The new Hungarian Fundamental Law in the light of the European Union’s normative values

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The study analyses the relationship between the new Hungarian constitution (officially “Fundamental Law of Hungary”) coming into force on 1 January 2012 and the normative values of the European Union with special regard to the legally binding Charter of Fundamental Rights that transforms the general values into individual rights. Prior to this it is worth to give an overview of the characteristics of the Union founding principles [Article 2 TEU] and human rights standard [Article 6 TEU] because these serve as benchmarks of the Hungarian fundamental rights catalogue, and some clauses influencing its interpretation in the new constitution.¹

I. On the normative values of the European Union

As Fossum and Menéndez stated, the European Union gradually emerged as a political community in its own right. Its comprehensive scope of regulation (treaties, regulations, directives and case-law) covers all areas of public policy and confers rights to the nationals of Member States. Besides this, the European integration process generated a supranational structure that intensifies the progressive convergence of the Member States’ institutional structures.² EU law and institutional system influencing its citizens’ day-to-day life needs distinct democratic legitimacy stemming from the

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The constitutional development of the Union is quantifiable by the establishing treaties and treaty amendments; however, as to its substance it is based on the common constitutional traditions of the Member States. As a result of the multilevel European constitutional development the constitutional traditions of the Member States converged in their respective content and interpretation, while the single states managed to preserve their own constitutional identity.

The constitution of the Union is based on the national constitutional traditions. It is important however, that its basis is the common constitutional traditions as a whole, not any single tradition of a state. These common traditions are reaffirmed by Article 2 of the Treaty on the European Union (hereinafter: TEU) as amended by the Lisbon Treaty (hereinafter: TL), which assigns the common values as legitimating source of the societies forming a union: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” Although Article 2 formulates values, these can be considered as basic principles of the Union, because they produce legal consequences; see e.g. Articles 3(1), 7 and 49 of the TEU. Thus they influence the objectives of the Union, their infringement shall be sanctioned, and their recognition is the condition of the accession to the EU. As Bogdandy stated, the values of Article 2 are to be understood as legal norms, and since they are overarching and constitutive, they are founding principles. The Court of

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5 Article 3(1) of the TEU: The Union’s aim is to promote peace, its values and the well-being of its peoples.
6 Article 7(1)-(3) of the TEU: On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. … The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations. … [T]he Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.
7 Article 49 of the TEU: Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. …
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Justice of the European Union (hereinafter: CJEU) for the first time referred to these values – enshrined at that time in Article 6(1) of the TEU pre-Lisbon – in its famous Kadi-decision (2008), as principles that cannot be derogated by any acts of the Union even by those based on international law. Besselink pointed out, that this judgment was the full recognition of the values shared by the Union and the Member States.

Besides affirming the shared values, the TEU also declares that the Union shall respect the national identities of its Member States, defined by the TL as inherent part of their political and constitutional structures. The definition emphasises the constitutional, political and state aspects, thus in this context the national identity can be understood (much more) as constitutional (than as a cultural) identity. One of the legally relevant questions in this respect is who will decide on the content of the constitutional identity of a Member State and on the acts or measures of Union affecting or infringing that constitutional identity. It can be supposed that a relationship of cooperation between the national (constitutional) courts and the CJEU is necessary in case of such conflicts, the first to determine the constitutional identity case by case, and the latter to decide on the meaning of the relevant EU law in dispute.

An EU Member State is henceforth to a great extent free to decide on its own constitutional structure, which is the basis of its constitutional identity. One of the most important differences between the Union and the federal state is that the national constitution making power is not bound by any extern obligations, thus – in principle – it is legally unlimited. It is clear however, that the functions of the constitution (integration of society, division of public power, ensuring human rights etc.) shall be taken into account during the constitution making, and practically the international

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9 C-402/05. P. and C-415/05. P. Yassin Abdullah Kadi and Al Barakaat International Foundation v the Council and the Commission, Judgment of the Court of 3 September 2008 [ECR 2008, I-6351] para 303: ‘Th[e EC Treaty] provisions [on the direct effect and priority of international law, in particular the obligations Member States have accepted for the purpose of maintaining international peace and security] cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Art. 6(1) EU as a foundation of the Union.’


11 Article 4(2) of the TEU: The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect 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. According to Besselink, the plural in the first sentence of Article 4(2) may refer to that the national identity does not mean merely state identity, instead, the TEU acknowledges the potential multinational character of Member States, where the – national, ethnic, cultural etc – diversity is part of the constitutional structure. See Besselink op. cit. pp. 43-44.

12 Besselink op. cit. p. 45. See to this e.g. the Omega-judgment of CJEU (C-36/02. Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundestadt Bonn, Judgment of the Court of 14 October 2004 [ECR 2004, I-9609]) and the Lisbon-judgment of the German Federal Constitutional Court (BVerfG, Urteil des Zweiten Senats vom 30. Juni 2009 [2 BvE 2/08]).
obligations – unless the state intends to abrogate them – limit this freedom.\footnote{13} In other words, some manifestations of this ‘constituent freedom’ may lead to break with the community of states, and result in withdrawal or exclusion. If a state wishes to remain the member of the Union, it cannot afford to eliminate the membership criteria, and must not reverse its basic relation to the union law. The first case arises if a Member State tries to abolish democracy, or gives up the essential elements of the rule of law. Different forms of democracy or the rule of law, however, are still possible. The second case occurs if a state declares in its constitution that the national law takes priority over EU law. In any other cases – that is, if the government is committed to membership in the EU – the freedom of constitution making is not complete, since the implementation of EU law is the duty of domestic public administrations and national courts in the first place. Therefore, the system and functioning of national courts and public administration is not indifferent to the EU. EU membership sets certain requirements for state organisation and the national legal system, in particular to ensure the uniform and effective application of EU law. If the relevant rules of organisation, responsibility and procedure are laid down by the national constitution, then to that extent it also shall correspond to the EU requirements.\footnote{14}

II. On the protection of fundamental rights in the EU

Article 2 of the TEU is – beyond the objectives of the integration process defined in Article 3, the democratic principles enumerated in Title II, and the accession criteria in Article 49 – closely related to the fundamental rights standard of the Union as outlined in Article 6 of the TEU. The three pillars of this standard are the Charter of Fundamental Rights (hereinafter: Charter), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the recognition of fundamental rights as the general principle of Union law.\footnote{15} The fundamental rights standard is binding on the institutions of the Union and – within the scope of the EU law – on the Member States as well.

\footnote{13} Constitution-making power is original as it is not bound by the former constitution and determines the procedural frameworks itself. However, it does not mean, that this power would be unlimited. Constitution-making takes place in a particular political community and in a particular situation. If it aims to create a democratic constitution, this objective limits the scope, content and procedure of the constitution-making. International obligations of the state and respected international and European standards occur as external legal limits during constitution-making. (In case of a new state the external boundary is the claim for recognition by the international community.) See Petrétei, J.: Az alkotmányos demokrácia alapintézményei, Dialóg Campus, Budapest-Pécs, 2009, pp. 75-78.


Entering into force of the TL on the one hand met with the old demand that the Union – similar to its Member States – shall possess its own, legally binding catalogue of fundamental rights. On the other hand, the Union was authorised to accede – also similar to the Member States – to the ECHR. Article 6(3) of the TEU is not unprecedented in primary legislation; it intends to require as basic principle that human rights are part of the union legal order. It prescribes furthermore two features that may serve as measures to decide on the scope and content of human rights in single cases; these are the common constitutional traditions of the Member States and the ECHR. In sum, it can be concluded that Article 6 expresses the ‘anthropocentric dimension’ of the Union, limits the powers of Union substantively, and strengthens the rule of law principle so it would prevail in the Union.

In Pernice’s opinion, the Charter in particular explains and specifies what the common values referred to in Article 2 of the TEU as the foundation of the Union may really mean. The Charter rights may be invoked both in political processes (i.e. against adopted legislation) and as individual actions for judicial review. The respect of the Charter as legally binding instrument creates a direct legal relationship between the citizens and those who exercise the power for and on behalf of them. Thus the Charter makes it clear that the Union is different from any other international organisation, since it is the Union of citizens, and the Charter ‘indicates that the citizens are taking ownership of it’. The Charter fully respects the implementation of subsidiarity, as it contains many references to national law and practice, and as primarily the EU institutions are bound by it – the Member States only when implementing Union law. However it worth to mention that the Charter has incorporated the CJEU case law based on the constitutional traditions of the Member States, thus there are no significant differences compared to the national fundamental rights catalogues. The Charter contains a “horizontal” clause on non-reversal, which involves the recognition of other legal mechanisms, in particular national constitutions and the international texts on the protection of human rights and fundamental freedoms, from the time that they are ratified by the Member States. On the basis of this recognition, the principle used is that of the most favourable provision: the level of protection guaranteed by the Charter may not be lower than the level offered by the provisions of the texts cited, within their respective fields of application.

17 Pernice stated: ‘The new reference in Article 6, para. 1 TEU-L underlines that the Treaty establishes a direct relationship between the citizens and those who are exercising power on their behalf and upon them. I am not aware of any other treaty or international instrument with this specific feature. It does constitute, I submit, the basis of what we call in French terms the contrat social.’ Pernice: op. cit. pp. 253, 236.
19 Article 53 of the Charter.
The accession of the Union to the ECHR may trigger the harmonisation of the European human rights protection. Approximation of the case law of the two courts (CJEU and ECtHR) goes back several decades. Case-law of the CJEU and the ECtHR have played a significant role in displaying interaction between the ECHR and human rights protection of the Union, both during the initial steps and at present. Alongside the parallels between the judgments of the two courts, tensions may also arise between them, as it is of importance which court can exert a greater influence on the case-law of the other.\textsuperscript{21} With regard to the two types of case-law, the CJEU was the first to take steps in the direction of having regard to the ECtHR with the latter's longer past and considering it more and more as source of the “general principles of Community law”, contained in the TEU.\textsuperscript{22}

Several judgments of the ECJ – cf. Roquette Frères case,\textsuperscript{23} Booker Aquacultur case\textsuperscript{24} – show that the CJEU emphatically did not deviate from the interpretation given by the ECtHR because of the “special significance” attributed to it.\textsuperscript{25} The steps taken by the ECJ have been answered by the ECtHR too, since in several cases one may observe the approximation of the ECtHR to the case-law of the ECJ and the approximation of the ECHR to the Charter. One may cite as an example the Goodwin case\textsuperscript{26}, in which the ECtHR ensured a greater degree of protection to the marriage of transsexuals than contained in Article 12 of the ECHR with express reference to Article 9 of the Charter.\textsuperscript{27} Mention should also be made of the Pellegrin case,\textsuperscript{28} in which the ECtHR interpreted the right to a fair process citing the case-law of the Court of Justice.\textsuperscript{29} Finally, in the Bosphorus case\textsuperscript{30} the ECtHR affirmed the scrutiny of restrictions relating to human rights protection to the Charter.
Union law from the point of view of human rights; at the same time, it also admitted that it applied the ECHR as a standard with respect to Union law only insofar as there were deficiencies in the Union’s own provisions or practice relating to human rights protection. In this case the ECtHR reviewed the development of fundamental rights protection by the Community (now Union), its substantive legal guarantees and the applicability of the Community (Union) control mechanism from the aspect of the protection of individual rights. In consideration of all of the above, the ECtHR found, that “the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, »equivalent« […] to that of the Convention system.”

The ECtHR has developed the approach of interpreting the ECHR as constitutional document, which has become thus the part of the European public policy (ordre public). It is supported by the peremptory effect of the Convention from the viewpoint of international law, pursuant to which the Contracting Parties should not refer to other international obligations in order to derogate any provision of the ECHR. Due to the interpretation of the ECHR as part of the European ordre public, the State Parties are bound by it inherently and directly, and the international organisations’ functioning under the scope of the ECHR are bound by it indirectly. The constitutional character of the Convention is also strengthened by the wide understanding of state responsibility that occurred in the case law of the ECtHR aiming to guarantee effective judicial review.

The Strasbourg Court does not even hesitate to implicitly review the constitutional provisions of the Member States correlating to the Convention.

The Charter of Fundamental Rights offers satisfactory solution to the problem of the relationship between the Charter and the ECHR. The Charter takes the Convention as setting out the minimum level of protection, while making it clear that the Charter itself may provide for a more extensive level of protection. It is furthermore intended

31 Bosphorus ibid. Point 165.
34 See e.g. Kiss v Hungary, Judgment of 20 May 2010 (Application No 38832/06). Article 70(5) of the former Hungarian Constitution provided inter alia that persons placed under total or partial guardianship do not have a right to vote. Detailed regulation on disenfranchisement can be found in the Hungarian Civil Code and in Act C of 1997 on Election Procedure. The ECtHR concluded that “an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote.” Thus there has accordingly been a violation of Article 3 of Protocol No. 1 to the ECHR. By this ruling, the ECtHR implicitly “overruled” constitutional norms as well. See to this Gurbai, S., A gondnokság alá helyezett személyek választójogának vizsgálata az Emberi Jogok Európai Bíróságának a Kiss v. Magyarország ügyben meghozott ítélete alapján, Közjogi Szemle, 2010/4, pp. 33-41.
to promote harmony between the two instruments and to avoid competition between them. The Charter expressly states that the meaning and scope of the Charter rights corresponding to the rights guaranteed by the Convention should be interpreted consistently with Convention rights.\(^{35}\) Principle of legal certainty also requires the consistent interpretation of the fundamental rights. The uncertainty regarding the content of rights is incompatible with their substance.\(^{36}\)

The evolution of fundamental rights standard in the Union, and its post-Lisbon content is a substantial progress in the fulfilment and specification of democratic and rule of law principles and other values of Article 2 of the TEU. In the absence of a distinct human rights charter and participation in ECHR mechanism, criticism had been expressed that whilst the EU strongly insisted on the human rights protection in its external relations, there were no equally strong internal guaranties for that.\(^{37}\) The achievements of the TL in the field of human rights protection are as follows. (i) the legally binding Charter and the accession to the ECHR enhance the legitimacy of Articles 7 and 49 of the TEU. (ii) The case-law of the CJEU and the ECtHR may become integrated, which serves effective judicial protection. (iii) The Charter binds the Member States as well „when implementing Union law“, however, the CJEU understands this in a wider sense: Member States have to respect the fundamental rights „acting within the scope of“ Union law.\(^{38}\) Thus on the basis of the preliminary ruling of the CJEU, national courts of law may apply the Charter directly.\(^{39}\)

### III. Compatibility of the new Hungarian constitution with International and Union law

After this short introduction, the study focuses on the question, to what extent the new Fundamental Law of Hungary\(^{40}\) (hereinafter: FL) is compatible with the trends of international and especially European constitutional development, with special regard to the founding values and fundamental rights standard of the Union.

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\(^{38}\) Mathisen op. cit. p. 20.

\(^{39}\) C-188/10 and C-189/10. Aziz Melki (C-188/10) and Sélim Abdeli (C-189/10) joint cases, Judgment of the Court of 22 June 2010.

\(^{40}\) For the official English translation of the Fundamental Law, see: http://www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf.
Taking into consideration the global tendencies of constitutionalism as well, it is worth to mention that the national constitutional development of democratic states converge since the 1950’s in three features: (i) supremacy of the legislation is refused and judicial (constitutional) review is emerging,41 (ii) states are committed to the protection of fundamental rights and basic freedoms prescribing explicit – sometimes implicit – limitation clauses with respect to the principle of proportionality, (iii) states are committed to the respect of guarantees of the rule of law.42

The ensuing analysis is twofold: on the one hand it compares the provisions of the FL with the regulations of the former Constitution (Act XX of 1949 on the Constitution of the Republic of Hungary as revised in 1989-90, in force until 31 December 2011; hereinafter former Constitution) and tries to evaluate the changes. On the other hand, it also considers the relevant rules of FL in the light of the Charter of Fundamental Rights and other Union values. The Charter is of particular interest, as during the Hungarian constitution making in 2011 it occurred – and the Hungarian Government inquired from the Venice Commission43 – whether to what extent it is necessary to incorporate the Charter rights into the national constitution. The Venice Commission emphasised ‘that up-dating the scope of human rights protection and seeking to adequately reflect, in the new Constitution, the most recent developments in the field of human rights protection, as articulated in the EU Charter, is a legitimate aim and a signal of loyalty towards European values’. However, the Commission also underlined, that the incorporation of the Charter as a whole or of some parts of it could lead to legal complications. Thus, it should be taken into account that the interpretation of the EU Charter by the CJEU might deviate from the one provided by the Constitutional Court of Hungary; the interpretation of the substantive provisions of the EU Charter is dependent on the ECHR and the case-law of the ECtHR; in the case law of the ordinary domestic courts it might lead to problems that they should distinguish between the application of the Charter within and outside the scope of Union law. All these may be the case thereby giving up the constitutional autonomy of the Member State. The Venice Commission recommended ‘that it would be more advisable for the Hungarian to consider the EU Charter as a starting point or a point


43 The Venice Commission was addressed three legal questions by the Deputy Prime-Minister and Minister of Public Administration and Justice of Hungary. One of the questions was the following: To what extent may the incorporation in the new Constitution of provisions of the Charter of Fundamental Rights enhance the protection of fundamental rights in Hungary and thereby also contribute to strengthening the common European protection of these rights?
of reference and source of inspiration in drafting the human rights and fundamental freedoms chapter of the new Constitution.\textsuperscript{44}

The seriousness of the question by the Hungarian Government is undermined however by the fact that the draft of the new constitution was not sent to the Venice Commission on time, thus the Opinion of 28 March 2011 contained general comments and not evaluated any particular provisions of the draft constitutional text. Meanwhile the governing party alliance published (on 07 March 2011) and submitted to the Parliament (on 15 March) a draft, which originally did not follow precisely the spirit and the content of the Charter. After a short – approx. one month – parliamentary debate, the adopted Fundamental Law contains more or less the same rights in its relevant Chapter (“Freedom and Responsibility”), and some sentences of the Charter were finally incorporated, but – compared to the Charter – the content of the rights enumerated by the Fundamental Law is poorer and the text raises the possibility of wider limitation of rights. The Venice Commission in its second opinion, which was given upon the request of the Parliamentary Assembly of the Council of Europe and was published on 20 June 2011, examining the final text revealed several controversies that should be eliminated by utilising the common European values during the interpretation.\textsuperscript{45} In the following the study summarises ten theses on the compatibility of the new Hungarian Fundamental Law with the European values.

IV. The Fundamental Law contains general and special (European) authorising articles, thus the international and union requirements of human rights protection are applicable

The FL expresses the commitment to the international community and law [Article Q] and contains also a Europe-clause supporting the cooperation in the EU [Article E]. The function and the purpose of these articles are similar to the corresponding rules of the former Constitution; the new wording is not really updated, but at least is not diminished compared to the former [§6 (1)-(2), (4); §7 (1), §2/A].\textsuperscript{46}


\textsuperscript{46} Fundamental Law Article Q(1) In order to create and maintain peace and security, and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with every nation and country of the world. (2) Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under international law. (3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in the form of legislation.
A taxonomic change is that the relevant constitutional objectives, authorisations and 'bridge-rules' are grouped into one article, not scattered through separate sections like in the former Constitution.

Article Q(1) FL differs from the former Constitution in as much as it does not contain the renouncement of war and the prohibition of the use of force based on Article 2(4) of United Nations Charter. Instead, it positively formulates the aims of peace, security and sustainable development during the international cooperation. Thus it contains the minimised version of one of the Union objectives; however Article 3(5) of the TEU overarches more aspects of participation in international community. Unfortunately, the FL reduces the scope of cooperation to nations and countries and does not refer to other actors of the international community (e.g. international organs, institutions, NGO’s and transnational organisations). Article Q(2)-(3) of the FL regulates the relation between international and domestic law. It maintains the principle of harmony, and in respect of the ‘generally recognised rules of international law’ it upholds the monist concept with adoption theory. In case of other sources of international law (treaties and case law of international courts) it supports the dualist model with transformation. The latter model became more

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Fundamental Law Article E(1) In order to enhance the liberty, prosperity and security of European nations, Hungary shall contribute to the creation of European unity. (2) With a view to participating in the European Union as a member state, Hungary may exercise some of its competences arising from the Fundamental Law jointly with other member states through the institutions of the European Union under an international agreement, to the extent required for the exercise of the rights and the fulfilment of the obligations arising from the Founding Treaties. (3) The law of the European Union may stipulate a generally binding rule of conduct subject to the conditions set out in Paragraph (2). (4) The authorisation to recognise the binding nature of an international agreement referred to in Paragraph (2) shall require a two-thirds majority of the votes of the Members of Parliament.

Former Constitution §6 (1) The Republic of Hungary renounces war as a means of solving disputes between nations and shall refrain from the use of force and the threat thereof against the independence or territorial integrity of other states. (2) The Republic of Hungary shall endeavour to co-operate with all peoples and countries of the world. (4) The Republic of Hungary shall take an active part in establishing a European unity in order to achieve freedom, well-being and security for the peoples of Europe. §7 (1) The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law. §2/A (1) By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as ‘European Union’); these powers may be exercised independently and by way of the institutions of the European Union. (2) The ratification and promulgation of the treaty referred to in Subsection (1) shall be subject to a two-thirds majority vote of the Parliament.

48 Article 3(5) of the TEU: In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.
explicit by prescribing the duty of ‘publication in form of legislation’. Thus the frames of interpretation elaborated by the Constitutional Court on the basis of §7(1) of the former Constitution have not changed in essence, but the new provision does not really reflects the criticism laid down in jurisprudence.\(^{49}\) It still does not express the priority of international law over domestic law.

To ensure ‘harmony’, the Constitutional Court under Article 24(2) point f) of the FL continues to revise the conflict between domestic legislation and international treaties in the future, but the FL does neither regulates who may initiate this procedure, nor refers to the possibility of ex officio revision. This is defined in the new cardinal act\(^{50}\) on the Constitutional Court.\(^{51}\) It is not clear either, how ‘harmony’ shall be ensured, if a domestic legal act violates one of the ‘generally recognised rules of international law’, thus – as hitherto – it can be answered by constitutional interpretation. The annulment of the domestic legislation breaching an international treaty is optional under Article 24(3) point c) of FL, which weakens the efficiency of the constitutional requirement of harmony. It would have been more fortunate to oblige the Constitutional Court in the FL to annul those domestic legislative acts that are at the same rank as, or lower rank than the act transposing the international treaty.\(^{52}\) The domestic legislation conflicting with TEU or TFEU should have been an exception to this rule. The breach of TEU or TFEU shall be established by the CJEU, thus it is an extern limitation for the Constitutional Court’s competence.\(^{53}\)

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\(^{50}\) Cardinal act means organic law. The adoption requires two-third majority of the MPs present. See more on cardinal acts below, in thesis h).

\(^{51}\) According to the Act CLI of 2011 on the Constitutional Court the revision either takes place ex officio, or upon the initiation of one-fourth of the MPs, the Government, the president of the Supreme Court, the Supreme Prosecutor, the Commissioner for Fundamental Rights, or the judge of any court of law if in a given case s/he shall apply a domestic legislative act conflicting with an international treaty.

\(^{52}\) Cf. with the former Act XXXII of 1989 on the Constitutional Court. Under §§ 44-47 the annulment was obligatory in such cases. The new Act CLI of 2011 on the Constitutional Court is ambiguous at this point. Under §42(1) the Constitutional Court shall annul the domestic legal act conflicting with an international treaty, if the given domestic legal act may not conflict with the act promulgating the given international treaty on the basis of the FL. \(i.e.,\) if an international treaty is promulgated by an act of parliament, and the challenged domestic legal act is e.g. a government decree then the latter shall be annulled. Under §42(2) the Constitutional Court shall call the Government or the law-maker to eliminate the conflict, if a domestic legal act conflicts with an international treaty, and the act promulgating the given international treaty may not conflict with the concerned domestic legal act on the basis of the FL. That is the case when an international treaty is promulgated by a government decree, and the domestic legal act conflicting with it is an act of parliament. The new regulation does not answer the question of the same rank collisions, \(i.e.,\) if the international treaty is promulgated by the act of parliament, and the domestic legal act conflicting with it is also the act of parliament.

\(^{53}\) See Constitutional Court Decision No 61/B/2005. AB [judgment of 29th September 2008]. In respect of the exercise of jurisdiction of the Constitutional Court, this decision rejects expressly for the first time the examination of a collision with EU law: “The jurisdiction of the Constitutional Court is laid down by Article 1 of the Act on the Constitutional Court. The cited provision contains
Article E(1) as the basis of the European and Union cooperation essentially follows word by word the §6(4) of former Constitution. Thus the frame of interpretation remains unchanged; this objective expresses the commitment to each kind of European (international or supranational) cooperation. The most intensive form of this cooperation is the one in the framework of the European Union.\textsuperscript{54} Article E paragraphs (2) and (4) with some simplification adopt the rules of §2/A of the former Constitution; however, the formulation differs at one point. The difference is that the two distinct clauses of §2/A(1) ['exercise certain constitutional powers jointly with other Member States (…); these powers may be exercised independently and by way of the institutions of the European Union'] have been merged in Article E(4) ['jointly with other member states through the institutions of the European Union']. However, in legal understanding, in the course of Union legislative processes the Member States do not exercise the competences ‘jointly’, but those are exercised by the institutions.\textsuperscript{55} §2/A – which also uses inadequate terminology – defined the ‘way of institutions’ as one of the forms of joint exercising powers in the EU. In Article E of the FL, yet, the exercise of powers 'through the institutions' is referred to as joint exercise. While the Lisbon Treaty abolished the so-called pillar system, and created a single institutional system, the supranational (i.e., Community) method has not become automatically dominant. The Lisbon Treaty intended to integrate the perspectives of supranational and intergovernmental methods e.g. by respecting the constitutional identity of Member States, the effective involvement of national parliaments, the consolidation of Member States' initiative in respect of some competences.\textsuperscript{56} Equating joint exercise of powers with that of through the institutions is misleading in the text of FL. In the course of the federal development of the Union not only the institutional way of exercising powers is necessary (e.g. in case of treaty-amendment), and strictly speaking the joint exercise of powers is not the same as the exercise through the institutions.\textsuperscript{57} All these would have been surmounted, if in the text of FL the 'conferral' of certain constitutional powers appeared in accordance with Article 5 of the TEU.

Article E contains only one new rule compared to §2/A of the former Constitution, in its paragraph (3) it states that ‘[t]he law of the European Union may stipulate a


\textsuperscript{56} Besselink op. cit. pp. 38-41.

\textsuperscript{57} The Constitutional Court has also respected the relevance of the difference of exercising powers jointly and by the way of institutions. See the Decision No 143/2010. (VII. 14.) AB on the Act promulgating the Lisbon Treaty; press release is available at http://www.mkab.hu/admin/data/file/797_143_2010.pdf.
generally binding rule of conduct’. According to the case law of the Constitutional Court based on the Constitution, §2/A “defines the conditions and the framework of participating in the European Union as a Member State and the position of community law in the system of the Hungarian sources of law.”\(^{58}\) The issue is that the position of Community or Union law in the domestic legal system was still unclear on the basis of this interpretation. Latter the Constitutional Court widened the meaning of the authorising provision (§2/A) with one statement, by naming it as the ground for the constitutional law validity of Community law: “Under Article 2/A of the Constitution community law applicable in Hungarian law is just as valid as is law adopted by Hungarian legislation.”\(^{59}\) The FL tried to utilize this case law, but the efforts cannot be considered successful, because paragraph (3) does not add anything to the legal status of EU legislation. From the domestic legal viewpoint, the ground for constitutional validity of Union law became clearer than it was; however it still does not solve the problem of application primacy, \textit{i.e.} that the domestic legal act conflicting with an EU legal act is not applicable.

With respect to Articles Q and E of the FL, international agreements continue to oblige Hungary to respect, protect and uphold the rule of law, democracy and fundamental rights. The above-mentioned provisions – since they relate to the effect that the international and supranational laws governing nations have on Hungarian law – are valid in respect of the constitution (as prevailing at any time), and set requirements that broach no exceptions. The European constitutions also contain similar provisions with the same functions, reaffirming the existence of multilevel and parallel constitutionalism in the European legal area. Thus these kinds of constitutional provisions preliminary commit and restrain the national governments for and by the international and common European values.\(^{60}\)

Several provisions of the FL, however, can also be interpreted as permitting exceptions to the aforementioned European requirements – pertaining to democracy, the rule of law and the protection of fundamental rights – and as such they could come into conflict with international commitments.

\(^{58}\) Decision No 1053/E/2005. AB, ABK 2006/6, p. 498
\(^{59}\) Decision No 61/B/2005. AB, 29 September 2008
V. In the catalogue of fundamental rights some new components has appeared, and the Fundamental Law maintains the principles of democracy and rule of law, however the frames of interpretation is changing in respect of some rights

The FL under the title “Freedom and Responsibility” summarises in 28 articles the catalogue of fundamental rights (Articles II-XXIX). These articles contain partly substantive or constitutional rights (amongst which compared to the former Constitution new ones are the right to good administration, some social rights of the employees, right to self defence), partly prohibitions (new ones are the ne bis in idem, the non-refoulement, the biomedicine prohibitions), principles (new ones are the equality before the law or the social responsibility for property), and in the field of social rights constitutional objectives (the protection of elderly and persons living with disabilities, striving to provide decent housing, access to public administration, the use of technological solutions and scientific achievement). Several provisions of the FL regulate moral duties, the legal content of which has not been clarified yet (e.g. adult children’s obligation to look after their parents, obligation to work, contribution to the performance of state and community tasks). Article B of the FL also supports the most important principles of the former Constitution – these are the rule of law and the democracy – and, although not in the official name of the country, but at least regarding the form of state Hungary remains a republic, thus the republican traditions and guaranties may prevail. Article C(1) of the FL explicitly provides the principle of division of powers, which is welcomed considering the fact that until now this significant principle appeared only in the preamble of the former act on Constitutional Court (Act XXXII of 1989, in force until 1 January 2012) and of course in the Constitutional Court’s case law. It is worth to mention, however, that the division of powers should also be reflected in the rules on state organs in the FL and in constitutional practice.

61 The number of the fundamental rights, prohibitions and principles is in line with the ‘global average’, which might be the effect of the European human rights regime. Law and Versteeg composed a rights index of 56 fundamental rights. In 1946 a constitution contained 19 rights in average, this number increased to 33 till 2006. The most popular rights and principles are the freedom of religion, the freedom of expression and/or press, equality rights, the right to private property, the right to private life, the habeas corpus, the right to assembly, the right to association, women’s rights, freedom of movement, right of access to court, prohibition of torture, right to vote, right to work, positive right to education at state expense, judicial review, prohibition of ex post facto laws. See more in Law, D. S. – Versteeg, M., The Evolution and Ideology of Global Constitutionalism, Washington University in St. Louise, School of Law, Faculty Research Paper Series, Paper No 10-10-01 (2010) pp. 31., 37-38.

62 See Articles XVI, XII and O of the FL.
VI. The scope of the rights related to human dignity is narrower in the Fundamental Law than that of the EU Charter.

Although the value of human dignity is recognized in the preamble and in Article II of FL, the rights deduced from and defining the aspects of the – also in the future indivisible – right to life and human dignity might be interpreted restrictively. Just a few examples to highlight, that protection of foetal life from the moment of conception allows in principle the restriction of the right to abortion and the women’s right to self-determination. The new content of the reproductive freedom (and the right for an artificial insemination in the light of protection of foetus) is also an open question. Article IV(2) of the FL – uniquely in international comparison – allows the life sentence; however, without proper guaranties for judicial review it may risk to violate human dignity and to contradict the prohibition of torture and inhuman or degrading treatment or punishment. Article XIX(3) also gives reason for concern from the viewpoint of equal dignity, as it contains the new measure of ‘usefulness of activity to the community’, which may be taken into account in deciding on the nature and extent of social aids. It is also regrettable that Article II does not contain

63 “We hold that human existence is based on human dignity.” This sentence more or less expresses that human life and human dignity indivisible values creating a unity. Thus also in the future the monist approach based on the unity of body and soul prevails, which was elaborated by the Constitutional Court in 1990. ‘Human life and human dignity form an inseparable unity and have a greater value than anything else. The rights to human life and human dignity form an indivisible and unrestrainable fundamental right which is the source of and the condition for several additional fundamental rights. The constitutional state shall regulate fundamental rights stemming from the unity of human life and dignity with a view to the relevant international treaties and fundamental legal principles in the service of public and private interests defined by the Constitution. The rights to human life and dignity as an absolute value create a limitation upon the criminal jurisdiction of the State.’ Decision No 23/1990. (X. 31.) AB, Point V.2. Available at http://www.mkab.hu/admin/data/file/746_23_1990.pdf.
64 Article II of FL: “Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; embryonic and foetal life shall be subject to protection from the moment of conception.”
65 However, the FL does not declare the positive right to life of the foetus, just declares the protection of foetal life by the state. It does not necessarily imply an obligation for the state to penalise abortion. See also Opinion No 621/2011 of Venice Commission, Points 66-67.
67 Article IV(2) of FL: “No person shall be deprived of his or her liberty except for statutory reasons or as a result of a statutory procedure. Life imprisonment without parole shall only be imposed in relation to the commission of wilful and violent offences.” See also the concerns of Venice Commission: “By admitting the life imprisonment without parole, be it only in relation to the commission of wilful and violent offences, Article IV of the new Hungarian Constitution fails to comply with the European human rights standards if it is understood as excluding the possibility to reduce, de facto and de jure, a life sentence.” The Venice Commission also reminded of the case law of the ECHR (Kafkaris v Cyprus, Judgment of 12 February 2008, No 21906/04). Opinion No 621/2011 of Venice Commission, Points 69-70.
explicitly the complete abolition of death penalty.\textsuperscript{68} It would have been reasonable to mention, because the Republic of Hungary committed itself internationally to that prohibition.\textsuperscript{69} The prohibitions of servitude and human trafficking are new provisions compared to the former Constitution, however in Article 5 of the Charter these are completed with the prohibition of slavery and forced or compulsory labour.

VII. The scope of freedoms under the Fundamental Law is diminished compared to the Charter and the former Constitution

In connection with the value of freedom, it is worth to refer first to the preamble of the FL, according to which “individual freedom can only be complete in cooperation with others”. The Charter applies a completely different approach, and emphasises in its preamble that the Union “places the individual at the heart of its activities”. It raises the individuals’ responsibility only in connection with the enjoyment of rights.\textsuperscript{70} While the approach of the FL – taking also into consideration the numerous basic obligations-- is collectivist, the Charter focuses on the philosophy of individual freedom.\textsuperscript{71}

As to the rights related to freedom, the regulation in the FL also raises some problems. The habeas corpus provision which is part of the right to personal freedom and security was not developed during the constitution-making, thus it is formulated also in the future as the duty of authorities, not as an individual right to the judicial review of an arrest [see Article IV(3)].\textsuperscript{72} The term ‘as soon as possible’ was not specified in connection with the bringing before a judge either.\textsuperscript{73} By introducing the right to self-defence in the constitutional provisions [Article V], the boundaries of the

\textsuperscript{68} Similarly, see the Opinion No 621/2011 of Venice Commission, Point 68.
\textsuperscript{70} Charter Preamble: “Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.”
\textsuperscript{71} Also refers to this the Opinion No 621/2011 of Venice Commission, Point 57.
\textsuperscript{72} Article IV(3) of FL: “Any person suspected of and arrested for committing any offence shall either be released or brought before a court as soon as possible. The court shall be obliged to give such person a hearing and to immediately make a decision with a written justification on his or her acquittal or conviction.” Cf. with Article 5(4) of ECHR: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”
\textsuperscript{73} This is particularly problematic, because Act LXXXIX of 2011 amending Act XIX of 1998 on Criminal Procedure allows in criminal cases of special significance 120 hours (5 days) of arrestment. It conflicts with the requirement of ‘reasonable time’ and with the case law of the ECtHR. See McKay v the United Kingdom, Judgment of 3 October 2006, Point 47 (in the given case the ECtHR has held 4 days at the longest as reasonable). See also Mészáros, B.: Kiemelt jelentőségű ügyek, alkotmányos aggályok – új különéljárás a büntetőeljárási törvényben, Közjogi Szemle, 2011/3, pp. 62-63. and http://igyirnankmi.blog.hu/2011/06/15/lassitva_gyorsitani (2011.06.17.).
individual and state responsibility become uncertain. The relationship between the new right and the monopoly of the state to enforce the constitution and the legislation as outlined in Article C(3) of FL remains an open question. It can be presupposed that the former is an exception to the latter rule, however this solution is unfortunate in case of a constitutional provision. Furthermore, it is also open to debate, what the relationship between the right to self-defence and the regulation on justified defence in the Criminal Code is. The Criminal Code defines justified defence as one of the exculpatory grounds, but it – in contrast to the self-interest pursuing approach by the FL – allows also preventing the unlawful attack against other persons, thus it also reflects to the principle of solidarity.

It would have been worth to regulate the basic principles of data protection – such as fair process, specified purpose, consent of the person concerned or other legitimate legal basis – in the FL similarly to Article 8 of the Charter, as the legislation on fundamental rights concerning data protection and access to data of public interest will not require qualified majority in the future under the FL. It is a novelty that instead of an ombudsperson, an independent authority supervises the exercise of these rights [see Article VI]. This became the National Authority for Data Protection and Freedom of Information. The regulation on this authority shall be adopted by cardinal law (with two-thirds majority of the MP’s) and its president is appointed by the head of state upon the motion of the prime minister – instead of election by the parliament that would have been a better guaranty of independence.

The formulation of the individual freedom of religion (Article VII of the FL) is in line with the text of the Charter and the former Constitution. What changed, however, is that on the basis of conscience the military service cannot be renounced, only unarmed military service can be chosen as an alternative (see Article XXXI of FL), thus there is no possibility to choose civilian service outside the armed forces. Article 10(2) of the Charter explicitly recognises the conscience objection. The Venice Commission also emphasised: “The exception for conscientious objectors may raise a specific problem. While it is true that the ECHR leaves it to the member states to decide whether to establish any obligation to perform armed services, the obligation to perform unarmed service in Article XXXI has to be interpreted using a systematic approach. Unarmed services should be performed outside the army in order to avoid potential conflicts with Article 9 ECHR (the right to freedom of thought, conscience and religion). This would resemble regulations in other European states and their

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74 Article V of FL: “Every person shall have the right to repel any unlawful attack against his or her person or property, or one that poses a direct threat to the same.” Article C(3) of FL: “The State shall have the exclusive right to use coercion in order to enforce the Fundamental Law and legislation.”

75 See §29(1) of the Hungarian Criminal Code: “The person, whose act is necessary for the prevention of an unlawful attack against that person, his own goods, or those of other persons, or against the public interest, or of an unlawful attack menacing directly the above, shall not be punishable.”

76 See also the partially cardinal act CXII of 2011 on information autonomy and freedom of information, especially its Chapter V.
handling of armed and unarmed services. The Hungarian Constitutional Court already in 1994 ruled that the differences of the conscience conflicts of those who accept the unarmed service inside the army and those who refuse any military service must be respected, regarding to the integrity of the personality and freedom of conscience. Unfortunately the new law of 2011 on national defence does not apply the mentioned case law and the recommendation of Venice Commission. An additional new constitutional rule is that under the FL the state and the churches shall cooperate for community goals, while they remain separate. Under the former constitutional regulation the independent courts of law registered the churches and decided whether a religious community asking for the church status fulfilled the legal conditions. According to the new cardinal act on churches, the parliament decides on church status of applicant religious communities, except for those churches enlisted in the cardinal law. This procedure makes the separation of state and churches relative, and infringes the principle of division of powers.

Among the rights guaranteeing free communication, the freedom to express one’s opinion is formulated in the FL similarly to the former Constitution. The state also recognises and defends the freedom and diversity of the press (see Article IX). The FL does not contain the prohibition of censorship, and does not formulate such guarantees as the Charter or the ECHR for precluding any interference by public authorities. The Venice Commission expressed at this point a serious criticism that is worth to quote. “The Venice Commission finds it problematic that freedom of the press is not formulated as an individual’s right, but as an obligation of the state. This freedom appears to be dependent on the will of the state and its willingness to deal with its obligation in the spirit of freedom. This construction has consequences for the substance, direction and quality of the protection, as well as for the chances for successful judicial review in cases of infringements of constitutional rights. Article IX is even more problematic since its paragraph 3 leaves the detailed rules for this freedom and its supervision to a cardinal Act – even without outlining the purposes, contents and restrictions of such a law. Once enacted, there will be no practical way for any further (simple) majority to change the act. The Commission suggests amending Article IX (and other norms on freedoms) in a way that explicitly makes clear that the constitutional guarantees contain individual rights.”

77 Article 10(2) of the Charter: “The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.” See also the Opinion No 621/2011 of Venice Commission, Point 84.
79 See §§ 4 and 9-10 of Act CXIII of 2011.
80 See Act C of 2011 on right to conscience of churches, religious denominations and communities. See also Ádám, A., Vallás, vallásszabadság és egyház Magyarország Alaptörvényének, továbbá „A lelkiismereti- és vallásszabadság jogáról, valamint az egyházak, vallásfelekezetek és vallási közösségek jogállásáról” szóló 2011. évi C. törvény figyelembe vételével, JURA, 2011/2.
81 See the Opinion No 621/2011 of Venice Commission, Point 74.
Finally it worth to mention that in case of economic freedoms, the FL although declares the right to freely chose work or occupation, but it is connected with the obligation “to contribute to the community’s enrichment” with one’s work “to the best of his or her abilities and potential” (see Article XII). This obligation limits the negative freedom – not to choose any occupation or work – and allows a kind of collectivist approach during the interpretation of this freedom. The latter can be also influenced by the “work which creates value” as the basis of Hungarian economy in Article M.

VIII. The Charter is more detailed in the field of equality rights and non-discrimination than the Fundamental Law.

It is a new and eligible component of the FL that in its Article XV it explicitly states the equality before the law, which was not expressed in the former Constitution. Article 20 of the Charter also declares it, and can be considered as a common constitutional tradition of EU member states. The FL regulates the equality rights in order of the Charter, however without applying the latter’s up-to-date solutions. The constitution-writers did not include the principles laid down by the case law of the Constitutional Court either, namely that non-discrimination shall apply not only to fundamental rights but also to other subjective rights, and the measure for discrimination in the latter cases is the existence of rational reason under objective consideration. Article XV lacks any mention of the prohibition of discrimination on the ground of sexual orientation, the prohibition of discrimination on the ground of age has an increasing significance in the case law of the CJEU, see e.g. C-144/04. Werner Mangold v Rüdiger Helm, Judgment of 22 November 2005 [ECR 2005, I-9981], or C-499/08. Ingeniørforeningen i Danmark v Region Syddanmark, Judgment of 12 October 2010. Although Article XV(2) of the FL prohibits any discrimination on the grounds of race, colour and national origin, but taking into consideration the special situation of ethnic and national minority groups in Central and Eastern Europe an updated constitutional text should contain the legal consequences of the facts. In the context of the FL the ‘national origin’ refers the more to the majority nation, and does not really imply to minorities.
marriage and family relations, although in practice discrimination appears in these relations most frequently. While Articles 25-26 of the Charter contain positive rights of the elderly and disabled people, the FL only promises the protection by the state in form of special measures (see Article XV(5) of the FL).

Here should be mentioned that the FL eliminates the dual definition of ‘national and ethnic minorities’ and introduces – perhaps for historical reasons – the word ‘nationalities’ instead, the content of which shall be concretised by cardinal law (Article XXIX). Any commitment for protection of minority languages can be found only in the preamble of the FL, while the protection of the Hungarian language – as official language – and sign language is a clear obligation for the state (see Article H of the FL). However, the FL contains in its chapter on fundamental rights also language rights of nationalities. The former Constitution clearly asserted the Hungarian state’s obligation to ensure the fostering of the cultures of minorities, the use of their native language, etc. The FL uses the term ‘respect’ in connection with these rights of nationalities, but avoids the use of terms ‘promote’ or ‘protect’ in Article XXIX. Furthermore, only the rights to express and preserve one’s (minority) identity and to the use of names in their native languages are formulated as individual rights, i.e. rights of persons belonging to nationalities. The other rights respected by the FL – just as the promotion of their own culture, the use of their native language, the education in their native language – seem to belong to minority communities.

IX. The scope of solidarity rights are wider in the Charter than in the Fundamental Law

The solidarity rights were codified by the Fundamental Rights Convention with regard to their close connection to the value of dignity. The principle of social solidarity also appeared in the case law of the CJEU as the foundation of social welfare system. Thus the Court of Justice ruled that the “system of social welfare, whose implementation is in principle entrusted to the public authorities, is based on the principle of solidarity, as reflected by the fact that it is designed as a matter of priority to assist those who are in a state of need owing to insufficient family income, total or partial lack of independence or the risk of being marginalized, and only then, within

85 “The Venice Commission finds regrettable that Art. H, which regulates the protection of Hungarian language as the official language of the country, does not include a constitutional guarantee for the protection of the languages of national minorities. It however notes that Article XXIX guarantees the right to the use of these languages by Hungary’s “nationalities” and understands this provision as implying also an obligation for the State to protect these languages and to support their preservation and development (see also the Preamble and Article Q of the Constitution).” Opinion No 621/2011 of Venice Commission, Point 45.

86 See also Opinion No 621/2011 of Venice Commission, Point 82.

the limits imposed by the capacity of the establishments and resources available, to assist other persons who are, however, required to bear the costs thereof, to an extent commensurate with their financial means, in accordance with scales determined by reference to family income.”

This case law and the continuous evolution of the Union’s social dimension are reaffirmed by the Solidarity Title of the Charter. ‘Charterising’ this group of rights is in line with the efforts to increase the democratic legitimacy of the Union and citizens’ affection for the Union by enhancing the welfare and social rights. Solidarity in the European Union is a common value recognised also by the preamble of the Charter and Articles 2-3 of the TEU, which can be considered as an identity-forming feature and socially it may serve the supranational community-building.

Article XVII of the FL regulates more details of the solidarity rights in the world of employment than the former Constitution did, and for that purpose the Charter was taken as a basis. The FL ensures fair and just working conditions for the employees, and guarantees a ‘statutory’ right to employees, employers and their representatives “to bargain and to conclude collective agreements, and to take any joint actions or hold strikes in defence of their interests”. The official Hungarian text contains the term ‘walkout’ instead of ‘strike’ and because of the unfortunate formulation of the sentence the employers as well may be entitled to hold strikes. This controversial formulation allows the presumption that the text implicitly refers to the ‘lockout’ – the right of employer to suspend work at the enterprise locking out this way the workers initiation for a strike action –, although it is doubtful that this was the purpose of Article XVII(2). Mention must be made about certain provisions of the FL that connect horizontally to Article XVII, and shift the frames of interpretation towards a collectivist approach. These are as follows: “We hold that the strength of community and the honour of each person are based on labour, an achievement of the human mind.” (in the text of preamble); “The economy of Hungary shall be based on work which creates value and freedom of enterprise.” [Article M(1)]; “Every person shall be responsible for his or herself, and shall be obliged to contribute to the performance of state and community tasks to the best of his or her abilities and potential.” [Article O]; “Every person shall have the right to freely choose his or her work, occupation and entrepreneurial activities. Every person shall be obliged to contribute to the community’s enrichment with his or her work to the best of his

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or her abilities and potential. Hungary shall strive to create conditions ensuring that every person who is able and willing to work has the opportunity to do so.” [Article XII(1)-(2)] Article XVII(1) prescribes the obligation of employees and employers to cooperate, and the purpose of this cooperation (ensuring jobs, making the national economy sustainable and other community goals), but does not mention either the own social and economic interests, the social dialogue or the system of social and economic interest reconciliation, or the workers right to information and consultation within the undertaking (cf. the latter with Article 27 of the Charter). The FL does not contain either the protection in the event of unjustified dismissal (cf. with Article 30 of the Charter), or any guarantees to reconcile family and professional life (cf. with Article 33 of the Charter, containing the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child). Article XVII(2) of the FL although refers to the protection of parents in the workplace, but the level of this protection depends on the measures adopted by the state, thus it is not a fundamental right.

Social security does not appear as a fundamental right in the FL, but merely as something the state “shall strive” for, thus it only appears to be a state goal, which can be evaluated as a step backward in comparison with the former Constitution. In Article XIX(1) of FL among the titles to statutory subsidies (within the group of people in need) old age is not listed; it appears alone, separately from the categories of neediness, in paragraph (4). Social insurance does not appear as a constitutional institution, instead, in Article XIX(2) the expression “a system of social institutions and measures” is used as the means of achieving the defined state goal. The above [in subtitle c)] already referred paragraph (3) of Article XIX raises serious concerns as it refers to uncertain measures: “The nature and extent of social measures may be determined by law in accordance with the usefulness to the community of the beneficiary’s activity.” The questions occur, what is useful to the community and who decides on the usefulness in certain cases. In the absence of “useful activity” the social support might be withhold on this constitutional bases, even if the person concerned is needy and the cause of the situation falls outside his or her own fault. The principle of “self-responsibility” is also weakened by the regulation of the FL relating to social security, especially by the obligation of the state to maintain a general state pension system based on social solidarity. As a basis for the state pension system (as a constitutional institution) the FL specifies exclusively social solidarity, although the principle of “bought right” should also function in this system, with special regard to the right to property, and the principle of individual responsibility.

92 It is no surprise. Until 31 May 2011 the government officers and until 7 April 2011 the public servants were dismissed without reasoning, by this time annulled the Constitutional Court the challenged laws. See Constitutional Court Decisions No 8/2011. (II. 18.) AB and 29/2011. (IV. 7.) AB, in Magyar Közlöny, 2011/14, 2011/37.

93 Cf. the first sentence of Article XIII(1) of the FL: “Every person shall have the right to property and inheritance.”
X. Guarantees of justice are more developed in the Fundamental Law compared to the former Constitution, but not all of the achievements of the Charter were not included

The Charter when detailing the rights related to justice guarantees the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated, so also in case of claims on violation of fundamental rights. Compared to this, the FL does not express the requirement of effectiveness, and it is not obvious whether claims arising from infringement on fundamental rights fall into the scope of Article XXVIII(7) of the FL.

The requirements of fair trial – independent, impartial tribunal, previously established by law, public hearing, and reasonable time – shall be applied to each kind of judicial procedures under the Charter, which also recognises the right to legal aid with the aim of ensuring effective access to justice. In the FL legal aid or access to justice are not mentioned, and the application of the requirements of fair trial is reduced to post-indictment stage of criminal procedure and to civil procedure. Presumption of innocence and right to defence – similarly to the Charter – are recognised by the FL. 94

Principles of nullum crimen sine lege and nulla poena sine lege have been clarified by the FL [Article XXVIII(4)-(5)], as the former Constitution contained a rather complicated and ambiguous regulation after an amendment related to the ratification of Lisbon Treaty in 2007. 95 The new constitutional regulation included the findings of the Constitutional Court. The Court ruled in 2008 that the expression of “criminal offence under Hungarian law” also refers to international obligations, international customary law and acts of the European Union. 96 It should be noted however, that the Charter also refers to the requirement of proportionality of punishment, which does not appear in the FL.

The FL similarly as the Charter contains the principle of ne bis in idem, i.e. right not to be tried or punished twice in criminal proceedings for the same criminal offence, which was not mentioned in the former Constitution.

94 Thus it is surprising – and maybe unconstitutional – that the Act LXXXIX of 2011 amending Act XIX of 1998 on Criminal Procedure restricts the right to defence in criminal cases of special significance. It is upon the public prosecutor’s discretion whether or not the arrested person may contact with his/her defending counsel in the first 24 hours of the arrestment. See also Mészáros, op. cit. pp. 62-63.

95 §57(4) of the former Constitution: “No one shall be declared guilty and subjected to punishment for an offense that was not considered – at the time it was committed – a criminal offense under Hungarian law, or the laws of any country participating in the progressive establishment of an area of freedom, security and justice, and to the extent prescribed in the relevant Community legislation with a view to the mutual recognition of decisions, without any restrictions in terms of major fundamental rights.” See also Chronowski, N., Nullum crimen sine EU? in Rendészeti Szemle, 2008/4.

96 Constitutional Court Decision No 32/2008. (III. 12.) AB, Point V. 2.5.
XI. It is doubtful whether the Fundamental Law adequately identifies the political community

It is problematic, from the perspective of the principle of democracy, that the FL does not clearly identify the political community to which it shall be applied, because the use of the concepts of political nation and cultural nation is inconsistent and controversial in the constitutional text. Article B of FL refers to the “people” as the source of public power, and the preamble is written on behalf of citizens – both sentences are the proofs of the political nation approach. At the same time, Article D of FL uses the expression of “one single Hungarian nation” and the preamble also refers to the “intellectual and spiritual unity of our nation torn apart”. This wording seems to support the cultural nation concept. Under the constitutional law, the term of (Hungarian) people refers to the political nation in the meaning of state-nation to which also the national and ethnic minorities belong. It is recognised by the FL as well, when it states that the “nationalities living with us form part of the Hungarian political community” and they “shall be constituent parts of the State” (see the preamble and Article XXIX). Using the category of nation in cultural sense, on the one hand has a narrower, on the other hand, however, a wider meaning than the political nation. It has narrower meaning, because it comprises only those citizens who belong to the majority national-ethnic group of the country with the same culture, language, identity etc. At the same time, it has a wider meaning, as it identifies as belonging to the nation also those who live in other countries and are citizens of other states, but their language, culture and origin bind them to Hungary. Thus, because defining the “nation” is rather controversial, under the Hungarian constitutional law it is better to use the term of “people” or “citizens”. That also means that one can consider the (Hungarian) people as indispensable component of the state, as well as a community bearing the political solidarity.

The creation of democratic will is restricted by the fact that the FL stipulates that in many fields of public policy – from family and tax policy to pension policy – the detailed regulation shall be enacted in form of cardinal acts, the adoption and amendment of which requires a two-thirds majority of the votes of Members of Parliament present. Thus the voters who are dissatisfied with the present government policy will hardly be able to achieve a change in the direction of governance, because future governments cannot shape in a more flexible manner, on the basis of a simple majority, their social and taxation policy. At this point it is worth to quote the criticism of the Venice Commission: “a too wide use of cardinal laws is problematic with regard to both the Constitution and ordinary laws. In [the Commission’s] view, there are issues on which the Constitution should arguably be more specific. These include for example the judiciary. On the other hand, there are issues which should/could have been left to ordinary legislation and majoritarian politics, such as family legislation or social and taxation policy. The Venice Commission considers that parliaments should be able to act in a flexible manner in order to adapt to new framework conditions.

97 See Petrétei op. cit. pp. 185-188.
and face new challenges within society. Functionality of a democratic system is rooted in its permanent ability to change. The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-third majority have of cementing its political preferences and the country’s legal order. Elections, which, according to Article 3 of the First Protocol to the ECHR, should guarantee the ‘expression of the opinion of the people in the choice of the legislator’, would become meaningless if the legislator would not be able to change important aspects of the legislation that should have been enacted with a simple majority. When not only the fundamental principles but also very specific and ‘detailed rules’ on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk.”

The open regulation of right to vote also related to the problems of defining democracy principle. Article XXIII(2) of the FL does not comply with Articles 39-40 of the Charter or with Article 20(2) of the TFEU. This is because it does not assure the citizens of other EU member states of the same conditions as Hungarian citizens in European Parliament and local authority elections, as for the former group a Hungarian place of residence is required, while in the case of Hungarian citizens this requirement does not apply under Article XXIII(1) of the FL. This conflict shall be eliminated in the corresponding cardinal act.

XII. The constitutional state governed by the rule of law – ‘Rechtsstaat’ – is limited in the Fundamental Law by the inefficient mechanism for safeguarding the constitution

Regarding the mechanism for safeguarding the constitution, one of the weaknesses is that the FL – similarly to the former Constitution – can be amended relatively easily, only two-third majority of all MPs is needed. The constitution amending process that started in 2010 and led to the constant amendments of the former Constitution based on ad-hoc political interests, made it clear that more guarantees are necessary – e.g. unchangeable provisions, referendum on certain amendments, approval of two sequential parliaments – for a stable constitution.

The other key institution in the safeguarding of a constitution is the Constitutional Court. In the governmental system of parliamentary democracy, constitutional jurisdiction counterbalancing the unity of action of Parliament and Government constitutes the guarantee for the separation of powers and the sovereignty of the law (constitution). The greater the unity of action between the legislative organs, the wider competence is needed for constitutional jurisdiction to maintain the balance. In respect of the principle of rule of law it is very harmful that the FL upholds for an indefinite time the restriction of the supervision and annulment rights of the
Constitutional Court that was introduced in November 2010. More specifically, Article 37(4) of the Chapter on Public Finances of the FL lays down that with regard to ex post norm control and constitutional complaint procedures, the Constitutional Court is prohibited from reviewing the content of or annulling Acts on public finances, with the exception of four “protected fields of fundamental rights” as long as state debt exceeds half of the Gross Domestic Product. Thus, the right of annulment is rendered relative by Article 37(4) of the FL, because it excludes the constitutional review and annulment of Acts relating to public finances from the side of content, apart from four exceptions. This is not rectified even by the fact that Acts relating to this subject-matter may be annulled in case the requirements of the legislative process were not met (for formal reasons). Paradoxically, this way the Fundamental Law also excludes the protection by the Constitutional Court of its own provisions relating to public finances, because the violation of rules relating to public finances contained in the Fundamental Law is most likely to occur by way of Acts relating to the state budget, taxes, customs duties etc., which are subject to ex post review by the Constitutional Court only from the aspect of the four protected fields of fundamental rights.

The Act adopted on 16 November 2010 – basically corresponding to the contents of the Fundamental Law – which restricts the Constitutional Court’s right of review and annulment is not in conformity with either with the principles of European constitutional achievements or the traditions of Hungarian constitutionalism developed since 1989-90 and democratic political culture. It violates the constitutional principles of the rule of law, legal security and separation of powers. As a result of

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99 As a result of a constitutional amendment in November 2010, a serious limitation of the competences of the Constitutional Court was introduced. According to this amendment, the Constitutional Court may assess the constitutionality of Acts related to the state budget, central taxes, duties and contributions, custom duties and central conditions for local taxes exclusively in connection with the rights to life and human dignity, the protection of personal data, the freedom of thought, conscience and religion or with rights related to the Hungarian citizenship. Also, the Court may only annul these Acts in case of violation of the abovementioned rights. The restriction of the Constitutional Court’s competences was the answer of the alliance of the governing parties to a Court decision, which annulled a law on a certain tax imposed with retroactive effect.

100 “As long as state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its competence set out in Article 24(2)b-e), only review the Acts on the State Budget and its implementation, the central tax type, duties, pension and healthcare contributions, customs and the central conditions for local taxes for conformity with the Fundamental Law or annul the preceding Acts due to violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and with the rights related to Hungarian citizenship. The Constitutional Court shall have the unrestricted right to annul the related Acts for non-compliance with the Fundamental Law's procedural requirements for the drafting and publication of such legislation.”

101 Only the effectiveness and implementation of the most important provisions relating to public finances are ensured to some extent even in the absence of protection by the Constitutional Court, since Article 44 (3) of the Fundamental Law charges the Budget Council with the task of giving its prior consent to the adoption of the State Budget Act “in order to meet the requirements set out in Article 36(4)-(5)”.
the restriction of the procedure of the Constitutional Court, numerous fundamental rights (especially, for example, the right to property, social rights, the freedom of enterprise, the right to a profession) become ‘defenceless’.  

XIII Some horizontal provisions of the FL may reduce the level of protection of fundamental rights

Article R(3) of the FL provides that: “The provisions of the Fundamental Law shall be interpreted in accordance with their purpose, the National Avowal and the achievements of our historical constitution”. By this, the preamble and the achievements of the historical constitution become obligatory rules of interpretation of the whole constitutional text, including Articles Q and E. The preamble with its increased normative force – beyond the historical references to “Christian Europe” and “Europe defended in struggles” – understands and mentions the European unity only in cultural sense (“We believe that our national culture is a rich contribution to the diversity of European unity”). The semantic content of the expression “achievements of our historical constitution” is rather uncertain. There is no consensus in legal science about the precise meaning of historical constitution; accordingly, it is the Constitutional Court that may determine which elements of it are relevant. The Venice Commission also mentioned, that the concept of historical constitution “brings with it a certain vagueness into constitutional interpretation”. Numerous elements of the “achievements of our historical constitution” are clearly unsuitable to be used during interpretation. Furthermore, it is an open question whether the precedents of the Constitutional Court on the basis of the former Constitution are belonging to the “achievements of our historical constitution”. It mostly depends on the future activity of the legislator and the case law of the Constitutional Court to what extent they use precedents of the previous Constitution. Finally it is also uncertain which achievements of the historical constitution are compatible with international and EU obligations of the state.

Although the catalogue of fundamental rights contained in the FL is more modern in some parts than that of the former Constitution, the system of fundamental rights protection as a whole outlined in the FL suggests a step backward compared to the former Constitution. This is manifested in the decrease in the level of rights protection by the ombudsman (one Commissioner for Fundamental Rights with deputies, a data protection authority instead of the ombudsperson), the abolition of the abstract

103 See Opinion No 621/2011 of the Venice Commission, Points 29, 34.
104 For example, one of the April Laws of 1848, the Bill on Union with Transylvania passed on 7 April, forming part of the historical constitution.
105 See also Chronowski, N. – Drinóczi, T. – Kocsis, M., What questions of interpretation may be raised by the new Hungarian constitution? Manuscript under publication in Vienna Journal of International Constitutional Law [www.icl-journal.com], 2011.
ex post norm control\textsuperscript{106} that may be initiated by anyone without being affected by the challenged norm, and the disappearance of the rule serving as the ground for the enforcement of claims relating to fundamental rights and fundamental rights jurisdiction before the courts of law.\textsuperscript{107} All this is not compensated even by the fact that in accordance with the FL there will be a possibility for the constitutional review of laws applied in specific cases or decisions of the judiciary. This is explained by the fact that the review of decisions of the judiciary by the Constitutional Court forces only courts to act with ‘enhanced fundamental rights discipline’, while the regular powers of courts relating to fundamental rights jurisdiction force all executive organs to do so. The weakening of the system of protection raises the danger of violence of the right to effective judicial protection guaranteed by the ECHR and the Charter.\textsuperscript{108} The CJEU stated in Unibet case and confirmed in Kadi-I case: “According to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice”.\textsuperscript{109}

\textsuperscript{106} Hungary has become an interesting model for the functioning of actio popularis system within constitutional justice. This system implies that every person is entitled to take action for constitutional review against a normative act after its enactment, – without needing to prove that he or she is directly affected by it. This unique institution constituted the guarantee of the democratism of the Hungarian state governed by the rule of law, against which references, as arguments, to the workload of the Constitutional Court cannot be accepted. (In its Opinion No 614/2011, Points 57-59. the Venice Commission states that the availability of an actio popularis in matters of constitutionality cannot be regarded as a European standard and the Hungarian system based on the Constitution in force is rather exceptional in international comparison and the Commission also refers to the argument about overburdening the Court.) The actio popularis character of ex post norm control guaranteed that legislative organs did not merely have to fear annulment of their products by the Constitutional Court but they also had to have regard to the fact that “anybody” might control their activity and set in motion the constitutional review mechanism. This – even without a relating impact analysis – renders probable theoretically that the legislator acts with more self-control and constitutional discipline.

\textsuperscript{107} The former Constitution prescribed in its §70/K.: “Claims arising from infringement on fundamental rights and objections to the decisions of public authorities regarding the fulfilment of duties may be brought before a court of law.”

\textsuperscript{108} Another interesting and somehow menacing issue is that the bill upon the transitional rules of the Fundamental Law of Hungary lodged to the parliament on 20 November 2011 contains further restrictions of the right to effective remedy. If a ruling of Constitutional Court or the CJEU arises a debt obligation of the state, under certain circumstances a special contribution to satisfying the common needs – i.e. extra tax – shall be adopted (Article 28 of the bill). It can be understood as an intention to sanction – at least indirectly – the lawsuits and complaints in cases of great economic significance.

The scope of interpretation becomes reduced in general as a result of Article N(3) of the FL, according to which in the course of performing their duties, the Constitutional Court and the courts of law are also obliged to respect the principle of balanced, transparent and sustainable budget management. The question arises whether the courts shall “economically” interpret the fundamental rights? Might be the consequence of this rule of interpretation that the limit of necessity and proportionality lie somewhere else then it lied under the former Constitution and the previous case law of the Constitutional Court related to restriction of rights? In case of rights related to dignity, personal and political freedom or equality restrictions based on economic concerns are not applicable, because it contradicts with the case law of the ECtHR on benchmarks of restriction, i.e. the restrictive measure shall pursue a legitimate aim in a proportionate manner.\textsuperscript{110}

The FL is characterised by a large number of basic duties, the interpretation of which may influence also the content of certain fundamental rights. Of course it is not useless to write into the constitution some basic duties, and with regard to the consequences of globalisation, and common safety, environmental, health risks of the mankind the scope of the duties can be widened in the course of constitution making.\textsuperscript{111}

The former Constitution also declared as a basic duty to obey the Constitution and legal provisions, the lawful action against the effort to obtain power with violent means or hold possession of power exclusively, contribution to rates and taxes in accordance to income and wealth, general and free compulsory school attendance, military defence obligation, and parents and guardians have the obligation of seeing to the education of minor children.\textsuperscript{112} However, it is not accidental that there is no international convention on the basic human duties yet, as such an international obligation presumably would cause more damage than advantage to human rights.

\textsuperscript{110} See also the concerns on Article N(3) of the FL in Opinion No 621/2011 of the Venice Commission, Point 51. [Article N(3)] “seems to give the budget management priority with respect to a weighing of interests in cases of infringements of fundamental rights. The Venice Commission considers that financial reasons can bear on the interpretation and application of norms, but they are not as such sufficient to overcome constitutional barriers and guarantees. They must not in any way hamper the responsibility of the Court to scrutinize an act of state and to declare it invalid, if it violates the Constitution.” See more in Chronowski – Drinóczi – Kocsis, op. cit.

\textsuperscript{111} Ádám, A., On novel goals and tasks of the public power, Manuscript referred with the permission of the author, under publication in Banaszak, B. (ed.), Festschrift für Professor Kazimierz Działocha, Wrocław 2012.

\textsuperscript{112} As opposed to the six explicit basic duties contained in the former Constitution, the FL lays down twelve: action against arbitrary power [Article C(2)], contribution to the performance of state and community tasks [Article O], the protection, sustenance and preservation of the environment – in particular natural resources, biodiversity, cultural assets – for future generations [Article P], the obligations relating to law-abidance and interpretation [Article R(2)-(3)], respect for fundamental rights [Article I(1)], obligation to work [Article XII(1)], parents’ obligation to look after and provide schooling for their children [Article XVI(3)], adult children’s obligation toward their parents [Article XVI(4)], employers’ and employees’ obligation to cooperate with each other [Article XVII], contribution to satisfying community needs [Article XXX], obligation to defend the country [Article XXXI], obligation to appear before a parliamentary committee (regulated by a cardinal Act) [Article 7.(3)].
law, providing governments with excuses to limit the exercise of human rights. The human duties have fallen into two categories. The first category comprises “vertical” duties in the relation of the individual and the state, which might be enforced by the government. The second category comprises horizontal duties in relations of the individual with other members of the society. Vertical duties usually appear in national constitutions, however separately from constitutional rights, i.e. the exercise of the rights is independent from the fulfilment of the duties. Horizontal duties are usually not written into the constitution, as the constitution transforms these into vertical duties, as authorises the state to specify and enforce them, and thus intervene into the organic relations of the society. This effect can be avoided by prescribing the respect of others’ fundamental rights, and some prohibitions. Unfortunately, several of the basic duties in the FL are of indefinite content, they have not been adequately defined (for example, contribution to the “community’s enrichment” with work; or the method and extent of contribution to state and community tasks; connections between the contribution to satisfying community needs and contribution capabilities etc.). All this leaves wide scope for action of legislature in specifying obligations, and the directions are unpredictable yet.

Conclusion

This study evaluated some provisions of the new Hungarian Fundamental Law in the lights of the normative principles of the EU and the EU-Charter of Fundamental Rights. Even if the analysis was not all-encompassing, and applied mostly a critical approach, on the basis of the text of the FL itself, it can be stated as conclusion that the new provisions are neither at all pints in line with the normative values and fundamental rights standard of the EU, nor collide with them. One may only lay down that there are some provisions in the FL in case of which some of their potential interpretations might collide with certain Union norms in given circumstances. However, ultimately, the direction of interpretation of these problematic provisions depends on the parliament, the Constitutional Court and the courts of law. It cannot be denied that the FL is an ideological constitution with nationalist-ethnocentric

113 In 2003, the United Nations Commission on Human Rights received a draft declaration on human social responsibilities, but the Human Rights Council has not considered them. See Knox, J.H., Horizontal Human Rights Law, in The American Journal of International Law, 2008/1, pp. 1-3.

114 Thus on the bases of the text of the FL, the application of Article 7 of TEU does not arise. Article 7 demands the clear and present danger of the violence of the EU values for the initiation of the Council’s procedure and decision. It can be presumed that in practice it would mean multitudinous or at least numerous proceedings and/or omissions leading to foreseeable and certain violation of Article 2 of TEU in a given member state. As Article 7 has never been applied, it also allows the presumption that the actors would be very cautious and circumspect with initiating such procedure. And finally, the margins of appreciation can be supposed to be wide in cases falling into the scope of constitutional identity of member states.
and collectivist features that diverges from the libertarian trends of West European constitutional evolution.

The constitutional practice based on the FL may be developed nevertheless in line with the Union values; at the most some provisions of the FL will not be effective or remain empty declaration, and belonging to Europe is worth this price. It is the responsibility of the Hungarian state authorities interpreting the FL, but first of all the duty of the Constitutional Court to take into consideration the international and especially EU obligations. Only a member state that puts aside constitutional fetishism and proves the insisting on voluntary self-commitment to European law and legal values can vindicate the constitutional tolerance\textsuperscript{115} expressed among the Union values.