2019, no. 1, p. 8.

<sup>18</sup> For some recent examples, see Szent Korona-tan, az íratlan alkotmány (*The Doctrine of the Holy Crown: The Unwritten Constitution*), in *Hirado.hu*, 6 January 2018, available at [hirado.hu](http://hirado.hu); A. SZOMOR, Egy évezred történelmi kataklizmái sem tudták megsemmisíteni (Even the historical cataclysms of a millennium could not destroy it), in *origo.hu*, 20 August 2018, [www.origo.hu](http://www.origo.hu).

it as a purely ornamental or ideological element<sup>19</sup> to offering criteria for identifying historical achievements.<sup>20</sup> Even the wording of judicial opinions diverges, referring to the provision as “a framework”, “a principle”, or “a norm”. As we are going to see presently, the Constitutional Court has chosen not to ignore the duty of interpretation thus established, but to avoid using it in a polemical manner.

### III. CONSTITUTIONAL IDENTITY

While the reference to the historical constitution may be regarded as a specifically Hungarian phenomenon, constitutional identity has played a role in European constitutional debates for quite a while. That debate inscribed itself into the discourse on the question of sovereignty within the European Union. While the very existence of the Union is linked to the primacy of EU law and its direct effect, it is also characterised by the constitutional pluralism resulting from the Member States keeping their sovereignty. Conflicts arising between the two kinds of legal orders, European and domestic law, have provoked responses from constitutional courts of Member States already before the Maastricht Treaty.<sup>21</sup> Part of the concerns addressed in these decisions were related to the level of human rights protection, while others focused on safeguarding national sovereignty.

Drafters of the Maastricht Treaty tried to tackle the latter kind of reservation through Art. 4, para. 2, providing that “[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State”.

In subsequent constitutional debates, “national identity” has been interpreted as “constitutional identity”.<sup>22</sup> Arguably, however, rhetoric focused on the defence of constitutional identity is essentially about the protection of Member State sovereignty against centralisation in the EU.<sup>23</sup> Yet that protection may be served differently, with the image used by several scholars, with a shield or a sword.<sup>24</sup> Constitutional identity as “shield”

<sup>19</sup> See Z. SZENTE, *The Doctrine of the Holy Crown*, cit.

<sup>20</sup> See Á. RIXER, *A vívmány-teszt (The Achievement Test)*, Budapest: Dialóg Campus, 2018.

<sup>21</sup> Cf. *Solange I* (German Federal Constitutional Court, judgment of 29 May 1974, BvL 52/71) to *Lisbon* (German Federal Constitutional Court, judgment of 30 June 2009, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09).

<sup>22</sup> That move is criticised as unfounded by E. CLOOTS, *National Identity, Constitutional Identity, and Sovereignty in the EU*, in *Netherlands Journal of Legal Philosophy*, 2016, p. 84.

<sup>23</sup> *Ibidem*, p. 83 et seq.

<sup>24</sup> See, e.g., T. KONSTADINIDES, *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement*, in *Cambridge Yearbook of European Legal Studies*, 2011, p. 195 et seq.

has been interpreted as a way of guiding European integration into a desired direction from the perspective of a Member State. An early example for this is the German Constitutional Court's *Solange I* decision which forced the EU to provide for the protection of human rights.<sup>25</sup> This approach is not *per se* hostile to integration, yet the Member State concerned demands something in return. Using the concept as a "sword", however, actually poses a challenge to the primacy of EU law.

#### IV. CHRISTIAN CULTURE

Unlike the concepts discussed above, the "Christian culture of Hungary" refers to two things that are not legal in nature, and not even indirectly created by the state: culture and Christianity. On the one hand, both the law and the state are parts of culture as a whole. On the other hand, what makes a nation's culture Christian is its special relationship to that particular religion, the latter being another part of culture.

The new passage of Art. R is not alone in referencing religion within the FL. Starting with the motto "God bless the Hungarians", taken from the national anthem, the preamble (itself entitled "National Avowal", or, more literally, "National Profession of Faith"<sup>26</sup>) declares that "[w]e are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago", and "[w]e recognise the role of Christianity in preserving nationhood. We value the various religious traditions of our country". Later on, it also mentions the so-called "Holy Crown", albeit as an object that "embodies the constitutional continuity of Hungary's statehood and the unity of the nation". In the closing sentences, the text speaks on behalf of the members of the National Assembly, who adopt the FL "being aware of [their] responsibility before God and man". Given that context, the question arises whether there is anything new brought in by the Seventh Amendment, and whether the notion of protecting the Christian culture of Hungary can be interpreted from the perspective of historical memory.

Shortly after the enactment of the Amendment, two notes by prominent Hungarian constitutional lawyers were published. Both texts focus on the question of whether the sentence inserted as para. 4 of Art. R adds anything to the already existing references to religion in general, and Christianity in particular. While the two contributions differ in their approach, there are some common points which deserve attention here.

<sup>25</sup> P. FARAGUNA, *Constitutional Identity in the EU – A Shield or a Sword?*, in *German Law Journal*, 2017, p. 1627.

<sup>26</sup> On the historical and literary connotations of the title see F. HORKAY HÖRCHER, *The National Avowal*, in B. SCHANDA, Zs. A. VARGA, L. CSINK (eds), *The Basic Law of Hungary*, Dublin: Clarus Press, 2012, p. 25 *et seq.*

Taking a more critical stance, Gábor Halmi points out the twofold message of the Amendment.<sup>27</sup> At a European level, he argues, the text speaks to Christian Democratic parties (which is also the term accompanying or sometimes replacing “illiberal democracy” in the self-styling of the current Hungarian regime<sup>28</sup>), and together with the widely used reference to Robert Schuman’s *dictum*, it is a sign of allegiance (and, one should add, also a warning that the Europeananness of more liberal currents can be questioned). In terms of domestic constitutional law, Halmi states, the amendment expresses a clear preference for Christianity, as opposed to both non-Christian religions and non-religious world views. He sees two possible consequences: “it can be used as a basis of reference [for the Constitutional Court] to annul any legal norm allegedly violating Christian culture”, and that “the representatives of the Christian religion can feel themselves entitled to be intolerant towards the representatives of other religions”. Yet these are mere possibilities, particularly because (as Halmi himself emphasises) believers, and especially church-goers, are a minority in Hungarian society, even among those voting for the incumbent parties. Moreover, the overall message is inconsistent, as government communication often alludes to pre-Christian symbols traditionally linked to the Hungarian national past. Thus, “Christianity and religion serve as reference points that [Prime Minister Viktor] Orbán’s right wing populism uses opportunistically”, following “the authoritarian traditions of the Horthy-regime between the two World Wars”, with its (implicit) idea of a national religion. In sum, Halmi concludes, the amendment “strengthens the role of religion to constitutionally legitimize the concept of ethnic nation”. Halmi does not offer much to support that latter claim, however. What can justify such an interpretation is perhaps the opposition of Christian culture and non-European immigrants, often labelled *en bloc* as “Muslims”. That opposition is not part of the constitutional text but clearly present in government communications,<sup>29</sup> together with allusions to the historical role of Hungary as the “defender of Christianity” against the Turkish invaders of the 15th–17th centuries.<sup>30</sup>

<sup>27</sup> G. HALMI, *Fidesz and Faith: Ethno-Nationalism in Hungary*, in *VerfassungsBlog*, 29 June 2018, verfassungsblog.de.

<sup>28</sup> See, e.g., Z. Kovács, PM Orbán at Tusványos: “The essence of illiberal democracy is the protection of Christian liberty”, in *About Hungary*, 27 July 2019, abouthungary.hu.

<sup>29</sup> A recent example is PM Orbán’s speech at the Atreju 2019 event held by the Brothers of Italy party (FdI), on 21 September, available at abouthungary.hu, with the claim that “migrants will become citizens with voting rights; and they are Muslim people who will never support policies which are based on Christian foundations”.

<sup>30</sup> See, e.g., PM Orbán’s 2015 interview in the Swiss weekly *Die Weltwoche*: R. KÖPPEL, W. KOYDL, *Ein Wort von Merkel – und die Flut ist gestoppt* (*A word from Merkel – and the flood stops*), in *Die Weltwoche*, 13 November 2015. An English translation is available at abouthungary.hu.

Balázs Schanda adopts a different perspective in his note,<sup>31</sup> and focusses on the semantic content of the conception of "Christian culture". Pointing out that the state has no access to the essence of Christianity, that is, a religious doctrine, he argues that the FL can only regard the Christian culture of Hungary as a fact, not as something to be achieved. That is supported by the wording of the constitutional passage, speaking of protection. As for the question of whether Hungarian culture can be described as "Christian",<sup>32</sup> he refers to the historical connection between the birth of Hungarian culture and the adoption of Christianity,<sup>33</sup> stating however that "in terms of our days it cannot be suggested that the role of Christianity would be exclusive". What follows from that is, according to Schanda, that the constitution-maker only wishes to protect the cultural identity of Hungary, which, as part of Europe, is rooted in Christian traditions.

That latter position seems to be supported by the reasoning of the modification proposal to the amendment, which actually introduced the reference to "Christian culture".<sup>34</sup> Quite enigmatically, however, the reasoning only states that "[i]n Europe, there are currently processes going on that may lead to a transformation of the traditional cultural landscape of Europe. Without Christian culture there is no Europe and no Hungary. Christian culture is a universal value, the preservation of which is of special importance, and for that reason, the protective role of the state needs to appear among the provisions of the Fundamental Law". While it is unclear whether the protective duties thus established are aimed against non-Christian immigrants or European legislation changing cultural traditions, the identification of "Christianity" with "the traditional cultural landscape of Europe" is apparent.

## V. HISTORY AND INTERPRETATION

Among the three concepts examined, it is the achievements of the historical constitution which have been most reflected in the reasoning of the Constitutional Court, given its earlier appearance in the text of the FL. In this section, we give a brief overview of relevant case-law, focusing on the historical and memory-related aspects of the Constitutional Court's interpretation.

<sup>31</sup> B. SCHANDA, *Magyarország kereszteny kultúrájáról* (On the Christian Culture of Hungary), in Pázmány Law Working Papers, no. 8, 2018, plwp.eu.

<sup>32</sup> For a positive answer, based on the inseparability of evaluative and descriptive aspects, and quoting PM József Antall (1990–1993) claiming that in Central Europe "even atheists are religious", see M. PAKSY-BETKE, *Construction normative de l'identité nationale et fait religieux – vue de Hongrie*, in *Lettre Droits de l'homme en Europe centrale et orientale*, 2013, p. 14.

<sup>33</sup> Quoting Antal Szerb, an author and historian of ideas, who stated that any attempt to reconstruct a pre-Christian Hungarian culture is "perverse and ridiculous". cf. A. SZERB, *Magyar irodalomtörténet* (A History of Hungarian Literature), Budapest: Magvető, 1992 (original ed. 1934), p. 29.

<sup>34</sup> Modification proposal to the amendment of 14 June 2018, T/332/11, available at [www.parlament.hu](http://www.parlament.hu).

## V.1. ACHIEVEMENTS OF THE HISTORICAL CONSTITUTION

While the Constitutional Court has, since its earliest decisions, referred to relevant facts of legal history,<sup>35</sup> the amendment has raised the question of how the provisions of the FL can be “interpreted in accordance with [...] our historic[al] constitution”. As mentioned above (in section I), the text refers to “achievements” rather than to the historical constitution as a whole. This definitely allows for some degree of selection, while the identification of the historical constitution remains a preliminary question, setting limits for that selection.<sup>36</sup>

As the FL does not specify the meaning of the term “historical constitution”, the Court has started to develop its own doctrine soon after the FL entered into force. In a reasoning touching upon the issue of judicial independence, it stated that: “It is a minimum requirement of the consolidated interpretation of the Hungarian historical constitution to accept that the Acts of Parliament constituting the civic transformation completed in the 19th century form part of the historical constitution. These had been the Acts that had created – upon significant precedents – a solid fundament of legal institutions that served as a basis for building a modern state under the rule of law”.<sup>37</sup>

In addition to describing the core of the historical achievements that may serve as the basis of constitutional interpretation, the Court also emphasised that “[i]t is a duty of the Constitutional Court to determine on the basis of the Fundamental Law which elements of the historical constitution should be regarded as achievements”.<sup>38</sup> In subsequent decisions, that happened through the labelling of certain principles and institutions as achievements of the historical constitution, mostly with reference to historical parallels, but seldom on the basis of comparative analysis. Among the historical achievements thus identified are, in addition to judicial independence,<sup>39</sup> the right to legal remedy,<sup>40</sup> judicial review of administrative acts,<sup>41</sup> freedom of the press,<sup>42</sup> disciplinary liability of judges,<sup>43</sup> religious freedom,<sup>44</sup> and local self-government.<sup>45</sup> References to

<sup>35</sup> See I. VÖRÖS, *A történeti alkotmány az Alkotmánybíróság gyakorlatában*, cit., p. 44, with references.

<sup>36</sup> *Ibidem*, p. 45 *et seq.*

<sup>37</sup> Hungarian Constitutional Court, judgment of 7 July 2012, 33/2012 AB, para. 75.

<sup>38</sup> *Ibidem*.

<sup>39</sup> See further Hungarian Constitutional Court, judgment of 4 October 2012, 25/2013 AB, decision of 11 February 2014, 3015/2014 AB, as well as judgment of 8 February 2016, 2/2016 AB, on the separation of the judicial and administrative branches.

<sup>40</sup> Cf. Hungarian Constitutional Court, judgment of 21 July 2015, 26/2015 AB.

<sup>41</sup> Hungarian Constitutional Court, judgment of 5 June 2015, 17/2015 AB, with reference to Act 26 of 1896 and the pre-FL judgment of 1 July 1997, 39/1997 AB. Cf. I. VÖRÖS, *A történeti alkotmány az Alkotmánybíróság gyakorlatában*, cit., p. 45.

<sup>42</sup> Hungarian Constitutional Court, judgment of 29 September 2014, 28/2014 AB.

<sup>43</sup> Hungarian Constitutional Court, judgment of 15 July 2014, 21/2014 AB.

<sup>44</sup> Hungarian Constitutional Court, judgment of 1 March 2013, 6/2013 AB.

<sup>45</sup> Hungarian Constitutional Court, judgment of 2 October 2015, 29/2015 AB.

historical achievements are, however, more frequent than that: they are sometimes just established by way of mentioning Art. R, section 3, among the constitutional bases of the decisions, and sometimes even negatively, that is, by stating that something is *not* part of the historical constitution.<sup>46</sup>

## v.2. CONSTITUTIONAL IDENTITY

In the first decision to use and interpret the concept of constitutional identity,<sup>47</sup> the Constitutional Court of Hungary practically identified the meaning of the term with that of the “achievements of the historical constitution”. After stating that the content of constitutional identity will be developed on a case-by-case basis,<sup>48</sup> the Court explained that:

“The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today – can be highlighted as examples: freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us. These are, among others, the achievements of our historical constitution; the Fundamental Law and thus the whole Hungarian legal system are based upon them”.<sup>49</sup>

The decision, of course, was not about the historical roots of constitutional identity but focused on the question of sovereignty. The Court ruled that the primacy of EU law notwithstanding, there may be exceptional cases in which it may, “as a resort of *ultima ratio*, [...] examine whether exercising competences on the basis of Article E(2) of the Fundamental Law results in the violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the State) and the constitutional self-identity of Hungary”.<sup>50</sup> The power thus vindicated (“sovereignty control”) has been exerted by the Court in a more recent decision<sup>51</sup> not allowing the EU Agreement on a Unified Patent Court<sup>52</sup> to be promulgated. While that latter decision actually develops a historical argument (i.e. that the UPC

<sup>46</sup> Cf. I. VÖRÖS, *A történeti alkotmány az Alkotmánybíróság gyakorlatában*, cit., p. 46, with examples.

<sup>47</sup> Hungarian Constitutional Court, judgment of 5 December 2016, 22/2016 AB.

<sup>48</sup> *Ibidem*, para. 64.

<sup>49</sup> *Ibidem*, para. 65. A dissenting opinion to a later decision comes quite close to that interpretation by speaking of the “self-identity of Hungary based on its historical constitution”: judgment of 9 July 2018, 9/2018 AB, Stumpf, dissenting, at para. 83.

<sup>50</sup> See Á. MOHAY, N. TÓTH, *Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E(2) of the Fundamental Law*, in *American Journal of International Law*, 2017, p. 468 et seq.; K. KELEMEN, *The Hungarian Constitutional Court and the Concept of National Constitutional Identity*, in *Ianus – Diritto e Finanza*, 2017, p. 23 et seq.

<sup>51</sup> Hungarian Constitutional Court, judgment of 9 July 2018, 9/2018 AB.

<sup>52</sup> Agreement on a Unified Patent Court of 19 February 2013 (2013/C 175/01).

Court was not included in the Founding Treaties of the EU), no reference to the historical aspects of constitutional identity is made.

### V.3. CHRISTIAN CULTURE

As for the Christian culture of Hungary, to date there is no post-2018 decision using the concept in its reasoning. In earlier case-law, the relationship between law and religion is mentioned in a few cases, though not in the actual reasons. A recent decision (judgment of 23 July 2014, 27/2014 AB), adapting the reasoning of an earlier one (judgment of 12 February 1993, 4/1993 AB), nevertheless emphasises the institutional separation of the state and religious communities as well as the equality of the latter.<sup>53</sup>

Most recently, in decision of 5 March 2018, 3081/2018 AB, the petitioner referred to, *inter alia*, the passages of the National Avowal mentioning Christianity and family values (the focus being on the latter). The Court did not address the merits of the petition, which it did not admit due to formal reasons. In a dissenting opinion, however, one of the judges approached the problem from the perspective of religious freedom. He argued that “[a]lthough the recognition and protection of Sunday as a day of rest was traditionally based on religious considerations in societies with a Christian majority, today that factor plays no definitive role: it is only a minority that has a demand for religion-based holidays, whereas the holiday character of Sunday is regulated and protected by the state due to explicitly secular, rather than religious, reasons. Nevertheless, that protection – if effective – has the not inconsiderable corollary of being related to the right of religious practice”.<sup>54</sup> Thus, the argument is directed at the protection of a religious minority rather than the (majority) culture. The claim that the regulation of national holidays, although partly of religious origin, is not related to any specific religion anymore follows an early decision of the Court (judgment of 27 February 1993, 10/1993 AB).

Before the issue of the Sunday work ban, it was the new regulation of the legal status of religious communities, by Act 206 of 2011, which elicited several petitions. In dealing with these, the Court primarily focused on rule-of-law considerations, and mentioned the historical role of religious communities only in its reference to the National Avowal. What is interesting to note here is that while the constitutional text puts a special emphasis on Christianity, with only a vague reference to respecting the “religious traditions of our country”, the wording of the decision is more general: “the importance

<sup>53</sup> Cf. G. SCHWEITZER, “Becsüljük országunk különböző vallási hagyományait” (“We value the various religious traditions of our country”), in A. PATYI (ed.), *Rendhagyó kommentár egy rendhagyó preambulumról: Magyarország Alaptörvénye, Nemzeti hitvallás* (An Unusual Commentary on an Unusual Preamble: The Fundamental Law of Hungary, National Avowal), Budapest: Dialóg Campus, 2019. p. 119.

<sup>54</sup> Hungarian Constitutional Court, decision of 5 March, 3081/2018 AB, Schanda, dissenting, para. 30. The petition was directed against certain provisions of Act 23 of 2016 abolishing the partial ban on Sunday work in the retail sector, introduced by Act 102 of 2014.

of religion and churches for the history and social life of Hungary is also appreciated by the national avowal (preamble) of the Fundamental Law".<sup>55</sup>

## VI. CONCLUSION: PARTISAN TENDENCIES AND NEUTRALISING EFFORTS

What seems to be the common factor in the two strains of the above investigations may be described as the historicisation of constitutional concepts. That seems to happen by the constitution-maker as well as by constitutional lawyers (and, in particular, by the Constitutional Court) interpreting the text. The ways of, and reasons for, doing so may differ, however.

In the case of the constitution-maker, there seems to be a tendency to increase the volume of historical references in the constitutional text. Considering the difference between the original conception and the text enacted in 2011,<sup>56</sup> the growth of the preamble is striking. The amendments then added to these references, seeking to complete the unifying historical narrative already present in the National Avowal, e.g. by emphasising the responsibility of the political heirs of the Socialist Workers' Party.<sup>57</sup> The latter move brought the constitutional narrative closer to the present, not in terms of creating (or at least re-establishing) a national community, but by making it part of political struggles of the day.

Both chronologically and in its content, the reference to the historical constitution seems to belong to the first wave, that is, the community-centred narrative elements. Constitutional identity and Christian culture, in turn, share the two-faced character of the second wave, by assuming an existing national unity on the one hand, and situating it within the perceived political and cultural conflicts at the European level on the other. In doing so, they seem to be closer to declarative political statements than actual normative provisions.

That notwithstanding, the Constitutional Court, and the scholarly community in general, seem to have seriously considered the normative content of Art. R, sections 3 and 4, even though a critical tone has been present even in certain dissenting opinions. It is in this interpretive discourse that the concepts of constitutional identity and Christian culture become historicised explicitly as well. While that tendency seems to parallel the intensified memory politics of the post-2010 regime, it may be motivated by different considerations. When seeking to contribute to the feeling of community or to participate in political conflicts by way of introducing new constitutional provisions, the constitution-maker may not need historical(ly sounding) concepts to be clear. To a certain

<sup>55</sup> Hungarian Constitutional Court, judgment of 1 March 2013, 6/2013 AB, para. 122.

<sup>56</sup> See I. VÖRÖS, *A történeti alkotmány az Alkotmánybíróság gyakorlatában*, cit., p. 47, quoting Resolution 9/2011 OGY of the National Assembly of 9 March 2011 on the preparations of the new Constitution.

<sup>57</sup> See M. KÖNCZÖL, *Dealing with the Past in and around the Fundamental Law of Hungary*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, cit., p. 246 et seq.

degree, conceptual opacity may better serve both integrative and partisan aims. Those interpreting the constitutional text, however, may adopt a historicising approach for two reasons. First, pointing to specific historical events, achievements or documents is often the easiest way to offer a more or less well-defined reading that is also less liable to be rejected as subjective. Second, such an objectivising move distances the interpreter from current political debates. To sum up: historical references in constitutional interpretation can be used to neutralise certain tendencies of constitution-making, in terms of both clarity and objectivity.