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Eszter Bodnár

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IN EVROPSKE ŠTUDIJE

The role of European institutions in the protection of rule of law, democracy and human rights - A case study about Hungary

Eszter Bodnár¹

ABSTRACT

What are the greatest challenges posed to the rule of law and democracy in our days? Which of the branches of government threaten them most? What has been the role of the European institutions? What would need to be done to improve the rule of law and democracy? These are some of the questions that were set us to answer in a case study about Hungary.

In my essay I focus on the role of the European institutions in the protection of rule of law, democracy and human rights. After giving a short overview of the recent constitutional changes in Hungary to help understanding the background, it presents how the constitutional amendment weakened the system of checks and balances, especially the role of the Constitutional Court. In its main part, the essay evaluates through cases the influence of three European institutions (namely the Venice Commission, the Court of Justice of the European Union and the European Court of Human Rights) on the Hungarian constitutional changes and whether their activity is able to assist, complete or even replace domestic remedy mechanisms. Finally, it makes attempts to seek possible ways for the future to improve the rule of law and democracy.

Keywords: European institutions, Hungarian constitutional system, Constitutional Court, rule of law, human rights

¹ Assistant Professor of Law, Eötvös Loránd University, Faculty of Law, Budapest.

Vloga evropskih institucij na področju varstva vladavine prava, demokracije in človekovih pravic na Madžarskem

POVZETEK

Kateri so največji izzivi vladavini prava in demokraciji v današnjem času? Katera od vej oblasti jima najbolj grozi? Kakšna je vloga evropskih institucij? Kaj bi bilo treba storiti za izboljšanje pravne države in demokracije? To so le nekatera od vprašanj, ki jih bomo preučevali na primeru Madžarske. V prispevku se bomo osredotočili na vlogo evropskih institucij pri varovanju vladavine prava, demokracije in človekovih pravic. Po začetnem kratkem pregledu nedavnih ustavnih sprememb na Madžarskem, obravnavamo kako so le-te oslabile sistem zavor in ravnovesij, predvsem pa vlogo ustavnega sodišča. Prispevek v svojem glavnem delu skozi primere ovrednoti vpliv treh evropskih institucij (Beneške komisije, Sodišča Evropske unije in Evropskega sodišča za človekove pravice) na madžarske ustavne spremembe, pri čemer analizira ali lahko njihovo delovanje pomaga, dopolnjuje ali celo zamenja domače mehanizme za odpravo kršitev. Prispevek v zadnjem delu obravnava možne predloge za izboljšanje pravne države in demokracije na Madžarskem.

Ključne besede: evropske institucije, madžarski ustavni sistem, ustavno sodišče, pravna država, človekove pravice

What are the greatest challenges posed to the rule of law and democracy in our days? Which of the branches of government threaten most the rule of law and democracy? What has been the role of the European Union with regard to the rule of law and democracy? What would need to be done to improve the rule of law and democracy? These are some of the questions that the organisers of the workshop set us to answer in a case study.

However, in case of Hungary it is not easy to deal with these questions in a short essay because in the years 2010-2013, the country went through a process in that the whole constitutional system including the constitution was changed. Furthermore, some

of these changes can be explained only by referring back to the history of the last two decades, especially to the era of democratic transition in 1989-1990, and at the same time, these developments have serious impact on the future.

Therefore, in my essay I would like to focus only on one topic, on the role of the European institutions in the protection of rule of law, democracy and human rights. First, the essay gives a short overview of the recent constitutional changes in Hungary to help understanding the background. Secondly, it presents how the constitutional amendment weakened the system of checks and balances, especially the role of the Constitutional Court. Finally, the essay evaluates through cases the influence of three European institutions and whether their activity is able to assist, complete or even replace domestic remedy mechanisms.

1. A short overview of the recent constitutional changes in Hungary

On the general election in 2010 the party alliance Fidesz-KDNP obtained the two-third majority of the mandates in the Parliament and announced its intention to prepare a new constitution.

The constitution in force that time was originally adopted in 1949 and survived the darkest years of socialism but was totally revised and amended during the democratic transition in 1989-90. The text of the new constitution was based on the agreement of the state party and the democratic opposition, but was adopted by the last one-party parliament in 1989, it was meant to be a transitory constitution that would give place to a new constitution to be adopted by the first freely elected parliament. However, it turned out that the parties in the parliament of 1990-1994 were divided and were unable to reach the appropriate consensus. Between 1994 and 1998 the governing parties had the two-third majority but were not able to effect a compromise on the text of a new constitution and later no government had the necessary majority.²

The new constitution (called Basic Law) was adopted on 18 April 2011 only by the votes of the governing parties because the opposition parties either refused to take part in the process after

² About the history of the democratic constitution of Hungary of 1989 see *M. Dezső, B. Somody, A. Vincze, E. Bodnár, N. Novoszádek, B. Vissy, Hungary, In: A. Alen, D. Haljan (eds.), IEL Constitutional Law, Alphen aan den Rijn, 2010, pp. 29-32.*

the limitation of the competences of the Constitutional Court or voted 'no'. The drafting deliberating and adopting process was criticized for the lack of transparency, for the swiftness (only one month passed between the submission and the adoption of the bill) and for the inadequate consultation with the parliamentary parties, civil society and voters.³

The Basic Law was completed by a document called Transitional Provisions of the Basic Law that was adopted separately, on the 30 December 2011, but declared itself as part of the Basic Law. It contained on one hand the regulation that was necessary to arrange the transition between Constitution and Basic Law (e.g. the remaining force of legal acts adopted under the Constitution, the remaining of the mandates of public officials), however, on the other hand it included regulations that had no transitional character and established exceptions to the rules of the main text of the Basic Law. Most of these exceptions concerned the fundamental rights and were reactions on the former decisions of the Constitutional Court that declared a regulation in a legal act unconstitutional.⁴ With the incorporation of the text of the legal regulation into the text of the Transitional Provisions (that was declared having the force of the constitution), the Parliament intended to avoid judicial review by the Constitutional Court.

The Basic Law referred the regulation of more than 50 fields to cardinal acts requiring for their adoption and amendment the two thirds of the MPs present. Cardinal acts cover not only topics as the regulation on the main institutions of the state system (e.g. Parliament, courts, Constitutional Court), but also typical policy issues like family policy, the basic rules of public finances, public service provisions, pension system and tax system.⁵

As it was pointed out in the opinion of the Venice Commission, this wide use of cardinal acts is problematic because it can block the necessary reforms and limit the scope for action of the future governments that can make the elections meaningless what means a risk for the principle of democracy.⁶

³ Venice Commission raised serious concerns in connection with the constitution making process in *Venice Commission, Opinion on the new Constitution of Hungary, 2011, CDL-AD(2011)016*.

⁴ See in details in the next part.

⁵ Article L, Article 40, Article XXX (2) (M. Bánkúti, G. Halmai, K. L. Scheppele, *From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions*, In: G. A. Tóth (ed.), *Constitution for a Disunited Nation – On Hungary's 2011 Fundamental Law*, CEUP, 2012, p. 267).

⁶ Venice Commission (footnote nr. 3), point 24.

In the first year after entering into force, the Basic Law was amended three times. All of the amendments had the goal to offer a constitutional basis for some draft bills that would be otherwise in contradiction with the Basic Law so they can be considered as 'preventive measures'.⁷

On the petition of the Commissioner of Fundamental Rights the Constitutional Court annulled the non-transitional rules of the Transitional Provisions.⁸ According to its decision, the authorization of the Basic Law ('The transitional provisions shall be adopted separately by the Parliament according to the procedure referred to in Point 2 above.') gave only a possibility to regulate transitional issues in the separate document, any other rules should be incorporated into the text of the Basic Law. Although the Constitutional Court based its decision on formal grounds, it reserved itself the right to examine the regulations on the merits even when they will be incorporated into the text of the Basic Law.

As a reaction, the Parliament adopted the Fourth Amendment of the Basic Law that entered into force on 1 April 2013.⁹ The amendment incorporated those provisions of the Transitional Provisions into the Basic Law that were previously annulled by the Constitutional Court. As a consequence, the text of the Basic Law is overloaded with rules that are normally subject of acts – however, the constitution-making power wanted to exempt this questions from the scope of the assessment of the Constitutional Court.¹⁰ Besides, it also contained some new regulations that aimed to limit the powers of the Constitutional Court, what we will discuss later.

Finally, the Fifth Amendment was adopted to react on some critics of the European Commission and the Venice Commission on the Fourth Amendment; however, most of the criticized elements remained unaffected.¹¹

⁷ *The First Amendment (18 June 2012) intended to ensure the status of the Transitional Provisions at a constitutional level and to protect the benefits of the former President of Republic by referring its regulation to cardinal act. The Second Amendment (9 November 2012) would provide a constitutional basis for the active voting registration system. The Third Amendment (21 December 2012) was adopted to ensure the constitutionality of the new Land Regulation.*

⁸ HCC, Decision no. 45/2012 (XII. 29.).

⁹ *Fourth Amendment of the Basic Law (25 March 2013).*

¹⁰ For example the requirements of the recognition as a religious community (*Article VII (4)*) or the possibility to subject the financial support of higher education studies for a definite period in employment (*Article XI (3)*).

¹¹ *Fifth Amendment of the Basic Law (26 September 2013).* It entered into force on 1 October 2013.

2. Weakening of the national protection system

The rule of law, democracy and human rights are to be protected above all by the actors of the national constitutional systems. Modern constitutions institutionalize organs that ensure the effectiveness of the constitutional principles and restrict the power of other organs.

In Hungary it was mainly (but of course not exclusively) the Constitutional Court in the last two decades that limited the power of the legislature and forced it to function in a constitutional way.¹² Nevertheless, as a consequence of the recent constitutional changes, the power of the Constitutional Court has strongly weakened.

The main part of this tendency is caused by the practice described above: the continuous overruling of the decisions of the Constitutional Court by an amendment of the constitution.

One of the examples for this is the definition of the family. In its decision the Constitutional Court annulled Section 7 of the Act on Protection of Families that defined the family as a system of relations that generates an emotional and economic community of natural persons, based on the marriage of a man and a woman, next of lineal descent or adoptive guardianship.¹³ The Court has found this concept of a family too narrow as the State should also protect long-term emotional and economic partnerships of persons living together (for example, those relationships in which the couples raise and take care of each other's children, or couples who do not have any children or are not able to have any children, grandchildren cared for by grandparents etc.). As a reaction, the Fourth Amendment inserted the following rule into the Basic Law: 'Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation's survival. Family ties shall be based on marriage or the relationship between parents and children.'¹⁴ So it reintroduced the unconstitutional regulation on constitutional level.

Also a reaction on one of the previous decisions of the Constitutional Court is Article XXII of the Basic Law that introduces

¹² M. Bánkúti, G. Halmai, K. L. Scheppele (footnote nr. 5), pp. 249-250.

¹³ HCC, Decision no. 43/2012 (XII. 20.).

¹⁴ Article I (1).

an obligation of the State and local governments to strive for the protection of homeless persons but at the same time grants authorization for the Parliament and the local governments to declare illegal staying in a public area as a habitual dwelling with respect to a specific part of such public area. In its decision the Constitutional Court namely reviewed the Petty Offence Act and stated that the punishment of unavoidable living in a public area fails to meet the requirement of the protection of human dignity, and can neither be justified by the removal of homeless people from public areas nor by providing an incentive for such persons to avail themselves of the social care system.¹⁵ In the Court's view, homelessness is a social problem which the State must handle in the framework of social administration and social care instead of punishment. The answer of the Parliament was: giving an authorization for punishment of homelessness in the text of the constitution.

As a consequence of this tendency, these issues are exempted from the constitutional review as they form the part of the constitution. Although there was a debate whether the Constitutional Court can overview the amendments of the constitution also on the merits, the Fourth Amendment – following the decision on the Transitional Provision in that the Court left the question open – made it unambiguous. According to the new Article 24 (5), the Constitutional Court can review the amendment of the Basic Law only with respect to the procedural requirements. Therefore, constitutional-making power definitely excluded the possibility to let the Constitutional Court interpret its competence in a broader sense.

Several other changes intended the weakening of the powers of the Constitutional Court. Already in 2010 happened the most painful change in the competences that curtails judicial review in an important field of legislation. According to the rule of the constitution:

‘As long as the state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its powers set out in Article 24(2)b) to e), review the Acts on the central budget, the implementation of the central budget, central taxes, duties and contributions, customs duties and the central conditions

¹⁵ HCC, Decision no. 38/2012 (XI. 14.).

for local taxes for conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul these Acts only for the violation of these rights. The Constitutional Court shall have the unrestricted right to annul also Acts having the above subject matters, if the procedural requirements laid down in the Fundamental Law for the making and promulgation of those Acts have not been met.’¹⁶

This rule was also an answer for a decision of the Constitutional Court that annulled an act that implemented a ‘punitive tax’ that was a significant element of the government’s communication. Virtually it exempts from the judicial review all act of Parliament on budget and tax issues as it allows its review and annulment only in connection with four fundamental rights. Article 37 (5) of Basic Law even aggravates the situation: it excludes the review of the concerned law till the state debt exceeds half of the gross domestic product – so it can occur that these acts will never be subjected to constitutional review. After all, it means that in this field it depends only on the consideration and self-restraint of the legislature to adopt acts corresponding to the constitution.¹⁷

At the same time the possibility to bring a case to the Constitutional Court was also narrowed. Although the introducing of the German-type constitutional complaint that makes challenging also the judicial decisions possible is warmly welcomed, the limitation of ex-post review is worrying. The *actio popularis* that enabled every citizen and organisation to initiate the procedure of the Constitutional Court helped in the democratic transition to attain quickly a decision on the constitutionality of acts, even in politically sensitive questions. ‘Citizens participated in legislation, even if from the negative (Kelsenian) side; (...) the population learned that there are limits to political power, and that those barriers are to be found in Constitution.’¹⁸ Under the new system, only the Government, one-fourth of all Members of Parliament,

¹⁶ Basic Law Article 37 (4).

¹⁷ However, the Constitutional Court tried its best to widen its competence and interpreted the right to human dignity in a broader sense in one of the cases. See HCC, Court Decision no. 37/2011 (V. 10.).

¹⁸ L. Sólyom, *The Rise and Decline of Constitutional Culture in Hungary*, In: A. von Bogdandy, P. Sonnevend (ed.), *Constitutional Crisis in the European Constitutional Area*, Budapest, 2015, p. 17.

the President of the Kúria (Supreme Court), the Prosecutor General, or the Commissioner of Fundamental Rights can submit such an initiative.¹⁹

It should be emphasized that the suppression of the *actio popularis* is not contrary to the European constitutional heritage, however, it practically made it more difficult to reach the constitutional review of several debated acts, at that moment when the whole constitutional system was amended and the Parliament adopted more acts than even before.

The Fourth Amendment contained two more changes concerning the Constitutional Court. On one hand, it limited the scope of the evaluation. Article 24 (4) of Basic Law provides that the Constitutional Court may only review or annul a provision not submitted to it for a review if its substance is closely related to a provision that was specifically challenged. That was a reaction on the decision of the Constitutional Court on the voter registration in that it expanded its review to rules that were not challenged by the president of the Republic.²⁰

On the other hand, one of the most criticized provisions of the Fourth Amendment was that ruled the non-applicability of the former case law of the Constitutional Court. According to point 5 of Closing and Miscellaneous Provisions introduced by the Fourth Amendment 'The decisions of the Constitutional Court taken prior to the entry into force of the Fundamental Law are repealed. This provision shall be without prejudice to the legal effects produced by those decisions.'²¹ It means that the Constitutional Court should in every case review its case law whether it is applicable or not.

All of these changes intended to or had the result of weakening the role of the Constitutional Court and narrowing the scope of its review. As a matter of fact, we can not argue that the Constitutional Court would cease to operate or can not have any role in the system of checks and balances. However, it suffered serious losses in its importance as defender of the constitutionality. As a

¹⁹ About the changes of the competences of the Constitutional Court see in details *K. Rozsnyai, Änderungen im System des Verwaltungsrechtsschutzes in Ungarn, ÖV, 2013, 9, pp. 340-341.*

²⁰ HCC, Decision no. 1/2013 (I. 7.).

²¹ Constitutional Court interpreted the relevant new provision of the Basic Law first in its decision no. 13/2013 (VI. 17.) CC. According to the decision, the Constitutional Court is entitled to use the statements of its decisions taken prior the entry into force of the Basic Law or can freely decide on leaving them out of consideration also in cases when the text of Basic Law corresponds with the rule of the constitution. The Constitutional Court is allowed to quote and refer to the arguments and principles elaborated in its prior practice.

consequence of the systematic impairment of the Court's competences and limitation of its procedure, it became more difficult to find a remedy for the infringement of the principle of the rule of law and human rights at national level.

3. The European institutions' role and influence on the Hungarian constitutional system

At this point we can go on with the establishment of the fact that in Europe the constitutional system is not any more a national issue of the single states as they are a member of a community that sets standards that can be called Europe's constitutional heritage. Most of these standards are also codified, legally binding and can be executed by institutions established for this goal. The new Hungarian constitution did not bring changes in the field of the relation with international and European law.²²

Since the beginning of the changing process of the constitutional system in Hungary, it was assessed and criticized by several European institutes in different procedures. Although at several fronts the debate had a political nature (see for example the debates in the European Parliament), here I will focus on the legal procedures.²³

3.1. Venice Commission

One of the first reactions on the constitutional changes in Hungary came from the constitutional law advisory body of the Council of Europe, the European Commission for Democracy through Law, the so-called Venice Commission.

The first opinion was initiated by the Hungarian Government during the constitution-making process and addressed three questions to the Commission about the future text of the constitution by requiring an opinion whether this regulation would be in harmony with the European constitutional traditions.²⁴ The drafters

²² Although the new text contains some minor changes, there is no reason to expect important changes in the constitutional position of the international law and European law. Concerning international law see *M. Hofmann, Central and Eastern European Member States of the EU and the European Convention on Human Rights*, In: *A. von Bogdandy, P. Sonnevend (ed.)* (footnote nr. 18), p. 282. Concerning European law see *A. Bragyova, No New(s), Good News? The Fundamental Law and the European Law*, In: *G. A. Tóth (ed.)* (footnote nr. 5), pp. 357-358.

²³ About the political critics, especially formed by European Parliament see *A. Jakab and P. Sonnevend, Continuity with Deficiencies: The New Basic Law of Hungary*, *ECLR*, 2013, 9, pp. 134-136.

²⁴ *Venice Commission, Opinion on three legal questions arising in the process of drafting the New*

of the new constitution followed the advices of the Venice Commission in these questions: first, they did not incorporate the EU Charter of Fundamental Rights as a whole into the text; secondly, the constitution implies reasonable restrictions on the *ex ante* review of acts that can be initiated by the Parliament; thirdly, the *actio popularis* was changed by the German type constitutional complaint, and on the recommendation of the Commission, the ombudsman was added as an initiator of the *ex post review*.

The request for a second opinion on the new constitution from the Venice Commission came from the Monitoring Committee of the Parliamentary Assembly of the Council of Europe after the adoption of the constitution. Besides the critics about the lack of transparency of the process of the adoption and the inadequate consultation with the Hungarian society, the Venice Commission raised concerns also on the merit of the constitution. Among others, it criticized the extensive use of cardinal acts, the life imprisonment without parole, the limitation of powers of the Constitutional Court on taxation and budgetary matters, and the early retirement of the judges.²⁵ None of these issues were amended after the opinion – although there were three amendments of the constitution during the first year, there is no evidence that the recommendations of the Venice Commission were even considered.

After the adoption of the Fourth Amendment the Venice Commission released its third opinion about the new constitution of Hungary on the initiative of the Secretary General of the Council of Europe. In this opinion, the Commission's main concerns were related to the role of the Constitutional Court and judiciary and the overruling of the decisions of the Constitutional Court. The opinion strongly warns the Parliament not to use the constitution solely as a political mean.²⁶

Although these main concerns were not responded by Hungary, there were some minor changes related to the Constitutional Court's deadline for dealing with requests from ordinary courts and the system of the transfer of cases was repealed. In the proposal of the bill of the Fifth Amendment there is a ref-

Constitution of Hungary, 25-26 March 2011, CDLAD(2011)001.

²⁵ Venice Commission (footnote nr. 3), para 145-147.

²⁶ Venice Commission, *Opinion on the Fourth Amendment to the Fundamental Law of Hungary, 2013, CDL-AD(2013)012, paras 140-147.*

erence that it reflects also on the Venice Commission's recommendations.

The Venice Commission dealt also with some of the cardinal acts of Hungary. One part of the procedures were initiated by the Hungarian Government (Acts on the Judiciary, Freedom of Religion, and Parliamentary Elections), the others by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (Acts on Freedom of Information, the Constitutional Court, Prosecution, Nationalities, and Family Protection, Transitional Provisions).

From these nine requested acts seven were evaluated by the Venice Commission.²⁷ In the opinions the Venice Commission noticed numerous positive aspects of the new regulations, but it raised also concerns. In most of the cases these critics were not followed by an amendment of the relevant regulation. However, there was one exception: the cardinal acts on the judiciary.

In its opinion, the Venice Commission evaluated the Act on the Legal Status and Remuneration of Judges and Act on the Organisation and Administration of Courts of Hungary. It criticized several points of the regulation, especially the wide competences of the new administrative institution, the National Judicial Office and its President and the transfer of cases.²⁸

However, the Hungarian Government submitted on the same day a bill that – based on the draft opinion – took into account the recommendations of the Commission and the bill was adopted by the Hungarian Parliament in a few weeks.²⁹

²⁷ Venice Commission: *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, 2012, CDL-AD(2012)001; *Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary*, 2012, CDL-AD(2012)004; *Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary*, 2012, CDL-AD(2012)008; *Opinion on Act CLI of 2011 on the Constitutional Court of Hungary*, 2012, CDL-AD(2012)009; *Opinion on the Act on the Rights of Nationalities of Hungary*, 2012, CDL-AD(2012)011; *Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary*, 2012, CDL-AD(2012)020; *Opinion on Act CXII of 2011 on informational Self-determination and Freedom of Information of Hungary*, 2012, CDL-AD(2012)023; Venice Commission and OSCE Office for Democratic Institutions and Human Rights, *Joint Opinion on the Act on the Elections of Members of Parliament of Hungary*, 2012, CDL-AD(2012)012.

²⁸ Venice Commission, *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary* (footnote nr. 27), para 119.

²⁹ *Act CXI of 2012 on the amendment of the Act CLXI of 2011 on the Organisation and Administration of Courts and Act CLXII of 2011 on the Legal Status and Remuneration of Judges*.

The Venice Commission evaluated these amendments in a second opinion and found that the wide powers of the President of the National Judicial Office had been much limited and will no longer be discretionary, but that the system for appointment and dismissal of judges was still very unsatisfactory, with insufficient legal guarantees against dismissal or removal of a judge. The amendment did not deal with the issue of transfers of cases from one court to another, either.³⁰

However, the Fifth Amendment annulled this rule from the constitution and referred to the opinion of the Venice Commission.

After all, we can notice that the direct effect of the Venice Commission's opinions was rather narrow. However, we should add, that there are also indirect effects that can not be neglected. Especially in its second opinion on the new constitution, the Commission advised as to how to interpret certain provisions of the Basic Law in harmony with the European constitutional principles. These ways of interpretation can be regarded as a standard for the national authorities, especially for the courts and for the Constitutional Court. In case of the latter, the importance of this help for interpretation is even higher in cases where the Constitutional Court would refer back to its previous case law that was repealed by the Fourth Amendment – in these cases the Venice Commission's opinions can have a strengthening effect.

On the other hand, Constitutional Court may use also the Venice Commission's opinions about the on several acts when it evaluates their constitutionality. It already happened in the case of the act on churches where the Constitutional Court referred back to the opinion of the Venice Commission in the reasoning of its decision annulling several parts of the act.³¹

Finally, we can not preclude the possibility that the institution in the future will more depend on the Venice Commission's opinion in case of future constitutional crises.³²

³⁰ Venice Commission, *Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001* (footnote nr. 27), paras 90-93.

³¹ HCC, *Decision no. 6/2013 (III. 1.)*. The Constitutional Court referred to the opinions of the Venice Commission also in its previous case-law. See for example HCC, *Decision no. 49/B/2007* and *Decision no. 5/2004 (III. 2.)*.

³² J. Nergelius, *The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania*, In: A. von Bogdandy, P. Sonnevend (ed.) (footnote nr. 18), pp. 307-308.

3.2. The Court of Justice of the European Union

The European Commission followed the Hungarian constitution-making process from the very beginning. Concerning the constitution and the new cardinal acts – after informal letters – the European Commission sent three Letters of Formal Notice to Hungary as a first step towards infringement procedure. The letters raised concerns related to the new regulation on three independent institutions: the Central Bank, the judiciary and the data protection authority.³³

At the same time, Hungary applied for Balance of Payments aid from the EU and for precautionary financial assistance (Stand-by Arrangement) from the IMF. As the IMF made it clear that it will not negotiate with Hungary without the European Union, the European Commission seemed to be in a strong negotiating position. At this point, it even seemed possible that the Commission would demand that Hungary complied with the reports of the Venice Commission in exchange for the initiation of negotiations on financial aid, even if those reports also affected areas clearly beyond the scope of EU law. This would have meant a large scale attempt to enforce European standards of the rule of law beyond the actual competences of the EU.³⁴

After Hungary's formal replies, the Commission decided to send two reasoned opinions on the retirement age of the judges and the independence of the data protection authority, however it demanded further clarification on the central bank and further aspects of the independence of judiciary.³⁵ On 25 April 2012, the European Commission noted that the Hungarian Government promised to take into account the Commission's legal concerns on the independence of the Central Bank and to amend its national legislation, and decided to enter into negotiations on precautionary financial assistance with Hungary.³⁶

³³ European Commission, *European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary*, http://europa.eu/rapid/press-release_IP-12-24_en.htm?locale=EN (accessed: 24. 2. 2015).

³⁴ A. Jakab and P. Sonnevend (footnote nr. 23), p. 132.

³⁵ European Commission, *Hungary – infringements: Commission takes further legal steps on measures affecting the judiciary and the independence of the data protection authority, notes some progress on central bank independence, but further evidence and clarification needed*, http://europa.eu/rapid/press-release_MEMO-12-165_en.htm (accessed: 24. 2. 2015).

³⁶ European Commission, *Commission decides to enter into negotiations on precautionary financial assistance with Hungary*, http://europa.eu/rapid/press-release_IP-12407_en.htm (accessed: 24. 2. 2015).

The two remaining issues were referred to the Court of Justice of the European Union in an infringement procedure.

According to Article 26 (2) of Basic Law, judges shall be allowed to remain in office up to the general retirement age. In practice it meant that all of the judges who were above 62 (general retirement age) had to leave their office after the entering into the force of the Basic Law, although before that they had the expectation to remain in office till the age of 70.

This early retirement was criticized by the Venice Commission in its report as it is a matter of the independence of judiciary.³⁷ The violation of the principle of judicial independence was also declared in the decision of the Constitutional Court annulling with *ex tunc* effect the relevant provisions of the act on the legal status of judges.³⁸ According to the reasoning, the relevant provision of the Basic Law should be interpreted in a way that does not contravene judicial independence that means the retirement age should be lowered progressively.

The implementation of this judgment has resulted in considerable legal uncertainty. The judges concerned were forced to file a suit before the labour courts to have their dismissal reversed, and in case of a positive decision, they had to go through the appointment process to be reinstated into their position. This uncertainty was criticized by the Venice Commission that urged adoption of appropriate measures.³⁹

In this background came the infringement procedure of the Court of Justice of the European Court. In this process, the objections did not refer to the judicial independence as the competence of the EU would be questioned in this field. Instead, the European Commission claimed that by adopting a national scheme requiring the compulsory retirement of judges, prosecutors and notaries on reaching the age of 62 – which gives rise to a difference in treatment on grounds of age which is not justified by legitimate objectives and which, in any event, is not appropriate or necessary as regards the objectives pursued – Hungary has failed to fulfil its obligations under Articles 2 and

³⁷ Venice Commission, *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary* (footnote nr. 27), paras 102-110.

³⁸ HCC, *Decision no. 33/2012 (VII. 17)*.

³⁹ Venice Commission, *Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001* (footnote nr. 27), paras 74-80.

6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

In its judgment of 6 November 2012, the CJEU accepted the argument of the Commission and declared that Hungary violated EU law in this respect.⁴⁰

As a consequence of the judgment and taking into consideration also the reasoning of the Constitutional Court's decision, the Parliament amended the act on the legal status of judges and established a new system for the calculation of the retirement age that affects only the judges between the age of 65 and 70 and is based on the date of the birth.⁴¹

The second infringement procedure concerned the cease of the mandate of the Commissioner for Data Protection.

Concerning the Commissioner for Data Protection the explanation for the premature termination of his six-year term was the establishment of a new institution, the National Authority for Data Protection and Freedom of Information that is under the Basic Law responsible for supervising the protection of personal data and the fulfilment of the right of access to data of public interest.

This measure was challenged by the European Commission and the Court of Justice of the European Union found in its judgment that by the prematurely bringing to an end the term served by the supervisory authority for the protection of personal data, Hungary has failed to fulfil its obligations under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The Court pointed out that the data protection supervisory authorities must be allowed to perform their duties free from external influence. These independence necessarily covers the obligation to allow them to serve their full term of office and to cause them

⁴⁰ ECJ, *Commission v Hungary*, 6. 11. 2012 - C-286/12, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30ddf772aa7eca444c4ea902e45dc316d860.e34KaxiLc3qMb40Rch0SaxuPb3z0?text=&docid=131887&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=277935>. According to Thomas von Danwitz, 'If the rather technical answer given by the ECJ might have caused some surprise to academic observers who were focusing on the constitutional and political nature of the measure at issue, the sober reasoning of the Court, strictly limited to the technicality of the matter, should be understood as bridging the gap which Hungary will have to overcome in accepting the judgment.' (T. von Danwitz, *The Rule of Law in the Recent Jurisprudence of the ECJ*, *FILJ*, 5, p. 1344).

⁴¹ Act XX of 2013 on the amendment of acts on the retirement age applicable in several legal status in the judiciary.

to vacate office before expiry of the full term only in accordance with the applicable legislation.⁴²

After the judgment of the CJEU, the Hungarian Ministry of Justice made an agreement with the former Commissioner for Data Protection, so he was not restored to his office but got a satisfaction and the Minister for Justice released an official apology on behalf of the Government.⁴³

3.3. The European Court of Human Rights

Procedures in Strasbourg need time – so as the new constitution of Hungary entered into force on 1 January 2012, there are only a few cases concerning the constitutional changes in that the European Court of Human Rights already released a judgment.⁴⁴ However, there are several cases that are in connection with the new constitutional system or even with the text of the Basic Law. Here I would like to present some examples where the Hungarian Constitutional Court had no mean to review the regulation but Strasbourg Court was able to decide on the issue.

In July 2010 the Hungarian Parliament adopted an act that introduced a new tax on certain payments for employees of the public sector whose employment was terminated. Consequently, severance pay and other payments related to the termination of employment exceeding two million HUF became subject of a 98% tax. The act was to be applied from 1 January 2010, however entered into force only on 1 October 2010. As this retroactive effect was obviously contrary to the rule of law principle, the Parliament adopted an amendment to the (old) constitution to insert an exception into the text allowing special taxes beginning with the given tax year ‘in respect of any remuneration received against the good morals from public funds [...]’.⁴⁵

⁴² ECJ, *Commission v Hungary*, 8. 4. 2014 - C-288/12, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=150641&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=278782> (accessed: 24. 2. 2015).

⁴³ *Bocsánatkérés és 69 millió – erről szólt a megállapodás* [Apology and 69 million HUF – that is the agreement about], <http://nol.hu/belfold/bocsanatkérés-es-69-millio-errol-szolt-a-megallapodas-1473191> (accessed: 24. 2. 2015). After the agreement, András Jóri withdrew his application at the European Court of Human Rights.

⁴⁴ Jeremy McBride identified nine aspects of the Basic Law that appear to afford less protection for human rights than is required by the European Convention. Among them were also the provision for life imprisonment without parole that has already resulted into a concrete case in front of the European Court of Human Rights (J. McBride, *Trees in the Wood: The Fundamental Law and the European Court of Human Rights*, In: G. A. Tóth (ed.) (footnote nr. 5), pp. 364-370).

⁴⁵ *Amendment of the Constitution on 11 August 2010*, § 2.

The regulation on the punitive tax was reviewed and annulled by the Constitutional Court with the reasoning that incomes obtained on a statutory provision can not be considered as against the good moral so the new provision of the constitution does not cover this case.⁴⁶

The response from the Parliament was on one hand the reintroducing of the punitive tax and amending the provision in the Constitution to allow retroactive taxation going back five years from the actual tax year. On the other hand, the result was the limitation of the competences of the Constitutional Court in tax and financial issues that we presented above in details.⁴⁷

However, the Constitutional Court managed to examine the constitutionality of the given act and annulled the tax that applied retroactively for five years back on interpreting human dignity (that was one of the rights in connection it was allowed to do constitutional review of tax acts) in a broader way. Nevertheless, it did not concern the tax for the current tax year.⁴⁸

Consequently, in the case of those who were affected by the 98 percent tax, there was no open domestic remedy as neither courts, nor the Constitutional Court was able to review the relevant provisions. Therefore, individuals concerned could raise high expectation of turning to the European Court of Human Rights.

In its first concerning decision, in the case of *N. K. M.*, the Court held that this measure cannot be justified by the legitimate public interest relied on by the Government (namely satisfying society's sense of justice and protecting the public purse). Those who act in good faith on the basis of law (like the applicant) should not be frustrated in their statute-based expectations without specific and compelling reasons. Therefore the measure cannot be held reasonably proportionate to the aim sought to be realised and there has been a violation of Article 1 of Protocol No. 1 (protection of property).⁴⁹

Thus in these cases the human rights protection mechanism of the Convention system was able to give a remedy that was impos-

⁴⁶ HCC, Decision no. 184/2010 (X. 28.).

⁴⁷ Act CXIX of 2010 on the amendment of the Constitution.

⁴⁸ HCC, Decision no. 37/2011 (V. 10.).

⁴⁹ ECHR, *N. K. M. v. Hungary*, 14. 5. 2013 - 66529/11, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119704#{%22itemid%22:%5B%22001-119704%22%5D}> (accessed: 24. 2. 2015). The case were followed by several others and some are still pending.

sible in the framework of the Hungarian constitutional system.⁵⁰

In case *László Magyar v. Hungary*, the European Court of Human Rights found that the imprisonment for life without eligibility for parole violated Article 3 (prohibition of inhuman or degrading treatments) and Article 6 § 1 (right to a fair trial within a reasonable time) of the Convention. According to the Court, the law did not guarantee a proper consideration of the changes of in the life of prisoners and their progress towards rehabilitation, so the sentence could not be regarded as reducible. The Court pointed out that this case disclosed a systematic problem and to avoid rising similar applications, invited Hungary to put in place a reform of the system of review of whole life sentences to guarantee the examination in every case of whether continued detention is justified on legitimate grounds and to enable whole life prisoners to foresee what they must do to be considered for release and under what condition.⁵¹

Although the Hungarian Government reacted immediately with a statement that it continued to insist on the life sentence without parole, the case may have direct short-time affect on the Hungarian regulation.⁵² At the beginning of April 2014, the Szeged Regional Appeal Court suspended a criminal procedure and requested the Constitutional Court of Hungary to establish that the institution of actual life-long imprisonment is contrary to the European Convention of the Human Rights – which is not a question any more after the judgment of Strasbourg Court.⁵³ However, that will result in a strange legal situation: namely, life sentence without parole was also incorporated into the text of the Basic Law. According to Article IV (2), a sentence of life imprisonment without parole may only be imposed for violent intentional crimes. It means that because Constitutional Court can not review the rule of the Basic Law, it can only annul the relevant provisions of act of Parliament because of the contrary to the international obliga-

⁵⁰ It is worth to mention that in the case of N. K. M. and in some following cases the Court interpreted the requirement of the exhaustion of all effective domestic remedies in a very flexible way and so contributed also with this interpretation to the safeguarding of fundamental rights protected by the Convention (*M. Hofmann* (footnote nr. 22), p. 286).

⁵¹ ECHR, *László Magyar v. Hungary*, 20. 5. 2014 - 73593/10, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144109#{%22itemid%22:%5B%22001-144109%22%5D}> (accessed: 24. 2. 2015).

⁵² *Politics.hu*, Strasbourg court rules against Hungary in "real life imprisonment" case, <http://www.politics.hu/20140520/strasbourg-court-rules-against-hungary-in-real-life-imprisonment-case/> (accessed: 24. 2. 2015).

⁵³ *Hungarian Helsinki Committee*, Actual life imprisonment violates Convention, <http://helsinki.hu/en/actual-life-imprisonment-violates-convention> (accessed: 24. 2. 2015). Case number: III/00833/2014.

tions, but the relevant provision of the constitution will remain formally in force, however, without actual content.

Finally, in case of *Baka v. Hungary*, the applicant was a former judge at the European Court of Human Rights and later President of the Supreme Court of Hungary, and was dismissed from this later position by the force of the Transitional Provisions to the Fundamental Law of Hungary. The Court found that Mr. Baka's access to court had been impeded by the fact that the premature termination of his mandate had been written into the constitution and was therefore not subject to any form of judicial review. It also found that Mr. Baka's dismissal had been due to the criticism he had publicly expressed of government policy on judicial reform when he was President of the Supreme Court, underlining that the fear of sanction, such as losing judicial office, could have a "chilling effect" on the exercise of freedom of expression and risked discouraging judges from making critical remarks about public institutions or policies.⁵⁴

Beside the case of Court of Justice of the European Union where it found the early retirement of the judges age-based discrimination, the case Baka is also an example that even if the supranational courts are not explicitly entitled to protect such constitutional principles as independence of judiciary, they are able to examine the issues from a different point of view that can lead to the same results.

4. Closing remarks

After having an overview of the last few years' individual cases in front of the European institution, we should turn back to the questions set for the workshop and mentioned in the beginning of my essay.

What are the greatest challenges posed to the rule of law and democracy in our days? In my opinion, one of the main challenges to the rule of law and democracy is in Hungary now the unstable constitution and the use of it as a solely political instrument. Besides, the weakened system of checks and balances and insufficient protection system of human rights, rule of law and democracy.

⁵⁴ ECHR, *Baka v. Hungary*, 27. 5. 2014 - 20261/12, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144139#\[%22itemid%22:%5B%22001-144139%22%5D\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144139#[%22itemid%22:%5B%22001-144139%22%5D]) (accessed: 24. 2. 2015).

What has been the role of the European Union with regard to the rule of law and democracy? In my essay I intended to present how the European institutions influenced the processes in Hungary. To sum up, it may be established that their role was really crucial and in several cases they managed to have a serious impact on the Hungarian regulation and practice. We saw that they can have a say also in cases where the Hungarian protection system has no means. Although we trust in Europe and its institutions, we cannot be satisfied. As these institutions can only examine single cases, they cannot handle structural problems, so can only be an ultimate forum, can only complete but not replace domestic remedy systems.⁵⁵

And this leads us to the last question: What would need to be done to improve the rule of law and democracy? The functioning of domestic system of checks and balances has utmost importance. Some deficiencies (for example the limitation of the competences of the Constitutional Court) can be changed only by the amendment of the Basic Law and the relevant acts. However, even until these necessary changes these institutions have to find the way to remain the defender of the rule of law even in the new framework of the regulation. Interpreting their competences in a broader way, taking an activist point of view, reinforcing the fact that the Hungarian law is part of the common European constitutional tradition – these steps can be helpful. How European institutions can support them in this field, I presented before. However, that is not enough. Civil society organisations and especially academic sphere have an important role in this process.

Civil society has to find another means than before: they had more negotiations with the previous governments – however we can debate also how fruitful their activity was –, now they have to turn to Constitutional Court (find someone to submit a constitutional complaint), to the European Court of Human Rights and to other human rights protection mechanisms – so from this point of view it is a situation in that they can become stronger and more active.

⁵⁵ A more general solution could be the application of the Article 7 of the Treaty on the European Union and initiating a procedure against in case of a clear risk of a serious breach by a Member State of the values of the European Union. Such intention arose in case of Italy, Hungary and Romania but it was not realized for different reasons (*F. Hoffmeister, Enforcing the EU Charter of Fundamental Rights in Member States – How far are Rome, Budapest and Bucharest from Brussels?*, In: A. von Bogdandy, P. Sonnevend (ed.) (footnote nr. 18), pp. 202-233).

Academic sphere has also an exceptional responsibility. We entirely agree with László Sólyom, former president of the Constitutional Court who recently wrote: 'In sum, due to the history and mode of its development, Hungarian constitutional culture still has considerable legal potential and support to rely on. Beyond the legal profession and institutions such as the Constitutional Court or the Ombudsman, law schools bear special responsibility for it. Yet, at its present stage, the constitutional culture is already living first and foremost in the attitude of the people. Standing up for the Constitution is today a question of personal integrity.'⁵⁶

⁵⁶ L. Sólyom (footnote nr. 18), p. 31.
