The Most Significant Issues of Power Theory in Hungary from 2010 to 2014

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Abstract: Between the years of 2010 and 2014, the most significant change in the public law system took place in Hungary since the democratic transition of 1989. According to some, this has been a reform, whereas others regard it as destruction. During the transformation, of course, relations between all branches of power and their relationship with other factors of power had been a subject of debate. Yet – apart from the general question of how much the state policy established by 2014 complies with the democratic principles of the rule of law based on the division of power – from the viewpoint of power theory there had been three major issues that instigated fierce debates. They concerned the status of the president of the republic, the legitimacy of the constitution (Fundamental Law) and the relationship between the constitution-making power and the constitutional court. The present study aims to address the above questions.

Keywords: division of power, power theory, constitution-making, constitution-changing, constitutional court

Between the years of 2010 and 2014, the most significant change in the public law system took place in Hungary after the democratic transition and the fall of the communist single party state. Some say it was reform, others say it was destruction. There was considerable amount of scientific and political debate going on about the above issues both in the country and abroad. I trace the entirety of the process in a recently published, source research-based monograph of mine.[1] In this paper I intend to explore the three most important issues of the theory of power in the examined period. In Hungary from 2010 to 2014 – let us examine the process even in terms of the internationally well-known theories on the division of power such as the classical Montesquieuan, the American, the complex, the parliamentarian or the Hungarian Biboian ones – the governance in Hungary set out to reduce the powers of all those who possess them or at least to achieve their admission under governmental influence, and for the most part, it succeeded in this endeavor. With the transformation of media regulations it altered the world of the press, with legislation and methods less constitutional it changed the economic milieu, and with its personnel policies it drew public administration under strict control. In addition, of course, it made sure to weaken – in the most significant manner possible – the capacities of constitutional institutions listed in the Fundamental Law as being able to control the administration, though the range of these was much broader than the Montesquieuan triad would allow. Alternatively, it made sure that these would

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1 Gergely Bárándy, 'Centralizált Magyarország, Megtépázott Jogvédelm' in *A Hatalommegosztás Rendszerének Változásairól* (Scolar 2014).

not pose threats by a series of personnel-related decisions due to the weakening of their status of power.

Legal experts discuss the status and relationship of all branches of power and other factors of power. In terms of this system of relationships in the period that I have examined, debates erupted in almost all areas. These debates, however, with the exception of certain negligible aspects of the constitutional preparatory phase, were not conducted in the theoretical plane. Instead, members of parliament, representatives of nongovernmental civil organizations, public personalities, and experts criticized practical solutions and compared them to theoretical notions that are considered undebatable, but they did that without questioning the theoretical foundations, that is to say, the appropriate relationships of the various actors. As such, the proper connection between the judiciary and the legislative power had never been the target of arguments, nor had the notion been challenged whether status-related independence is part of judicial. On the other hand, discussion focused on issues like whether a judicial leader elected by the National Assembly should have amongst his competencies the power to decide appointments in the top echelons of the judiciary. No one contested that the State Audit Office should operate separately from the administration; instead the issue was whether the specific solution applied violated this principle or not. Everyone agreed that one of the National Assembly's most important tasks was the checking of the cabinet, the subject of debates was how much the issue of pushing the requests for inclusion in the Parliament's daily agenda out of the television broadcast affected this. Of course, notwithstanding the general question, which is not discussed in this study but in the monograph above mentioned, of whether the state created until 2014 satisfy the requirements of a democratic state ruled by law and based on the separation of power,[2] there were three points named in the Public Law of 2010-2014 concerning independent constitutional institutions – both in the field of politics and science – that sparked serious theoretical debate and that have to be analyzed in this essay:

- Is the president of the republic part of the executive power or is he a counterweight for the governance?
- Can the question of the Fundamental Law's legitimacy be simplified to the claim that the state institution authorized this document in a legal manner according to applicable laws and in adherence with the regulations of legislative procedure? Or in other words: can we use an equal-sing betwixt legislative and constitutionalizing powers when governing parties are able to exercise them both without the support of the opposition?
- What is the appropriate relationship between the constitutionalizing power and the Constitutional Court?

I. The President of the Republic: Part of the Executive or a Counterpoise for the Administration?

The separation of the head of state from the executive power was already raised in the 19th century. Basically this was the occurrence that broke the Montesquieuan triad, as Benjamin Constant identified the head of state as a fourth component, a role which

2 Gergely Bárándy, 'Centralizált Magyarország, Megtépázott Jogvédelm' in *A Hatalommegosztás Rendszerének Változásairól* (Scolar 2014).

was an institution balancing the executive and the legislative powers.[3] In a modern democracy, let it be a republic or a constitutional monarchy, there are instances where the head of the state is clearly a part of the executive branch (in presidential and semi-presidential states), and there are also examples of the position being a factor of power obviously independent from it. An instance for the former one is the case of the United States of America and France, whereas for the latter one most of the European countries may serve as an example, such as Germany or Spain.

A. The Solution for the Democratic Transition

During the Hungarian democratic transition, one of the largest debates in public law was centered around the roles and powers of the president of the republic. Some wanted the office to be strong, others wished for it to be weak, and the rest desired something in the middle. Thus in the plans back then, some defined the office according to a strong legal status and as part of the executive power, whereas some took the explicitly opposite approach.

Most of the plans, however, were silent on whether the president should be a part of the executive branch. In the end, the participants decided in favor of the weak presidential model, but they continued avoiding to define the relationship between the president and the executive power. The question was decided by the Constitutional Court in 1991 when it put the head of the state above the branches of power, that is to say, outside of the executive one.[4] However, after the Fundamental Law took effect, it explicitly forbade the Constitutional Court to take into account decisions and their justification made before the Fundamental Law's entering into force.[5] This is why the notion that debates may now arise about the legal status of the president is well-founded.[6] All the more so because the previous decision on it was found controversial by many researchers.[7] There were some, however, who did not only profess the office's differentiation from the executive branch, but even wanted to raise presidential independence to the constitutional level immediately after the democratic transition.[8] For example, according to Janos Sari the head of state is not a counterweight for the cabinet, as his role is specifically to balance and mediate. This issue he could not fulfill effectively if he participated in political conflicts as a 'party' balancing the cabinet.[9] Still he unequivocally treats him as someone outside the

3 János Sári quotes Constant: 'Az alkotmányos politika tana' in *A hatalommegosztás* (Osiris 1995) 193-194.

4 On the theoretical questions concerning the legal status of the head of the state after the democratic transition, see Antal Ádám, 'A Köztársasági Elnök, Az Országgyűlés és a Kormány Viszonyáról' in *Magyar Közigazgatás* XLI/11 (Nov 1991) 961-971; György Wiener, 'A hatalmi ágak elválasztása alkotmányos rendszerünkben' rpt in Nóra Chronowski and József Petrétei (eds), *Tanulmányok Ádám Antal Professor Emeritus Születesenek 80. Évfordulójára* (PTE Állam – És Jogtudományi Kar 2010) 463-476; András Szalai, 'Egyensúly Helyett Ellensúly. Az Államfő Mint a Parlamentáris Kormány Ellensúlya II' in *Pro Publico Bono* (2011/2) 48-49; Csaba Tordai, 'A Társadalmi Szerződestől Az Alkotmánybíróság Határozatáig. Kíserletek Az Államfői Tisztség Jogi Szabályozására' in *Politikatudományi Szemle* (1998/4); András Szalai, 'A Hatalmi Ágak Relatív Függetlenségéről, Avagy a Köztársasági Elnök Újra a Végrehajtó Hatalomban?' in *Jogelméleti Szemle* (9 April 2013); István Somogyvári, 'Az államhatalmi ágak megosztásáról' in *Társadalmi Szemle* (1994/1, 48/1991 IX. 26.) ABH.

5 The Fundamental Law of Hungary, Article 19.

6 See András Szalai (n 4).

7 For example see Lajos Lőrincz, '*A közigazgatás alapintézményei'* in HVG-ORAC (2007) 109.

8 Antal Ádám (n 4) 971.

9 János Sári, *A hatalommegosztás* (Osiris 1995) 212-215.

executive power. In Sari's opinion, this would mean that he 'acts as a president, but he does not govern.'[10] The great majority of analysts believe that, according to the current Fundamental Law, the president of the republic is not part of the executive in today's Hungary.[11]

B. The Real Dichotomy

Within the context of this work, there is really no point in further investigating this question. Between 2010 and 2014, the politicians who have advocated the president of the republic's belonging to the executive power and those who argued against it, actually did not set up a pair of opposites in accordance with their intentions. The question was far from being theoretical only. The president who was in office for two years after 2010 stated right at his inauguration that he was not a counterpoise for the work of the administration, but its engine. During his time in office, he never made use of his veto power. As a reference to my previous points, I share the view according to which

> 'the splitting and division of political power in a state can only be described in a fairly futile manner by the terms "legislative, executive, and judiciary," because there are comprehensive areas of power which cannot be divided according to the logic of the above mentioned triad. Just to mention the most important examples: governance, the constitutional court, or the exercise of presidential powers. These functions can only be understood through the principle of the division of power, and not by the separation of power.'[12]

Then, the real pair of opposites should have been: does the president of the republic have to be a balance to the cabinet? The most complete blurring and misinterpretation of public-law opposites were apparent precisely in the prime minister's words, stating that the division of power in accordance with a balance between the branches of power is important, but since the head of the state is not a separate branch of power, it cannot be a counterweight for the cabinet – he is then part of the executive power.[13]

As a constitutional institution, the head of the state is compelled to cooperation. Consequently, he cannot work against other constitutional institutions, such as the cabinet.[14] In the meantime, in Jozsef Petretei's study, which examines the content of the president's duty to 'guard' over the democratic operation of the state, he defines the president's status as one of the counterweight of the cabinet, and this is something I agree with. He considers the '*maintenance of the balance of power*' to be one of the tasks of

10 ibid 204.

11 For example see Emőd Veress, '*Államfő és Kormány a Hatalommegosztás Rendszerében*' (Scientia 2011) 109 and 124-126.

12 Albert Takács, 'A Parlament Szerkezete Alkotmányelméleti Megközelítésben' in *Az Új Alaptörvényről – Elfogadás Előtt. Tanulmánykötet Az Országgyűlés Alkotmányügyi, Igazságügyi És Ügyrendi Bizottsága Által 2010. Április 8-án Azonos Címmel Megrendezett Tudományos Konferencián Elhangzott Előadások Alapján* (Országgyűlés Alkotmányügyi, Igazságügyi És Ügyrendi Bizottság 2011) 141.

13 The prime minister voiced his opinion on public television's *Az este* programming in August 2010, which was quoted by an internet news portal <www.hvg.hu/itthon/20110804_Orban_Schmitt_egy_eve> accessed 6 February 2015.

14 See 62/2003 (XII. 15.) ABH.

the office.[15] Similarly, the Constitutional Court stresses the president's role as a counterbalance:

> 'According to the Constitution, the president of the republic is entitled to the right to independent decisions if the state's normal functioning has been disturbed and the balancing role of the president of the republic is needed […]'[16]

There is no consensus about what the proper legal status of the head of the state should be, and what the best way would be for the president's election. Some argue for direct elections, but several people have recommended the establishment of an electoral body independent from the National Assembly and composed according to various principles, which would in turn elect the president.[17] There is no debate, however, on the fact that in his current status the head of the state should be a counterweight to the executive power. Additionally, the Constitutional Court's position, according to which the president is not part of the executive branch but fulfills a balancing role instead, enjoys the support of a convincing majority in the legal sciences. Thus in this area, I think it is indeed unequivocally possible to answer the question that was raised.

II. Can the Question of the Fundamental Law's Legitimacy be Simplified to the Claim that the State Institution Authorized the Document in a Legal Manner According to Applicable Laws and in Adherence with the Regulations of Legislative Procedure? In other Terms: Can the Constitutionalizing Power be Equated with the Legislative one when the Governing Parties Can Dominate Both of them without the Support of the Opposition?

A. Constitutional Values in Brief

As an introduction, it is beneficial to offer a few sentences about constitutional values.

> 'The values enshrined in the Constitution gain their qualities as constitutional values from the constitutionalizing power. The governmental, societal, and individual acknowledgement and respectability of these is prescribed by a constitutionalizing entity. The values defined in the constitution are at the helm of normative legal values. […] Also with regards to normative constitutional values, the degree of internalization and interiorization signals their level of becoming societal, communal, and individual values. We can confidently state that the breadth and degree of social acceptance of constitutional values expresses the legitimacy of the system of constitu-

15 József Petrétei, 'A Köztársasági Elnök Mint Az Államszervezet Demokratikus Működésének Őre' in *Jogtudomány Közlöny* (2011 March) 142-43.
16 47/2007 (VII. 3.) ABH.
17 Péter Szegvári, 'Többségi És (vagy) Konszenzusos Demokrácia' in *Társadalmi Szemle* (1994/2) 72-74.

tional institutions, and the general qualitative level of constitutional perspective, constitutionalism, constitutionalization, public law, and general culture.'[18]

Thus it is clear that in an optimal case where these values are completely embedded in society, where they are the guiding light of social coexistence, they become values that drive social and international cohesion.

If we accept the notion that constitutional values are threefold, that is to say, they exist independently from the constitution, they are constituted by the constitutionalizing power, and they can be so-called assets[19] with regards to the former two concepts, we must also accept that these three layers project a type of hierarchy. Thus the social and value-related reorganization which comes to be as a necessary consequence of social and historical progress, cannot be realized neither arbitrarily nor in a manner in which basic values bow to assets, and the former, whilst becoming dependent on the latter, turns into a collection of limited, empty, formal set of rights. In other terms, the catalogue of fundamental rights defined in a constitution and identically referred to by all international agreements forms the framework and limitation for legislation. According to my point of view, this is a basic requirement of the above-mentioned process of embedding.[20]

B. On the Legitimacy of the Fundamental Law in General

The concept of constitution, its relationship with society, and the question of its legitimacy are multifarious and multi-layered questions of social, legal, and constitutional theory. In Janos Sari's words

> 'The constitutional concept's great dilemma is whether it is the fundamental law of the state regime or the whole of society. [...] These are ancient and naturally inconclusive questions of the constitutional concept.'[21]

In the context of this work, I will not even attempt to answer such questions. I will only look at their scope in the examined parliamentary cycle. As such, I will only subject the problem arising from the specific question I posed to a brief analysis.

After the acceptance of the Fundamental Law – and even before that – the question of legitimacy arose. The governing parties argued that there was no doubt about the Fundamental Law's legitimacy, because according to the effective laws, the National Assembly adopted it in a completely legal way. As a consequence, the governing parties – seeing how they had achieved a two thirds majority in the National Assembly via free and democratic elections – had the authority to constitutionalize on their own. The majority of opposing parties, however, questioned the legitimacy of the Fundamental Law. Albeit in their opinion the constitutionalization was formally legitimate, the content-related and social legitimacy of the Fundamental Law were absent. The majority never started a

18 Antal Ádám, 'Az Alkotmányi értékek értelmezéséről' in *Jura* 2 (2010) 117.
19 For a more detailed description see Antal Ádám, 'Az Alkotmányi értékek értelmezéséről' in *Jura* 2 (2010) 117.
20 Nóra Chronowski, Tímea Drinóczi, Miklós Kocsis, 'What questions of interpretation may be raised by the new Hungarian constitution?' (2012) 6 ICL Journal 41.
21 János Sári, *A Hatalommegosztás* (Osiris 1995) 171.

social or professional debate about the Law, and with the exception of the radical right, the opposition removed itself from the process of drafting. Yet no party belonging to the opposition supported the Fundamental Law's passage. It is a fact that there was only a single month and three days between the draft's legislative text becoming available to the public and its passage. The document, which was intended to be a constitutional concept originally – and was the product of a several-months long professional and social debate, but became a National Assembly resolution – was demoted to an aid resource for representatives through an amendment proposal from the governing party. This happened not only in a formal way, but also content-wise, due to the fact that the principles and state structure included in the concept fundamentally differ from the provisions of the Fundamental Law in numerous instances.

According to the circumstances created by the Hungarian Constitution – later the Fundamental Law – the governing parties' two thirds majority meant hardly anything in practice but a parliamentary model of a single-party state, where all members of Parliament were simultaneously members of the governing party. When faced with a two thirds majority, the opposition's capacity, save the power of publicity, was basically equal with zero. Though we can pinpoint several processes foreign to a democratic state and decisions incompatible with the value system thereof, from the point of view of the power theory, the period between 2010 and 2014 can certainly not be called one of a dictatorship or a totalitarian system. On the one hand, the governing majority won its seats through democratic elections. On the other, there was a real and legal possibility that in the next elections the democratic and legally acknowledged opposition could get a chance to reshape power relationships. But by stating this, it would be erroneous to conclude that no severe damage was done. Emod Veress is right to point out a new phenomenon, which appeared at the end of the 20th and at the beginning of the 21st centuries:

> 'From the point of view of limiting power, problems of enormous prevalence arose after the demise of totalitarian systems on the one hand through democratic transitions (where these were successful), and on the other, through the appearance of hybrid forms, which were mixtures of democracy and dictatorship (in Europe, primarily in the course of the Soviet Union's fall).'[22]

When some were referring to Russia or Azerbaijan in connection with the modifications, they were calling attention to this very danger, example, and path.

I agree that

> 'the constitutional parliamentary rule that the cabinet can only attend its functions with the support of parliament does not actually position parliament and cabinet against each other, but it does this with the majority and the minority – namely the parties forming the government and their opposition. […] essentially it does not result in the separation of the legislative and executive functions, but in the separation of the governing party's and the opposition's functions.'[23]

22 Emőd Veress, *Államfő és Kormány a Hatalommegosztás Rendszerében* (Scientia 2011) 85.
23 Albert Takács, 'A Hatalommegosztás Elvének Alkotmányelméleti értelmezése' in *Jogtudományi Közlöny* (June 1993) 216.

Then, if based on this sentence and the arguments mentioned above, we approach the questions not from the side of formality and public law regulations but from that of reality – which are in this present scenario differing points of access – then we will find that actually it was the cabinet that carried out constitutionalization.

The question is whether in the case of a two thirds parliamentary majority, that is, in the case of an entity which is authorized to constitutionalize, there is a difference between the legislative and the constitutionalizing power. And coming from that, can a constitution and related cardinal laws be considered legitimate if they were, due to their two thirds majority, only accepted by the governing parties without the participation of the opposition and society?

I share András Jakab's opinion on the legitimacy of constitutions:

> 'usually we expect three things from modern constitutions: (1) they should represent the legal self-limitation of power (this is expressed in the protection of fundamental rights and the division of power), (2) they should establish (constitute) democratically the most important basic institutions of the state, and (3) they should be symbols of a community's togetherness.'[24]

C. The Cohesive Symbolism of the Community as Legitimizing Element

As during the process of constitutionalization the opposition primarily debated the legitimacy of the Fundamental Law according to the last point, this is what I am also going to emphasize. This study, written by Jakab before the initiation of constitutionalization, lists a few principles of the trade which are, according to him, important in the process. As a last theorem, he states:

> '[…] it can be concluded that the constitutionalization has to be done for the entirety of society. Hence, the irritation of the opposition due to the introduction of a new (world view-related) provision which could lead the new Constitution to become some sort of a negative symbol. If there is a religious reference in the Preamble, then a passage which makes the text acceptable to nonbelievers must also be adapted. If we want to treat the new Constitution as a symbolic new start, then one-sided symbolism is the one thing which will damage this in the long term.'[25]

In a monograph, which was the first to evaluate and interpret the new Fundamental Law, the author makes his perspective even more understandable:

> 'The constitution is not only a legal document, but a symbol which expresses the unity of a political community, a country, and a nation. […] If the Preamble has a primarily symbolic role of holding a community together, then it has to be worded in a way which will allow most citizens emotional identification. If we do not take this

24 András Jakab, *Az új Alaptörvény Keletkezése és Gyakorlati Következményei* (HVG–ORAC 2011) 46.

25 András Jakab, 'Az Alkotmányozás Előkérdései' (VI.2010/4) Iustum, Aequum, Salutare 16. On the legitimacy of the new Fundamental Law see Tímea Drinóczi, 'Az alkotmány és az Alaptörvény legitimitásáról' in Péter Fülöp and András Bencsik (eds), *Jogász Doktoranduszok I. Pécsi Találkozója. Tanulmánykötet* (Pécs 2011) 83-99.

into account, then, regardless of content, a portion of the populace will consider the legislative text to be an illegitimate constitution. It will not view it as a symbol to identify with, but as a symbol of rejection. And if this is true for a more significant portion of citizenry, it will raise questions about the legitimacy of the constitution.'[26]

Up until this point, I am in complete agreement with him.

D. The Significance of the 'Process of Adoption'

However, Jakab goes on to say that in his opinion, when examining legitimacy, the procedure of passage is a 'factor of little significance.' In this particular instance, I think that this statement is erroneous. The mode of passage in the Fundamental Law's case symbolized the governing parties' lack of desire to compromise.[27] If that had been present, it would have been possible to create a constitution, which would have been respected by the country's citizens and also by political groups that espouse various political beliefs. The acceptance procedure was not relevant from a procedural perspective, but in this specific case it was notable due to a different, though not less important reason. The process only amplified the shortcomings of the Preamble and other normative provisions, which were criticized by the parties of the opposition and their sympathizers, and it turned the whole document into a question of prestige. The second largest political force in the country made the annulment of the Fundamental Law and its replacement by a new constitution part of its political program. In other cases, as Jakab notes, formal and procedural questions did not pose significant problems of legitimacy, since the population of the country was able to claim the passed document's contents as its own, and what's more, it could respect the values included, while later governmental successes only added to its strength. But this particular procedure of passage demonstrated an approach and process reflecting the forcefully accepted, uncompromising will of a single party with a self-admittedly Christian-Conservative value system – whilst completely neglecting the opinions of parties of the opposition and left-wing intellectuals – making it impossible for the majority of the citizens and their representative political parties to find the new Fundamental Law acceptable.

The reason why the majority of the society does not consider the new Fundamental Law their own follows from the below facts: Political parties that achieved the majority of the votes on the whole – way above 50% in contrast with the 45% of the governing party – at the parliamentary elections of 2014 (left-wing parties and the radical right), fully colluding with their supporting sympathizers have not advocated the adoption of the Fundamental Law; in fact they have most fervently opposed it. Apart from social groups with declared pro-government sympathies nobody has stood by the new Fundamental Law, neither leftists nor the radical right. The current two thirds parliamentary majority of the ruling parties is due to the extremely disproportionate electoral system criticized by the opposition. The social support of the opposition – measured at the election – was greater than that of the governing parties, and I know of no sympathizer who would urge his party to adopt the Fundamental Law. Nor has a referendum been carried out in con-

26 András Jakab '*Az új Alaptörvény Keletkezése és Gyakorlati Következményei*' (HVG–ORAC 2011) 52-53.
27 See also Tímea Drinóczi, 'Constitutional dialogue theories – extension of the concept and examples from Hungary' (2014) ZÖR 87-110.

nection with the new Fundamental Law, which could confute this perception. As such, the confirmation course of the Fundamental Law of Hungary and its symbolic strength greatly affect the law's legitimacy.

In his study, Mihaly Samu approaches the matter differently, but in terms of legitimacy, he also assigns relevancy to the symbolic content of constitutions, and in an indirect way, when he writes about the surpassing of the 'state-centric constitutionalization', he also notes the importance of the 'acceptance procedure'. According to his perspective, it is incorrect to treat a constitution as simply a piece of legislation. He considers it a fact that a constitution also fulfills a comprehensive role. It is a fundamental public life regulator. In his opinion it is not only a law, but it is a basic social norm. It stands above the inner autonomies of various social spheres as a comprehensive code according to the macro-level unity of society as a whole.

> 'Constitutional regulation extends to areas which are far from a legal character, and even more so from the possibility of legal validation.'[28]

He emphasizes that

> 'in modern civil societies, since public life becomes broader, civil society and the state are sharply distinguished. In public discourse, there is a qualitative difference between state institutions, civil institutions, public organizations, parties, and advocacy groups – state-centric constitutionalization lost its existential basis.'[29]

As a critique, he protested that

> 'in the current process of constitutionalization, practical politics ignores the split between the constitutionalizing power and public thought along the autonomy of each of these (especially when [the latter] is not identifiable with the legislative power). One cause of this is the exaggerated role of the political sphere which expropriates constitutionalization, and the other is a notion built on intuitive (haughty) dictatorial (Soviet) experiences, that constitutionalization can only be done through legislation (the legislative creates the constitution as if an ordinary law). In today's political thought there is an absence of the concept that a democratic constitution spans the varying characteristics of all of society; its rules and requirements are not only applicable as laws, but also in the self-limitation of various societal spheres. Because of this the constitutionalizing power's decisive role appears not only in the political sector, but also in the economic, cultural, social, and moral spheres.'[30]

I would mention that state-centric thought was confirmed by the words of a leading governing party politician, when he referred to the right of founding a church as a 'National Assembly privilege.' Another testament to this line of comprehension is the fact that the Fundamental Law ties a number of fundamental rights to the fulfillment of cer-

28 Mihály Samu, 'A Demokrácia és Az Alkotmányozás Fogalma' in *Közéleti Alkotmányozási és Jogpolitikai Tanulmányok. Bibliotheca Iuridica. Publicationes Cathedrarum* (Püski 2009) 95-96, 98.
29 ibid 91.
30 ibid 89.

tain duties. According to Samu, it is the attitude towards fundamental rights which separates state-centric philosophy from contravening views. The former views human rights as the state's benefactions, whereas the latter holds that they have to be ensured against the state.

E. The Attitude of the Government and Governing Parties towards the Symbolism of Community Cohesion as a Legitimizing Element

There are thinkers who emphasize the normative nature of constitutions, but there are very few today who think that a constitution is nothing more than a collection of legalistic rules or notions. In their case it would be a more easily acceptable point of view if they were to equate formal and social/content-related legitimacy. One interesting fact about the situation, however, is that while the governing parties' stance on legitimacy would suppose such an approach, the Hungarian maker of the constitution held the contrary. The extremely long preamble – entitled *National Avowal* – justifies the fact that the governing parties do not view the Fundamental Law solely as a legal standard. This is supported by one of the current prime minister's statements from 2009 in which he said that he had respect for the current constitution, but he did not respect it [sic – *trans*]. He held that the Hungarian Constitution was a 'technocratic collection of rules' which contains nothing that is worthy of a man's respect. In his perspective a constitution must mirror the soul of a country and a nation; it must proclaim who we are, where we are heading, and what we think. He made it unequivocal that

> 'creating a constitution is not party business, and it is not even a parliament's business […] this is a much broader and more important matter.'[31]

Neither did the president of the republic have different thoughts on the above. In his New Year's Day address on the day of the Fundamental Law's entering into force he said:

> 'This is not a hodge-podge, second-hand constitution, and it was not dictated by others. This fundamental law was tailored exactly to us. It contains the system of values and thousand-year past and future of Hungarians. […] From today, the fundamental law will be a force which permeates our lives and keeps us on the right path.'[32]

But we will reach the same conclusion if we read the comments offered by governing party members of Parliament during the parliamentary debate on the Fundamental Law. In his study, Istvan Stumpf refers to Jozsef Szajer – who, according to the governing parties' claim wrote the Fundamental Law's normative text – when stating that

> 'the creators of the Fundamental Law knew that a constitution is not simply a legal text, but it is a document which expresses a nation's emotional togetherness.'[33]

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31 See <http://www.hirextra.hu/2009/11/10/orban-techrokrata-szabalyhalmaz-az-alkotmanyunk/> accessed 9 February 2015; <http://nol.hu/belfold/orban___nem_tisztelem_a_jelenlegi_alkotmanyt_-421861> accessed 9 February 2015.

32 See <http://mandiner.hu/cikk/20120101_schmitt_pal_ujevi_koszonto> accessed 9 February 2015.

33 István Stumpf, 'Az Alaptörvény és Az Amerikai Alkotmányosság' (2013/6) Új Magyar Közigazgatás 4.

Amongst these arbitrarily selected examples, let me include one more. The government defended itself against criticism from abroad by asserting that the controversial passages of the Fundamental Law were simply declarative in nature. Such exclamations do not emphasize the Fundamental Law's normative quality – what is more, they stress that that is not of primary importance. Of course none of this has to have an influence on the scientific positions sketched out above and it is not decisive in any of the theoretical questions. Instead, it further weakens the constitutionalizing power's arguments. The question of the Fundamental Law of Hungary's legitimacy will be decided on an individual basis according to which scientific and/or political viewpoint one holds. However it cannot be challenged that the legislation is applicable, and it should be applied. Furthermore, it is also beyond doubt that, due to the lack of consensus at its adaptation, it is deficient of general recognition and acknowledgement, and a notable part of the country – along with the liberal and leftist camps – openly wants to abolish the Fundamental Law. Parties even included this as part of their political programs.

III. The Proper Relationship Between the Constitutionalizing Power and the Constitutional Court

A. Statement of the Problem and Answers of the Constitutional Court

There seems to be an agreement around the idea that even if we cannot equate executive and legislative powers, the balancing role of the latter shrunk to a minimum against the cabinet. A similar consensus exists on the concept that the main counterweight for these two entities surely possessing the greatest amount of public authority is the Constitutional Court.[34] According to the above mentioned conditions, it is also clear that the National Assembly has no primacy – the Constitutional Court and the legislative branch operate as grouped institutions of power, which, just like all the other branches, are compelled to work together. The question is only whether we can view the practice of the National Assembly overwriting the decisions of the Constitutional Court by lifting annulled laws into the Constitution as correct ones in accordance with the rule of law. Similarly dubious is the introduction of principles on the constitutional level which allow the passage of legislation previously voided by the Constitutional Court due to unconstitutionality. A further question is whether there is a difference between doing this a few times or making it a systematic solution. Finally, it is not clear whether the Constitutional Court's powers can be curbed in certain legislative fields in a way that fits a constitutional state.

The Constitutional Court answered the first two questions definitively:

> 'After a certain point, narrowing the powers of the Constitutional Court upsets the system of separation of powers based on the principle of checks and balances, either for the benefit of the constitutionalizing power, the legislative, or the governing-ex-

34 For example see Mária Bordás, 'A Hatékony állam és a Jogállam Konfliktusa' (2011/3) Közjogi Szemle 15; Nóra Chronowski, Tímea Drinóczi and Judit Zeller, 'Túl Az Alkotmanyon...' (2010/4) Közjogi Szemle 6-7; János Sári, 'Államszervezési elvek és értékek' in *Alkotmánytan* (Századvég 1992) 160-161; István Stumpf (n 33) 5.

ecutive. If the constitutionalizing power attempts to pass a legislative text which was previously struck down by the Constitutional Court by pasting it into the Constitution to avoid the possibility of review by the Constitutional Court, then this is an interference on the part of the constitutionalizing and legislative powers with the system of balance between the branches of power, and it does/could cause serious damage to fundamental rights. Such a "cooperation" between the constitutionalizing power and the legislative will result in the dangerous weakening of the Constitutional Court, and it will not be able to fulfill its tasks of protecting fundamental rights […]'[35]

The dangers of abusive constitution-amending practices are outlined even in the resolution[36] refusing the review of laws amending the constitution, due to lack of competency. The practice of introducing proposals for constitutional amendment as private member's bills instead of a cabinet motion – thus ensuring the lack of societal control – makes the acceptability of the procedure questionable from the viewpoint of the theory of constitution. What is more, it also erodes the societal legitimacy of the Constitution.[37] In a strikingly pessimistic minority opinion connected to the Constitutional Court's decision 61/2011 (VII. 12.), Laszlo Kiss comments as follows:

'A precedent resolution was born, which […] strengthens the power amending the constitution and the legislator in a [practice] in which if he wants to accomplish something at all costs, he can put that into the Constitution. By this precedent resolution, the Constitutional Court will in all such cases stand with an unloaded gun at its feet, and at most, it will express its disapproval. I am afraid that this will allow the dismantling of the state ruled by law and constitutional democracy (perhaps even in a way that will be subjugated to current political interests), in which the main role – due to the lack of substantial control by Constitutional Court – might even be played by its most important institutions, the legislative, and the power amending the constitution.'

The president of the Constitutional Court voiced a clear opinion about the third question at a conference:

'I believe that the retroactive review of legislation has two requirements according to our effective constitution, namely, that constitutional control should extend to all laws without regard to the area regulated, and that the Constitutional Court should be able to void legislations basically without a limitation on their subject matters. […]

35 61/2001 (VII. 13.) ABH.

36 'When considering the requirements of a democratic stated ruled by law […] the serial amendment of the Constitution for the purposes of realizing and accomplishing current political goals is very disturbing. Nonetheless, the Constitutional Court cannot review current political goals' 61/2011 (VII. 13.) ABH. Despite all of this, the majority opinion was that, while it is desirable to preserve the stability of the Constitution currently effective until the Fundamental Law took effect, the constitutional amendment procedure was formally correct according to the Constitution and it adhered to the procedural rules outlined in the law on legislation. As a result, the motion to recognize invalidity under public law was rejected.

37 According to Istvan Stumpf's parallel explanation none of this is troubling, because submitting such proposals as private member's bills is part of the representative's mandate.

> We continue to hold this as an essential interest of the Hungarian constitutional order.'[38]

If state authority – and more specifically, the executive and the legislative power – has competencies that cannot be controlled in any way, and as such are practically not under the rule of law, then the rule of law is damaged. It is not a happenstance that many consider the Constitutional Court essential because of the rule of law – which, in this respect, is a way of binding the National Assembly by law – and to administrative courts because of their role as an organ that overrules acts by the executive members of the state in case they were prepared without respecting the law. By curbing the powers of the Constitutional Court, the National Assembly basically withdrew itself from under the power of the law. It altered theoretical foundations by proclaiming practical interests, and consequently it broke the uniformly actualized character of the theoretical basis.

B. Promoting and Differing Interpretations in Hungarian Jurisprudence

Béla Pokol has an entirely different opinion on the relationship between the Constitutional Court and the National Assembly (and furthermore, the cabinet). According to him the principle of division of power came into being as a unique aspect of American democracy, however, starting in the second half of the 19th century, it was the English model that had spread across Continental Europe, with its house of commons wielding the entirety of the power. In this regime, democracy does not stand for the division of power, but the dismissability of the all-powerful cabinet, the freedom of the press, and the complete independence of judges and their subjugation only to law. For this reason, it was a fundamentally erroneous direction to inch towards the division of power after the democratic transition through measures such as the creation of the Constitutional Court, an independent prosecution, the system of ombudsmen or the National Court of Justice instead of a parliamentary system based on unity of power. Through the Constitutional Court's arbitrary interpretation of law and its overemphasized activities, its constitutionalism, on the basis of fundamental rights instead of that of the law, the Court further aggravated this unfavorable process. He puts it explicitly: 'the [Hungarian] Constitutional Court achieved a globally unique sovereignty in the face of the written constitution.' Based on this tendency, he even pits democracy versus a constitutional rule of law state:

> 'The question arises: why did we – but also a few other Western countries, though to a smaller degree – grow distant from democracy (and the rule of law) towards a "constitutional" state ruled by law?'

He attributes this inadequate path to the sins of 'liberal-leftist' intellectual and economic circles. According to him, it is a fundamentally wrong thought to believe that the principle of division of power has ever been a part of the Constitution. He holds that the Constitutional Court should only operate with a considerably smaller reach. In his view,

38 Péter Paczolay, 'Az Alkotmányozás Kérdései Az Alkotmánybíróság Szempontjából' in *Jogi Beszélgetések 2010-2012* (Kaposvár Megyei Jogú Város Önkormányzata 2013) 89.

the Constitutional Court has significantly overstepped its constitutional authorization by breaking with the Constitution's legislative text and thus creating an 'invisible constitution.' Although he recognizes that since Savigny there has existed a systematic and logical method of interpretation in accordance with the legislator's intention, however he states that

> 'all methods of interpretation have a fundamental common quality: they all have to be based on the legal text, and it is only during the interpretation of this when it is allowed to return to the rules of logic prompted by the legislator's wish or systematic argumentation.'[39]

I do not debate the validity of this statement, but in the case of the division of power, this is not what we were talking about. The subject was rather that the Constitution did not identify the principle itself, but instead it expressed its wish to this end by specifically circumscribing the competencies of state bodies. Thus, the Constitutional Court did not even have to surpass grammatical interpretation when it recorded the principle of the division of power. The Fundamental Law made it completely clear in its normative text that the idea of the division of power was a basic constitutional axiom. Consequently, neither before nor after the Fundamental Law's taking effect could it be doubted that the Constitutional Court, the cabinet, and the National Assembly were constitutionally delegated to the same plane, and as such, we can only assume the primacy of the legislative through false argumentation.

C. On the Content- and Constitutionality-Based Overrideability of Constitutional Amendments

However, the question that surfaced in connection with the relationship between the Constitutional Court and the constitutionalizing power – whether the Constitutional Court has a right to review constitutional amendments due to content-related reasons – should be expanded upon. Within this field, first we have to examine if the competencies of the Constitutional Court extend to a situation in which a measure – in this parliamentary cycle, namely, the Temporary Provisions[40] of the Fundamental Law – elevates itself to the constitutional level.

The Commissioner for Fundamental Rights argued for the ability to identify the competency. He detailed that

> 'The Constitutional Court possesses the competency to review laws which "replace the Fundamental Law," break the uniformity or structure of the Fundamental

39 Béla Pokol, 'Gondolatok a Hatalommegosztásról' rpt in *Tanulmányok Dr. Bérczi Imre Egyetemi Tanár Születésének 70. évfordulójára* (Szegedi Tudományegyetem Állam – és Jogtudományi Kara 2000) 435-440; Béla Pokol, 'Demokrácia, Jogállam, Konstitucionalizmus. A Magyar Alkotmányos Berendezkedés Feszültségei' rpt in *Magyarország évtizedkönyve 1988–1998 Vol I: A Rendszerváltás* (Demokrácia Kutatások Magyar Központja Alapítvány 1998) 409-417.

40 Due the problematic nature of self-definition, after the introduction of the notion, 'The First Amendment to the Fundamental Law of Hungary' took effect on 19 June 2002, which stated that the Temporary Provisions are part of the Fundamental Law.

> Law or open up its subject areas and contents,[41] and which "remove" the competencies of the Constitutional Court with regards to their formal qualities.'[42]

In its 45/2012 (XII. 29.) decision, the Constitutional Court – though it did not clarify its relationship with decision 61/2011 (VII. 12.) – responded the question affirmatively, and overruled certain provisions of the law. According to the majority opinion, while the Constitutional Court considered its practice pertaining to the review of the Constitution and its amendments to be definitive, the Court recorded, after inspecting the Temporary Provisions' place in the hierarchy of legal sources and its relationship with the Fundamental Law, that despite the constitutionalizing National Assembly's attempt at incorporation, the material legal source of the Temporary Provisions could not be considered a part of the Fundamental Law.[43] According to the majority of Constitutional Court justices, regarding the fact that the Temporary Provisions do not have a place in the system of legal sources,

> 'in terms of a legal source, it stands on "no man's land," it goes contrary to the Fundamental Law in several respects, especially with the segment which expresses the principle of the Fundamental Law's unity. The constitutionalizing will cannot be expressed in a legislation which is of mixed subject matter and has an unclear legal source [that is incoherent with the Fundamental Law].[44]

A loophole making such amendments to the Fundamental Law possible – not even considering the fact that it would make the length and content of the Fundamental Law indeterminable – would cause complete legal uncertainty, and would become an instrument enlisted for a single purpose. Skipping over the requirement of allowing the constitutionalizing power to include in the Fundamental Law only matters of constitutional significance that belong to the Fundamental Law's areas of regulation, this would have opened the door to having non-constitutional provisions declared as parts of the Fundamental Law and it would have put them beyond the Constitutional Court's ability to review.

Beyond all the above, after the making of Constitutional Court decision 61/2011 (VII. 13.), several constitutional scholars agreed that the Court's then-effective practice – according to which the Constitutional Court was obliged to refrain from overriding laws

41 Since 'the Temporary Provisions [TP] broke the uniformity of the Fundamental Law, a "Little Fundamental Law" came into being. The TP includes elements which do not belong under and are foreign to the Fundamental Law's areas of regulation. The TP became a law which substituted the Fundamental Law. Instead of being the Fundamental Law's amendment – which is made possible by an incorporation order detailed in the Fundamental Law's Article S – it became possible to simply amend the TP. Through this, provisions in any fields and at any time could become "parts" of the Fundamental Law, without incorporation.' 45/2012 (XII. 29.) ABH.

42 45/2012 (XII. 29.) ABH.

43 That the amended Fundamental Law states that 'The TP is part of the Fundamental Law, on its own does not change the fact that it is a "legislation of mixed subject matter," and as such, it contains provisions which […] overstep authorization. […] its provision did not become part of the Fundamental Law. The TP, as a separate piece of legislation, breaks the uniformity of the Fundamental Law. Consequently, the TP cannot be considered a part of the Fundamental Law, its status in terms of a formal legal source is not clear, and it goes contrary to the Fundamental Law's quality of uniformity.' 45/2012 (XII. 29.) ABH.

44 45/2012 (XII. 29.) ABH.

amending the Fundamental Law and questioning the constitutionality of constitutional amendments – had to be reexamined in order to sustain the rule of law in the state. According to all these authors the reason for this lay in that upon until now

> 'no one dared to think that the National Assembly would include legal content deemed unconstitutional in the Constitution in an unchanged form. No one expected such decay in the culture of rule of law. It is obvious that the Constitutional Court also drew the borders for its own activity with more strictness, which then in turn became unsustainable with the increasing prevalence of a legislative practice which provably violated the foundations of the rule of law and the state based on it.'[45]

The protection of the constitution cannot be reduced to adjudicating about basic rights.

> 'When deciding on constitutional violations, the Constitutional Court must consider and utilize other values included in the Constitution along with basic rights with a synoptic approach. At the same time, the Constitutional Court must credibly and obligatorily interpret the applicable provisions of the Fundamental Law in accordance with the coherent system of constitutional values, related international agreements, mandatory supranational norms, international decisions, and its precedent-level decisions.'

It does this with a constant eye on the uniformity of the legal system and the principle that provisions must not be interpreted in an isolated way but rather in an interrelated fashion, where they have to conform with the entirety of the constitution while the Fundamental Law maintains its internal and external coherence.

However, the question is whether in a case where the given legal provision amends the Constitution itself (or places a law previously deemed unconstitutional amidst the provisions of the Constitution[46]), the institution which was meant to protect the rule of law has any type of instrument to combat corrosive norms. In other words: do the Constitutional Court's competencies include the process of reviewing laws amending the Constitution/Fundamental Law?

There were many approaches aiming at answering this question. The simplest one – which the Constitutional Court applied in decision 61/2011 (VII. 13.), though not clearly or consequently and without the full understanding of its implications – is that they do not. Among the arguments for rejection is the notion that if the National Assembly voted with a two thirds majority to include the given provision in the Fundamental Law, the

45 László Kiss, 'Leépülő Jogállam – Leépülő Alkotmánybíráskodás' rpt in *Pécsi Közigazgatás-tudományi Közlemények 5. A Közigazgatás és Az Emberek* 38.

46 For example see the legislative practice after the Constitutional Court's decision 184/2010 (X. 28.) which overruled a 98% special tax, where the 70/I § – which curbed the Constitutional Court's powers – was included in the Fundamental Law's provisions, clearly with the intention to avoid the constitutional review of legislation aimed at the realization of the administration's political goals. For further reading see Nóra Chronowski, Tímea Drinóczi and Judit Zeller, 'Túl Az Alkotmányon...' (2010/4) Közjogi Szemle 1-11; Tímea Drinóczi, 'Constitutional dialogue theories – extension of the concept and examples from Hungary' (2013) ZÖR 87-110; Tímea Drinóczi, 'A 98%-os különadó megítélései (az Alkotmánybíróság és az EJEB)' (2013/9) Jogtudományi Közlöny 445-451.

possibility of review is excluded by definition, and what is more, in this the case the Constitutional Court would appropriate the competency of the constitutionalizing power.[47] Not to be neglected is the fact that the Court does not possess such powers originating either from the imminent text of the Constitution, or according to any method of deduction, which is also confirmed by its continuous practice[48]. Reviewing this practice is not justified by the theoretical basis that the Constitutional Court cannot change or override the Fundamental Law, which it is obliged to protect,[49] though the Court may submit comments to the legislative, and has already done so.[50]

If our response is affirmative, we have to ask a deeper preliminary question to find the basis for our review, and we have to accept the following conditions. By definition, constitutionalizing power is distinct from constitution-amending power. While the former is not a created but a 'creating' power whose task is to establish a supreme basic order based on all that we have said before in an integrative manner which creates value, the latter is originated from the constitution and its freedom to act is defined by the values enshrined in the constitution and the constitution's provisions.[51]

> 'With this, the exercise of constitutionalizing power and the exercise of created state power is clearly distinguishable. The pouvoir constituant [constitutionalizing power] is not tied to the constitution, but it is a power which creates a constitution. […] The constitutional-amending power, which was meant to alter the constitution, is a power which has been regulated and institutionalized by the [constitutionalizing power].'[52]

The constitution-amending power is bound to the constitution, and it can only modify the constitution to a degree defined by the original power and in cases where there is a social need for it. Furthermore, it may only amend in a manner specifically necessary to satisfy such a need.[53]

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47 The first decision in this field was 23/1994 (IV. 29.) ABH, which serves, among others, as the basis for 61/2011 (VII. 13.) ABH. In this regard, the most poignant insight is offered by 1260/B/1997. ABH: 'based on the constitutional and legal provisions pertaining to the competencies of the Constitutional Court, the Constitutional Court's powers do not extend to the review, amendment, and alteration of the rules of the Constitution, and as such, legislative provisions modifying constitutional rules are also excluded from the Constitutional Court's competencies. The Constitutional Court is not authorized to review constitutional provisions which became a part of the Constitution.' For a summary of the accepted legal practice see 45/2012 (XII. 29.) ABH.

48 For an explanation of the theoretical basis of deviation from this practice and its justification see Tímea Drinóczi, 'Gondolatok Az Alkotmánybíróság 61/2011. (VII. 12.) AB Határozatával Kapcsolatban' (2012/1) Jura 37.

49 It should be noted that the Court did surpass its previous practice by holding illegality under public law possible, though it still excludes the possibility of content-related review.

50 László Kiss says the following about the minority opinion attached to the 'comment': 'I consider the "comment" mentioned in the majority opinion to be insufficient, because the constitution-amending and constitutionalizing power knowingly utilizes the Constitution to achieve the goals of everyday politics. It does not do so accidentally.'

51 For more on the distinction between the constitutionalizing and the constitution-amending power and their characteristics see József Petrétei, *Az alkotmányos demokrácia alapintézményei* (Dialog Campus 2009); Antal Ádám, 'A magyar alkotmányból hiányzó alapértékekről' (2009/I) Közjogi Szemle; Nóra Chronowski, Tímea Drinóczi and Judit Zeller (n 46); László Kiss's minority opinion to 61/2011 (VII. 12.) ABH.

52 Nóra Chronowski, Tímea Drinóczi and Judit Zeller (n 46) 2.

53 András Bragyova followed this line of argumentation in a minority opinion attached to 61/2011 (VII. 12.). According to him, since the constitution-amending power is based on the constitution, it has limits. As a result, when it surpasses these limits, its actions are invalid.

When having established all the above, the questions of whether a created power originating from the constitution can surpass the framework established by an original power, and whether a derivative power can modify the system of standards consisting of non-constituted basic values that stand inherently above it, are answered by the Constitutional Court.

> 'The Constitutional Court always examines the mutual compatibility or incompatibility of a specific legislation with the Constitution. The uniformity of the legal system requires each legislation to be interpreted not only by itself, but also with regards to its coherency with the Constitution. In this regard, the Constitutional Court's mandatory interpretation of the constitution affects the constitutionality of legislative practice.'[54]

The institution created to protect the Constitution can only be inserted into this system if the Court's role is defined within the framework created by the constitutionalizing power. As such

> 'the constitution, as the supreme legal standard, enjoys comprehensive judicial protection, and the entirety of constituted state power falls under constitutional review. This is why we can view this institution and its activity as the pinnacle of the rule of law, because through it the judicial review of the state […] is realized.'[55]

The Constitution's provisions cannot be interpreted separately, since it consists of a system that is free of contradictions.[56] Thus, the Constitutional Court, during its interpretation of the constitution, is obligated to do its best to resolve the tension between provisions, doing so whilst exercising its cue of an 'active constitution protector.'[57] This is connected not only to cases where illegality under public law is at hand, but it is also inclusive of a content-related review. As a constitutional amendment has its content-related limits, 'all constitutional amendments that go against the already achieved state ruled by law is unconstitutional in terms of content.'[58]

From this, it can be clearly derived, that the Constitutional Court's competency with regards to bills amending the constitution is present.

IV. Summary

An interesting feature of the constitutional debate analyzed in the study was that it explored – via their specifically raised themes – problems of public law and constitutionality that have meant the frames of political latitude, state operation and in a narrower sense that of the distribution of power accepted by all ever since the political transition took place in Hungary. Important questions were raised like the one whether the President of the Republic is a counterweight to the government and the parliamentary major-

54 Antal Ádám, 'Az Alkotmányi értékek értelmezéséről' in *Colloquium* 124.
55 Nóra Chronowski, Tímea Drinóczi and Judit Zeller (n 46) 3.
56 See László Kiss's minority opinion to 184/2010 (X. 28.) ABH.
57 See László Kiss's minority opinion to 61/2011 (VII. 12.) ABH.
58 ibid.

ity. Is it all right to constitutionalize without consensus? Can a constitution that was meant to be the frame marking the edges of political latitude turn into the means of power techniques in a state ruled by law? Is it right to override the decisions of the Constitutional Court on a regular basis? May the powers of the Constitutional Court be limited in order to raise the effectiveness of certain legislative matters that are particularly important for the government? Or in other words: can certain powers of state authority be removed from within constitutional review in a state ruled by law? And most importantly: may the remedy for such a type of government operation be found within the frames of the rule of law?

Some constitutional lawyers practically took the position that there is a need for the review of the quarter-century-old legal principles followed by the constitutional court in order to ensure the democratic operation of the state. The way one can consider the above from a legal-technical point of view may, of course, be argued. As to myself, I agreed with the suggestion. Yet from the perspective of the theory of power the cause of this proposition in public law is indeed much more interesting. This is so because the process sketched out above at the same time means that the legislative and the executive powers have crossed limits that have been uncrossed ever since the democratic transition, ones that jeopardize the functioning of the state as a state ruled by law according to the significant constitutional lawyers and constitutional judges among others, ones that fundamentally weaken the system of governmental checks and that thus make it worthy to look for the opportunities to balance this process.

In this research I put aside the analysis of steps of centralization lacking – or, to put it more clearly, neglecting – theoretical basis, and only raised constitutional theory-related aspects of topics debated on the theoretical ground. Yet my study, besides being the analysis of the specific constitutional ideas, is at the same time an open criticism of the system; a critique of a state operation that erodes the idea and culture of the rule of law and the safeguards of the democratic state.