

TIMELY TENETS OF THE HISTORICAL CONSTITUTION
TO AID THE INTERPRETATION OF THE EUROPEAN AND
HUNGARIAN CONSTITUTIONALITY.

... the Hungarian Holy Crown is a state organisation, and despite having the characteristics of its former religious orders and institutions, basically and in essence is a democratic state organisation that manifests itself on the one hand in the sovereignty of the nation covering duly both the nation and the king, on the other hand in upholding the fact that the members of the Holy Crown in court are equal and all are afforded equal liberties. At the same token the Hungarian historical constitution far not impedes, but rather demands the democratic development of the new age.¹ Ákos Timon

“... regardless how uncertain the outcome of the battle is, it cannot bring about final defeat for a generous and courageous nation if it uses all of its strength in its attempt to accomplish its thousand-year old noble mission and to secure the freedom of its people when facing powers having the size many times of its own ...”² Endre Bajcsy-Zsilinszky

We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation. We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State.³ The Fundamental Law of Hungary (25 April 2011)

1 Ákos Timon: *The Doctrine of the Holy Crown* (A Szent Korona elmélete.) Budapest, 2000, pp. 70, p. 35-36. First edition: in: *Political Hungary* (Politikai Magyarország), v. 1, The History of Hungary from the Golden Bull until 1795. Budapest, 1912.

2 Endre Bajcsy-Zsilinszky: Kossuth and the Hungarian foreign policy. *Népszava*. 25.12.1941 19.

3 The last sentence became effective as of 29 June 2018. Seventh Amendment of the Fundamental Law. MK [MK = Magyar Közlöny = Hungarian Gazette; hereinafter: MK] 2018.97. The seventh amendment of the Fundamental Law was approved at the 20 June 2018 regular session of the Parliament.

I.

According to traditional interpretation the historical constitution of Hungary comprises of the decrees and laws of the entire thousand-year history of Hungary, plus the customary law, including the court decisions, and also the strictly relevant jurisprudential and political publications, therefore – in our opinion – all this can be considered as the achievements of the historical constitution.⁴

Let us look at those provisions of the Fundamental Law that place the strongest emphasis on the role and significance of the historical constitution in respect of protecting and preserving our constitutional national identity.

What does the Fundamental Law of Hungary tell us about the historical constitution and the constitutional identity that also may be derived from that?

The Fundamental Law of Hungary (25 April 2011) contains the following statements and orders in connection with the historical constitution:

In the preamble titled National Avowal it is stated:

We are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago. We are proud of our forebearers who fought for the survival, freedom and independence of our country. We are proud of the outstanding intellectual achievements of the Hungarian people.

We are proud that our nation has defended Europe over the centuries in a series of struggles and enriched Europe's common values with its talent and diligence.

We recognise the role of Christianity in preserving nationhood. We value the various religious traditions of our country. We promise to preserve our nation's intellectual and spiritual unity, torn apart in the storms of the last century.

We proclaim that the national minorities living with us form part of the Hungarian political community and are constituent parts of the State.

We commit ourselves to promoting and safeguarding our heritage, our unique language, Hungarian culture and the languages and cultures of nation-

4 In practice, as of now – at the time when we are talking about it – the Constitutional Court recognises only a much smaller area subject to evaluation; however this interpretation must be changed. The methods and possibilities of a total and comprehensive interpretation that covers the entire history of the laws are to be found in the following publication: Ádám Rixer: The place of historical constitution in today's laws. Károli Gáspár University of the Reformed Church of Hungary, Faculty of Law, Budapest, 2012. p. 24-25.

al minorities living in Hungary, along with all man-made and natural assets of the Carpathian Basin.

We bear responsibility for our descendants and therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources.

We believe that our national culture is a rich contribution to the diversity of European unity.

We respect the freedom and culture of other nations, and shall strive to cooperate with all nations of the world.

We hold that human existence is based on human dignity.

We hold that individual freedom can only be complete in cooperation with others.

We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are loyalty, faith and love.

We hold that the strength of a community and the honour of each person are based on labour and the achievement of the human mind.

We hold that we have a general duty to help the vulnerable and the poor.

We hold that the common goal of citizens and the State is to achieve the highest possible measure of well-being, safety, order, justice and liberty

We hold that democracy is only possible where the State serves its citizens and handles their affairs in an equitable manner, without abuse and impartially.

We honour the achievements of our historic constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation. We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State.⁵

We do not recognise the suspension of our historic constitution due to foreign occupations.

We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship.

We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; we therefore proclaim it to be invalid.

5 The last sentence became effective as of 29 June 2018. Seventh Amendment of the Fundamental Law. No. MK 2018.97. The seventh amendment of the Fundamental Law of Hungary was approved at the 20 June 2018 session of the Parliament.

We agree with the Members of the first free National Assembly, which proclaimed as its first decision that our current liberty was born of our 1956 Revolution.⁶

We date the restoration of our country's self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected organ of popular representation was formed.

We shall consider this date to be the beginning of our country's new democracy and constitutional order.

We hold that after the decades of the twentieth century, which led to a state of moral decay, we have an abiding need for spiritual and intellectual renewal.

We trust in a jointly shaped future and the commitment of younger generations.

We believe that our children and grandchildren will make Hungary great again with their talent, persistence and moral strength.

Our Fundamental Law shall be the basis of our legal order; it shall be an alliance among Hungarians of the past, present and future.

It is a living framework that expresses the nation's will and the form in which we want to live.

We, the citizens of Hungary, are ready to found the order of our country upon the common endeavours of the nation.

Article E) (1):

In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity. (2)

With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union.

Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form

⁶ The official version of the Fundamental Law of Hungary that also contains the amendments forming thus a uniform structure, and which version became effective on 29 June 2018, according to its meaning does not contain the provisions that became effective later, but we, however, are listing the applicable parts thereof. No. MK 2018.100. The seventh amendment is referenced with a separate footnote.

*of government and state structure.*⁷ (3) The law of the European Union may, within the framework set out in paragraph (2), lay down generally binding rules of conduct. (4)

For the authorisation to express consent to be bound by an international treaty referred to in paragraph (2), the votes of two thirds of the Members of the National Assembly shall be required.

The Foundation's rules in Art. R are as follows:

Article R)

(1) The Fundamental Law shall be the foundation of the legal system of Hungary. (2) The Fundamental Law and the laws shall be binding on everyone. (3) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution. (4) *The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.*⁸

In the part titled The State, Art. 28. says:

"Art. 28 In the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purposes and with the Fundamental Law. *In the process of defining the objectives of the provisions primarily the preamble of the provision and/or the reasoning used in the proposal to create or amend the provision are to be considered.*"⁹

When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good."

The achievements of the historical constitution are present both in the National Avowal and in the Foundation following the aforesaid pattern, but it is not only about mentioning them at two places; these two places are also connected through the normative power and weight of the achievements of the historical constitution dispensed to them in the Foundation, where they appear as mandatory rules and as a principle for interpretation. Finally, when Art. 28 on interpretation of the law in court mandates that the interpretation of the provisions must happen in concordance with the Fundamental Law, by this rule it extends the mandatory power of the interpretation of the law to every court of law. When interpreting the Fundamental Law, in accordance with par. 3 of Art. R the courts must fulfill their tasks "*in accordance with their purposes, the National Avowal contained therein and the achievements of*

7 Became effective as of 29 June 2018. Seventh amendment.

8 Became effective as of 29 June 2018. Seventh amendment. No. MK 2018.97.

9 Became effective as of 1 January 2019. Seventh amendment.

our *historic constitution*” and provide an explanation of the true meaning of the provisions.

The achievements constituting the backbone of the historical constitution represent the supplementation and extension of the Fundamental Law of 2011 and thus they became parts of the constitution that can be also interpreted as a historical integral process acting as a carrier of contents relevant to public law with mandated application.

The achievements of the historical constitution (AHC) are inseparable parts of Hungary’s constitutional identity.

II. Establishment of further principles on the limitations in cases when the jurisdiction is common with that of the European Union.

Here are some conclusions from the Hungarian Lisbon ruling of the Constitutional Court without the presumption of completeness.

According to Art. 4, par. (2) of TEU *“the Union will respect the equality of the Member States before the Agreements, furthermore their national (constitutional) identity, which is an inseparable part of their basic political and constitutional structure, including the regional and local governments too.”*

The Constitutional Court of Hungary has established¹⁰: *“Hungary’s constitutional identity is not a list of static and closed values; at the same time several of its important components can be used as a good example to be identical with the generally accepted constitutional values of our time: freedoms, power sharing, republic as form of government, respect of public autonomies, freedom of religion, the power of the law, parliamentarianism, equality before the law, acceptance of the power of the judge, protection of minorities living with us. Beside anything else these represent the basis of our historical constitution as the basis of the Fundamental Law and through that the Hungarian legal system.*

...Hungary’s constitutional identity is a fundamental value that was not created, but only recognised by the Fundamental Law.”

Limitations of use in cases when the jurisdiction is common with that of the European Union¹¹:

10 AB Ruling No. 22/2016 (XII.5.) of the Constitutional Court

11 Ibid

1. When the jurisdiction is common with that of the European Union there are two major limitations. On the one hand, the application of the common jurisdiction must not interfere with the sovereignty of Hungary (sovereignty control); on the other hand, it must not violate the constitutional identity (identity control).

2. When making decisions about the common application of further jurisdictions in relevance to rights and obligations included in the treaties of the European Union the preservation of the sovereignty of Hungary must be presumed (presumption of preserved sovereignty).¹²

3. Not even the common application of jurisdictions may result in the people's losing the opportunity of having the final say about the common application of the public authority (regardless if it is executed as a specific country or as a Member State). This is supported by the rule on the recognition by the Parliament as set forth in Art. E), par. (4) of the Fundamental Law, and/or in exceptional cases through invoking the right to hold a plebiscite as described in Art. XXIII, par. (7) of the Fundamental Law.

We believe that among the limitations of jurisdiction application applied under national laws and EU-law the meaning and the interpretation possibilities of the historical public law and of the achievements of the historical constitution depending on the intentions of the authority doing the interpretation are significant. There is a possibility that in the process of making a decision in the matters of Fundamental Law and constitutional rights the weight of the historical constitutional element, the principle, the value, the consideration, the presence of practical experience and experience that can be connected with some laws may change the decision on the issue. There is a possibility that after opening the repository of the historical constitution having also the basic constitutional principles of our modern age in our possession (if preferred contrary to them or rather reinforcing one over the other) a different, more correct decision might be brought about that serves the public welfare better than the one that might have been issued before. Our intention is to examine this possibility with more emphasis with our analysis.¹³

12 The same position is outlined in AB Decree No. 9/2018 (VII.9)

13 More in: Zsolt Zétényi: The achievements of our historical constitution and the Fundamental Law of Hungary of the year 2011 (Történeti alkotmányunk vívmányai és a 2011. évi Alaptörvény), 2015, Kairosz Publishing House, pp. 216.

III. Interpretation platforms of the historical constitution – Basic principles and derivatives

As we have already indicated the entire historical decree and the resulting laws, furthermore the customary law – including the court decisions and the jurisprudential and political publications in close relevance to them – can be regarded as the achievements of the historical constitution. It is sufficient to examine the English constitution or the *acquis communautaire* (aki k my-not r) concept of the European Union, which stands for “community achievements”. *“The EU provisions and the itemised statutory provisions are included in a capsule consisting of principles, non-mandatory recommendations, statements and opinions, rulings of the Union courts or other judicial authorities, technical rules, and internal agreements of various institutions, which ... many times have a significant effect on the practical application of the Union law.”*¹⁴ Thus, in my assessment the professional forum engaged in the interpretation of the constitution may not avoid the examination of the constitutional domain that had been expanded in such manner; this forum once having familiarised itself with the entire issue may consider the actual achievements that in the given context have significant relevance. While the Constitutional Court has temporarily stopped at the well-definable laws of the late modern period of our history, and others have extended this circle to include also the 1848 April laws (Trócsányi¹⁵), in my opinion there is no sufficient reason to exclude the not strictly definable legal traditions – referring here to the previous definition –, like especially the Admonitions of Saint Steven and Anonymous.¹⁶

The interpretation platforms, principles and derivatives that will follow may be considered purely intellectual products that are malleable when comparing them to the text of the laws, however, if the researcher succeeds in grasping the inwardness of the language of the old laws, traditions and of the people of the past, which together constitute the wide interpretation of the

14 The term Union achievement is a substantive one, 1. for example Art. 20, par. (4) of the European Union Rules. In many respect the term has been expanded, because nowadays we can read not only about Union achievements, but for example also about the “Schengen achievements” („l’acquis de Schengen”), 1. EUMSz Art. 87, par. (3). See: László Blumman: The rights of the European Union in practice. HVG–ORAC, 2010, p. 52-53.

15 László Trócsányi: *Quandaries in analyzing the constitution (Az alkotmányozás dilemmái)*, Budapest, 2014, pp. 65

16 For the methods of complex interpretation please see footnote No. 3: Ádám Rixer: The place of historical constitution in today’s laws. (A történeti alkotmány helye mai jogunkban).

history of customary laws – this may become a useful tool in vivisectioning the true meaning of the historical constitution.

When considering the current political status of Hungary within Europe, from the basic principles the following deserves special attention:

1. *The principle of independence, as a freedom principle, according to which the state separates itself from other major powers by its own decision – “Hungaria semper libera!” Hungary is always free.*

The historically defined fundamental principle of independence is manifested in the state’s and the nation’s independence.

According to the fundamental principle of national sovereignty, which embeds the sovereignty of the people too, the source of all powers is the Hungarian nation;

In the history of the Hungarian constitutionality, the sovereignty of the state and the protection of the constitutionality prevailed from the very beginning on – with changes after overcoming the time-to-time reoccurring unconstitutional conditions. The Hungarian state has always been a sovereign one from the very beginning on; it found limitations only in its own will: in the law and in the international treaties. Its self-reliance and independence required constant protection. Its history, although militarily not always successful, but considering the consequences being those the constitution-restoring laws, from the point of view of constitutionality is a history of successful independence wars.

Cum Deo Pro Patria et Libertate! Hungaria semper libera! – With God for the homeland and liberty! Hungary is always free! – this was the desire, the constant objective and intellectuality through thousand years, marked by years like 907, 1030, 1241, 1556, 1526, 1606, 1707, 1790-1791, 1848-1849, 1956...

The latest formulation of this principle, the right of the people and the nation to self-determination has been included in many international treaties of our time¹⁷;

According to Art. B) of the Fundamental Law the source of the public power is the people; this power is vested in the elected representatives of people and in exceptional cases directly in the people themselves. The vested state power is not without limitation; the Parliament may take actions only within the framework of the Fundamental Law. The limitations of the power of the Parliament are defined by the applicable provisions of the Fundamental Law [Cp. Decision No. 2/1993 (I. 22) of the Constitution Court, ABH 1993, 33, 36.]. As long as Article B) of the Fundamental Law contains the principle of sovereign statehood

17 Universal Declaration of Human Rights, 1948. International Covenant in Civil and Political Rights, Art. 1. “All peoples have the right to self-determination. According to this right the people freely determine their political status, pursue their economic, social and cultural development.”

and designates the people as the source of the public power, these provisions cannot be voided by the EU clauses of Article E). This was the opinion of the Hungarian Constitutional Court in its decision nicknamed “Hungarian Lisbon” on the basic principle of respecting our national identity by the European Union.¹⁸ The principle of sovereignty of the people as it appears in the historical constitution and the stipulation on the same subject in our current Fundamental Law represent the same institution. The historicalness confirms the constitutional principle of the present, which then obtains historical identity through this, therefore its weight and significance will increase multiple times.

The contents of sovereignty and the constitutional identity are not completely identical, because the latter includes many other elements too; still we are talking about partially identical interdependent institutions.

In the historical constitution, we can also find the roots representing the striving of the civil society to preserve the citizens’ independence from the state and to protect their freedom, assets and rights.

2. *The dignity and protection of the individual.* According to the other side in the state the individual himself is also a sovereign power, a value to be protected. – The content and emotional load of the principle in the English idiom “*My house is my castle*” has also been similarly accepted and used in Hungary as well.

The individual is not a servant at the mercy even of the highest power. The individual (a member of the political nation) is the highest value to be protected by the state, and at the same time it is also the source of power as a component of the sovereignty of the people. The task of guaranteeing the individual’s rights and freedoms – with today’s words: the basic human rights – is equivalent with the national interest.

The strength and the effectiveness of the civil society are based on the individual’s dignity and self-determination.

3. *The principle of self-governing based on self-determination*

Self-governing through elected offices is a thousand-year old essential and indispensable element of the Hungarian constitution, primarily in the fashion of county governments, but in other forms (like seats, districts, professional classes, guilds, churches, religions, associations, etc.) as well.

18 Constitutional Court decision No. 22/2016 (XII.5) AB

The bastions in our public law battles were the counties, thus the self-governments always had an enhanced role in the Hungarian public law in trying to defeat the autocratic attempts.

In the process of self-governing the minority, ethnic and religious self-government occupy another big area. Our history is a large repository of (religious, ethnic etc.) self-governments. *The civil society, as the source of power, protects its interest and values from the state that is in the process of distancing itself from public welfare, fairness and democracy through its self-governing organisations. For this purpose, for the preservation of these values the civil society is entitled and depending on the circumstances is obligated to create and operate a framework of international civilian organisations.*

4. Sovereignty of the people – being a member in the Holy Crown – equality in constitutional freedom – equality of the citizens before the law.

The root and the source of every secular power is the nation, which embodies the Holy Crown in its entirety – if there is a crowned king, then with him, and if there is not any, just by itself, nation represents the entire major power. The members of the community who represent the sovereignty of the people, the total number of Hungarian citizens (since 1848) being coordinated in upholding this sovereignty act like the brotherhood of the members of the nations. The historical status of this coordination as being the members of the Holy Crown regardless of language, religion and belonging to any ethnic community (contrary to the principle of subordination and superiority) is suitable even today to create a real national community and to protect the social interests and social values.

Except for some very exceptional cases, the Hungarian nation did not recognise and still does not recognise any individual power above itself. The loyalty and the devotion are addressed to the Holy Crown, just like the service, which is also rendered to it. Historically the ideological and normative proofs for the sanctity of the principle of coordination can be found in the Holy Crown doctrine as presented by Werbőczy.¹⁹

The forms of governments that existed throughout the history of Europe, where the sovereignty belonged either to the people or to the king, carried the seed of danger of allowing a minority to have autocracy. This could materialise either as an absolutist monarchy or as total dictatorship “in the name of the

19 István Werbőczy: *Tripartitum* (Hármaskönyv). *Corpus Juris Hungarici* 1000-1895. Special millenium edition, 1997. Edited by Dr. Dezső Márkus, Part 1, title 3, part 2 titles 3 and 4

people". In the Hungarian historical constitution at the times when there was a king on the throne, in principle and conceptually it was not possible that either the people (or their representatives acting in their name) or the monarch (head of state) rule constitutionally, legitimately and at the same time exclusively, because none of them could have exclusivity. *The power of the state in our time is shared and controlled, and it is a historic fact that mutatis mutandis was one of the characteristic features also of the shared and controlled power in the historical Hungarian state during the middle and modern ages.*

The historical constitution defined in the Holy Crown doctrine represented these items and principles, regardless if the principle of power and the system ruling with the power – although this principle and system were never legally implemented or abolished –, if they had the same name or not. It is to be noted that according to some authors of the first half of the twentieth century the principle and system were democratic and fit well the liberal principles of the bourgeois era; however today in their present forms, they do not demonstrate complexity. Barna Horváth, the excellent jurist specialising in natural law and also a legal philosopher (1896-1973), an expert of the Anglo-Saxon legal systems and the rule of law theory has successfully placed the Holy Crown doctrine and the Hungarian historical constitutionality among the examples of the institutional manifestations of the principle of rule of law upon which the power of law and the state founded on the rule of law are based, comparing it with the Anglo-Saxon doctrine of the rule of law and the German concept of the Rechtsstaat.²⁰

The doctrine of the Holy Crown obviously does not play out nowadays in its entirety; partially – among other things – because the form of government and the state organisation historically are not identical with those of the past, furthermore also because the internationally prevailing culture of the law and the multitude of concepts currently used, the political and moral principles and views, and the view of world have changed and the respect for Christian values has drastically deteriorated, although by judging from the survival of the historical constitution, not insurmountably.

The Fundamental Law of our age with its entire weight recognises, appreciates and respects the concept of the Holy Crown beyond its theoretical value: *We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation.*²¹

20 Barna Horváth: *Power of law and dictatorship (Joguralom és parancsuralom)* In: Jogállam, Year 1993, No. 1, pp. 71-78.

21 The Fundamental Law of Hungary* (April 25, 2011), Adherence to our national identity.

4. *The basic principles concerning the organisation of the society and upholding values that can be concluded from the sovereignty of people are significant. These principles have been long embedded in the historical constitution, and at the current time, we have the right to demand them – especially in form of subsidiarity and solidarity – from the European Commonwealth.*

Key concepts in the way of thinking of the human communities (civilian society) that is separate and distinguishable from the power holders are the subsidiarity and the solidarity that can also be considered as the principle of the organisation of the society, and principle of societal and human connections.

Solidarity is derived from the principle of *in solidum obligari* (Latin), meaning to be responsible for the whole. Everybody is responsible for everybody and everybody has the same rights; and a human by its nature is in the need of the actions of dialogue, love, acceptance and recognition. Solidarity of course is valid for the society as well. According to Renan, the great French philosopher of the 19th century the condition of the existence of a nation in an “everyday-plebiscite state” means the sharing of the pride of the past and sharing the same desire in the present. Another French philosopher Michale said: “the nation is one enormous solidarity”. According to Illyés: “to be Hungarian is the question of acceptance and not of birth”. The term subsidiarity originating from the Latin “subsidium” – “help” – means that activities and decisions that by nature belong to a lower level, must not be transferred to a higher level. The central organs of the state are prohibited to interfere with local matters.

In the process of international cooperation of the countries one can refer to the principle of subsidiarity, which – among other things – jointly with the solidarity define the framework of the responsibility and the authority of the state too. The same is true according to Christian teachings as well, namely that if the individuals can accomplish something using their own strengths and skills, it is prohibited to remove that thing from their authority in order to pass it on to the community to accomplish; it works the same way as with smaller and larger communities, namely if a smaller, less elaborately organised community is capable of carrying out a task and maintaining it, it is unlawful to pass it on as a task to a larger, more elaborately organised community. It is considered a serious crime that also upsets the proper order of the society.²²

The essence of every activity of the society is to use all of its strength within to help and assist the individual parts of the whole society without

The final text after the seventh amendment.

22 Pope Pius XI, Quadregesimo Anno 79.

swallowing or disintegrating those. These principles are valid on the basis of the natural law, and not on the basis of some concocted theory also in the international communities and in certain national communities in the relationships of the international commonwealth with the national governments.

The societal action presumes a joint, coordinated and shared mentality too. This mentality is also present in the historical constitution, where the conceptual and practical facts of solidarity and subsidiarity can also be found. It is sufficient to recall our freedom fights for the restoration of our constitution when the nation achieved constitutionality, by restoring it. The fights of our society for the protection of our constitution are the most beautiful manifestations of solidarity. The example of subsidiarity is the entire history of Hungary by itself with the principle and the practice of self-government contained therein, with the county system, the religious and ethnic autonomies (just think of the historical status of the Székely people, the Saxons' autonomy in Transylvania and Upper Hungary, the Jazygians' and Cumanians' autonomy, the Haiduk regions, and so on).

These principles are based on the sovereignty of the people being the most important fundamental principle of the Hungarian constitutionality, according to which the source of every power – even the origin of the power of the Holy Crown – is attributable to the authority of the people. The principle of the sovereignty of people and the examples and practical application of subsidiarity and solidarity upon which this principle is based is an expressive process stretching from the past of the historical constitution up to present times. This process does not stop at the national and state borders; instead, it penetrates the international community built on European Christian traditions. The mandatory application of these principles may be demanded from the leading international institutions as well, for they too are obliged to apply the principles of solidarity and subsidiarity.

When summarising the previously mentioned deliberations, it can be stated that the life of the society concluding from the sovereignty of the people is permeated – besides other requirements – by three principles of Christian origin, which is typical of the historical constitution as well and which can be demanded to be present in the commonwealth relations as well.

The first one is the protection and value of individuality, of the person who is an individual and a social being at the same time. Part of the evolution process of the person's individuality is that he helps his fellow men to reinforce their individuality and does not restrict them in preserving and nurturing their culture, ancient traditions and their lifestyle. The way humans realise

their own true being is by exceeding themselves; they do good, look for value and then apply it in life. Finally, they turn to God.

The second one is the principle of solidarity, which covers the service done for the benefit of the public and represents fairness. According to the fairness principle included partially in the public benefit, everyone has the right to basic vital conditions and socially disadvantaged people and ethnic groups deserve special support.

The third one is a great society organisation principle, the principle of the subsidiarity, which can be interpreted with an approach from the individual, the society and also of the international commonwealth. According to the proper interpretation of this principle both during the life of the individual, and in the society every decision has to be made and every action has to be carried out on the lowest possible level, where the action still can be carried out. *Mutatis mutandis* is valid also in the intergovernmental relations. This can be demanded from the European Commonwealth too as a principle that serves the development of the individual, is beneficial to the public and nurtures fairness, all at the same time.

5. *Accepting aliens – a fair assessment on the basis of public benefits and common sense.* This was applied during the history of Hungary starting from Saint Steven's Admonitions all the way to the occupation of Hungary by the Turkish Empire.

In modern times when foreigners were settled and immigrants came to the significantly devastated Hungary it resulted in ethnic changes that shook the position of the Hungarian people who founded and created the country and its government.²³ The history of Hungary has taught us an important fact and a fundamental lesson that foreigners have caused significant losses of life for the country.

The Mongol invasion of 1241 caused incalculable damages and the death of a very large number of people. The consequences of the Islamic occupation during the Turkish era from the beginning of the 16th century until the end of the 17th century that lasted for about 150 years were: significant damage, destruction (with targeted genocide) and loss of part of the population. According to reliable assessments during the last long peace period, which was the flourishing time of the Empire at the end of the 15th century, the population of the country was around 3 million people. This number is close to the population of contemporary England. However, due to the described destruction, the loss of life during the series of wars, the large number of foreigners

23 Some questions in the refugee issue with the consideration of the Refugee Law. 2015.

that were settled and immigrated to Hungary by the end of the 18th century created an ethnically mixed, multinational country and only 30 to 33% of the population spoke Hungarian as their first language, while in the 15th century this number was 75 to 80%. This low ratio, however, at the beginning of the twentieth century and in the second half of the nineteenth century i.e. the ratio of the people who founded and kept building the country and whose first language was Hungarian barely exceeded 50%. This was the situation despite the fact that more than half million Jewish immigrants, escaping primarily from the East were accepted here amidst favourable economic conditions and with the guarantee of equal rights. This ethnic diversity was presented as the reason in 1920 and before, then in 1947 when the major powers after the Second World War attempted to rip apart this historic country in their attempt to kill our nation with their arbitrary and unjust action called “peace settlement”.

When coming back to Saint Steven's Admonitions it is the wrong approach to presume that the author of the Admonitions would have supported mass immigration, therefore it would be a mistake to take the Admonitions into consideration.²⁴ Historians specialising in medieval history have no disagreement regarding the statement of the great King, when he said “a country with one language and one custom is weak and pitiful”²⁵, which is meant to say only that the princely court of the Hungarians, the political and cultural centre should accept dignitaries, soldiers and clergymen, because they would contribute to widening the horizon and enrich the knowledge of the people of distinction already living there, which in turn will strengthen the country's political leadership, because they will become familiar with the culture,

Manuscript with the author.

24 László Trócsányi: *Quandaries in analyzing the constitution (Az alkotmányozás dilemmái)*, Budapest, 2014, pp. 65. This example indicates that the achievements are to be taken from the entire historical constitution, thus the interpretation requires the use of multiple methods, including the historical one too and not just the grammatical method. The current opinion issued by the Constitutional Court, according to which it accepts the legislation of the late modern age from 1867 as the basis of interpretation is disputable.

25 The Latin version of Saint Steven's Admonitions has been preserved in several codices; the edition that is considered to be authentic has been published in *Imre Szentpétery's Scriptores Rerum Hungaricarum II*. Budapest, 1938. pp. 619-627. The text was edited by József Balogh. The translation appearing in this edition was prepared by Ágnes Kurcz, and it was published under the title: Remembering King Steven (István király emlékezete). Budapest, 1971. pp. 27-35.

The old editions in chapter 6, section 3 say: “As you see, weak and fragile is the country with one language and with one moral.”

the way of thinking, the strategy and fighting techniques of other Christian countries.²⁶ At this time, a calculated policy on the protection of the national identity could not be entertained... *The acceptance of aliens was handled even instinctively with a fair assessment based on its benefit for the public and with the use of common sense; thus it did not mean any risk for the customs and the culture of the country.*

*"A country can survive only if it has an accepted culture, a set of customs and moral basis, which is also accepted by the determining portion of the population. Having a dominant culture is not really subject to discussion, it is the essence of survival or non-survival of a nation."*²⁷

Using Hamlet's words: *"To be or not to be; this is the question."*

The primary condition of the existence of the country's and the people's sovereignty is the preservation of language and cultural identity of the country, the protection of the linguistic and cultural identity of the population that in itself is the state; protecting them among other things from uncontrolled mass immigration and from all other processes that may endanger this entity. This is the basic obligation and legitimate basis of every sovereign state. The consequences of immigrations and settling foreign people in the country in the 17th through the 19th centuries allowed us to draw this conclusion. The immigration policy of Hungary is the outcome of this conclusion and represents a segment in the nearly hundred-year-old process.

According to the seventh amendment of the Fundamental Law, its Article XIV has been amended to say that "(1) *foreign nationals cannot be settled in Hungary [...]* (4) If the non-Hungarian citizens do not get protection from their country of origin, nor from any other country, upon their petition Hungary will provide refugee status to them, provided they are being persecuted in their homeland or in the country of their temporary residence because of their race, nationality, social affiliation, religion or their political views, or if their fear from immediate persecution is well founded. *Non-Hungarian citizens who have arrived to Hungary through a country where they were not exposed to persecution or to an immediate danger of persecution are not entitled to refugee status.*"²⁸

26 Zsolt Zétényi: Saint Steven's admonitions and foreign policy (István király intelmei és az idegenpolitika). Hítel, December 2015

27 Tamás Fricz: The survival of the nation is at stake. (A nemzet megmaradása a tét), Magyar idők, 1 September 2018

28 Became effective as of 29 June 2018. Seventh amendment. Art. 5. MK 2018.97.

6. Value-principledness

The legislation works and the application of the relevant rights and obligations is carried out under the premise of Christian spiritual-moral values adhering to the principle of fairness and the need to be beneficial to the public.

In Hungary, the organisation of the government was based on Christian values and objectives from the very beginning on and during the thousand years of existence of Hungary, this is what it adhered to as a state and society. The three men as the flag bearers of the concept of the European idea, the big Christian Empire who nurtured it already at the time of the first millennium were: Pope Sylvester II, Otto I of the Holy Roman Empire and our king Saint Steven.

Our slogan, “CUM DEO PRO PATRIA ET LIBERTATE” used in one of our great freedom fights for the restoration of our constitution, expresses well the direction and goals during the history of Hungary, which direction and goals were also present in the greatest freedom fight of the world against Communism. “With God for the homeland and liberty”, that is for the constitution. With the power of the divine Caretaker, with the Lord of history for the homeland and liberty. God, homeland and the constitution (as an entity embodying the listed values) were the basis of the value-principled historical Hungarian fights.

“God bless the Hungarians!” This is the first sentence of our 200-year-old national anthem, but also the first sentence of the text of the Fundamental Law of Hungary (25 April 2011 version). According to Article R) of this document, which we have mentioned already and which also stands for the value-principledness, *the protection of the constitutional identity and the Christian culture of Hungary is the responsibility of every institution of the state* (par. 4).

Article 28 of the Fundamental Law remarks in the spirit of value-principledness that during the application of the law the courts interpret the text of the provisions primarily in conformity with their objectives and also with the Fundamental Law, which document even according to its critics is value-principled. This underlines the principle through the mandatory order according to which *“when interpreting the Fundamental Law or legal regulations, it shall be presumed that they serve moral and economical purposes which are in accordance with common sense and the public good”*.

The civilian society – as the carrier of the national conscience – in cooperation with the state, stimulating it if possible and working against it if necessary, will strive for the strengthening and protecting the constitutional identity and Christian culture of the country.

IV.

From among the principles originating from the fundamental principles obtained as the result of the above interpretation process, the following have significance considering our place and self-interpretation within the system of interrelations of the European powers:

1. *Limited, shared and controlled use of power. “Those who elected freely the chief to be their leader, should not be excluded, nor their progeny from the council of the chief, – furthermore all of them should get their share of the bounty (homeland) for which they had fought jointly.” (Blood oath)*²⁹

The king cannot make decisions without asking the nation, and the nation cannot create laws without the king’s approval, as it stands in the TRIPARTITUM, plus in a series of laws before and after it, as it has been referred to.

The previously mentioned tenets of the Holy Crown doctrine about the joint, mutual and limited use of power can be found in several laws.

2. *Ban on the autocratic use of power.* This principle also in consideration of the previously described principle of *limited, shared and controlled use of power* is the fundamental principle of the Holy Crown doctrine that is of the coterminous historical constitution. The power can be used only jointly by the king and the Hungarian nation under his rule. The king does not have independent power separated from that of the nation, because the rights that represent the entirety of the power and the completeness of the state belong to the Holy Crown. The power accorded solely to the Holy Crown, which is the power of the constitution, may exist even without a king; the source of the power is the nation. The head of the state, however, without the nation is capable of creating autocracy only. *Mutatis mutandi* even today is still the principle of the rule of law, the fundamental principle of constitutionality.

3. *The right to resist the unconstitutional power.* *Ius resistendi et contradicendi.* The right to resist and oppose is one of the securities to assure the application of the law on the basis of the historical constitution.

29 ANONYMUS GESTA HUNGARORUM, Chapter 6.
Translated by: Dezső Pais <http://mek.niif.hu/02200/02245/02245.htm#7>

Even later, the Hungarian nation considers the right of resisting the unconstitutional power (which already existed even before the Golden Bull, and can also be found in the blood oath sealed before the original settlement of Magyars in Hungary) as a basic right rooted in the historic constitution.³⁰

The lack of confirmation of this right, moreover its rescinding was one of the reasons of the beginning of Rákóczi's War of Independence. The violence of the upheaval, aimed at destroying order, in other words a revolution, can never be constitutional. On the other hand, a freedom fight aimed at restoring the independence can be constitutional and legal, because the law is never supposed to back down before illegal violence. A similar order can be found in the part titled Foundation, Art. C of the Fundamental Law of Hungary.

According to the Fundamental Law of 2011, everyone is entitled to and must take action using legal means not against every violation of the constitution, but against any attempt with *"the aim of acquiring or exercising power by force, and/or of exclusively possessing it."*³¹

One of the criteria of lawfulness is to defeat the attempts of violent power grabbing or power use, and/or the attempts of possessing exclusive power exactly in the interest of preserving the constitutionality and the rule of law.

The other criterion of lawfulness is the respect of the fundamental values, the people's right to live and to have human dignity. The requirement that will make the resistance lawful is to reject violence and to protect the peace and public order of the society.

The civilian society – as the source of power – must use the tools of active resistance too, reinforced by the historical traditions that have the power of the constitution, against the government, groups of the society and individuals who intend to eliminate the constitutional power and the civilian society itself by force and/or by turning it into a society where they are exclusive users of power. The civilian

30 Blood Oath "the fifth tenet of the oath", Golden Bull, section 31, *ius resistendi et contradicendi*. Section 2 *If, however, we or any of the kings who will come to rule after us would act against this contract of ours this letter shall empower both the bishops, and other feudal landlords, and nobles of our country jointly and one by one, those present and those to come, as well as their successors to resist and oppose us and the kings that will come after us without any shame for all disloyalty forever.* Article 31. <https://net.jogtar.hu/ezer-ev-torvenyei?pagenum=2>

31 Fundamental Law of Hungary (25 April 2011) Article C (1) The functioning of the Hungarian State shall be based on the principle of division of powers. (2) No one shall act with the aim of acquiring or exercising power by force, and/or of exclusively possessing it. Everyone shall have the right and obligation to resist such attempts in a lawful way. (3) The State shall have the right to use coercion in order to enforce the Fundamental Law and legal regulations.

society controls the government and demands from it to live up to the requirements of constitutionality, democracy and public honesty.

4. *Protection of the assets of the community, the national assets as the historical consequence and intellectual heritage of the Doctrine of Possession in the Holy Crown*^{32 33}.

Considering the spirit of this statement it is justified for Hungary to file a motion on the basis of Article 48 of the Treaty on European Union requesting to begin an ordinary revision of Article 345 of the process of the Treaty on the Functioning of the European Union (TFEU) at the European Council for its amendment – in concordance with the common law – and to discontinue the practice of considering the arable land as a capital when its ownership right is acquired, thus restoring the jurisdiction of Hungary and of all other EU Member States to handle the regulation of land ownership and land use nationally in a lawful manner.

The individual accession treaties define the applicable self-determination of the 28 Member States of the EU in regard to the land within their area of sovereignty (while differentiating between the legal statuses of the two groups of countries) contentwise in a totally different manner. The first group of countries consists of the Sixes who founded the EEC and the 9 Member States, which joined them later. They are the Fifteens. In regard to the self-determination in the area of land market Cyprus, Malta and Slovenia also belong to them, because – while these countries joined the EU along with the East-European entrants and obtained membership therein as of 1.5.2004 – they became exempt from opening the market for their lands allowing free capital movements (the Eighteens) exactly the same way. On one hand, the Eighteens, and on the other hand, the Tens have different status in regard to self-determination in the area of land rights. This is in conflict with the historical traditions of Hungary and with the principle of equal rights for all EU Member States.

32 According to the Doctrine of possession in the Holy Crown that was effective till 1848 the source of any right to possess was the Holy Crown, which meant that in case of death with no legal heirs left behind and treason the right to possess goes back to the Holy Crown – The owners of the assets obtained through inheritance (ancestors' property) had only the right of possession and enjoyment. There were heavy restrictions on selling and on taking out mortgage on them; inheriting it was absolutely not possible.

33 This is what the second section of the oath said: All should share the goods and chartels that we attained jointly. Blood oath. ANONYMUS GESTA HUNGARORUM, Chapter 6. Translated by: Dezső Pais <http://mek.niif.hu/02200/02245/02245.htm#7>

5. *Equal rights for nationalities and ethnic groups*, according to which the state does not discriminate between the individuals based on their nationality and ethnicity, and does not apply the law differently for the different nationalities – contrary to the old system of the Western-European practice that was accepted at many places – unless they have demanded it.

6. *The right of complaint*. Long time ago the Diets used this artificial term *gravamina et postulate*, which was the title of the list of complaints and grievances.

These *gravaminas* were collected at the county meetings where the election of the envoys (representatives) to the Diet took place, and the envoys carried them to the Diet. At the Pozsony Diet, it became a guaranteed rule that the Diet was not allowed to discuss intended issues until the monarch or Commissioner of the Diet addressed the *gravaminas* in an acceptable manner. This is the reason that in Hungary the ombudsman system known from the Scandinavian countries could not be established, because here the entire Diet acted in unity to protect the feudal constitution and to find solutions to the grievances addressing them to the monarch. After the transition into bourgeoisie, the *gravaminas* disappeared, and the right of complaint remained as security for the protection of constitutionality.

Still, however, during a significant historical period the complaints and grievances of the citizens of the country that is the contemporary civilian society, along with the measures to remedy them were placed before the motions of the monarch.

Summative thoughts

1. *The place and the legal status of Hungary within the European Commonwealth is a matter of vital importance*. In this respect the limits and framework of the constitutional identity define the considerations and the consequential actions of the state to be applied that are related to the Hungarian constitutional law and international common law, and in this sphere of concepts the three essential principles along with the essential laws are the constitutional principles in our present time. These easily recognizable principles that have their roots in the historical constitution represent the essential historical choice of values that have shaped the destiny of the nation:

First, the principle and the practice of independence;

Second, the principle of the people's sovereignty and the adjoining requirements and historical facts;

Third, the right to resist and oppose any unconstitutional power;

The outline of all three requirements is easily definable from the earliest periods of the historical statehood (blood oath = Anonymous, Saint Steven's Admonitions, the resistance clause in the Golden Bull, the laws concerning the succession to the throne, the diplomas issued by the Hungarian kings at their coronation, the freedom fights and the independence declarations and the dethronement statements as the result of these fights, which then were followed by the peace treaties and laws restoring the constitution.)

2. *"The Hungarian Constitutional Court identified the concept of constitutional identity as the constitutional identity of Hungary and analysed its content case by case under the consideration of the entirety of the Fundamental Law and/or its individual provisions in concordance with Article R), paragraph (3) of the Fundamental Law regarding its objectives, with the Adherence to our National Identity and with the achievements of our historical constitution."*³⁴

The Hungarian constitutional institutions must be on the lookout for the prohibition of *ultra vires* (misuse of community authority) and for staying within this power as a requirement of the constitutional law. The state in the international arena may claim and the Constitutional Court within its powers may establish the non-applicability of those legal actions of the European Union that were taken without the authority thereof.

In our current relation with the European Commonwealth and experiencing the present attempts, it is especially important, necessary and justified to protect our constitutional and national identity even on the basis of the chronology of historical legal principles referenced within. The Hungarian state has no other choice, because it is obligated to protect the essential values of the country with mandatory power. In this contextual system, the principles of the historical constitution are not mere decorative elements. When weighing the conflicting principles, and mostly the interests, their place is in that pan of the balance scale and with determining weight, into which the values of constitutional state and national identity were placed.

3. It is also necessary to consider the historical tradition, which made it possible and justified the resistance to unconstitutional powers constitutionally. The right to resist has not ceased to exist even with its formal abolishment in 1687 as the historical examples and the outstanding legal publications prove it through Rákóczi's War of Independence, the Independence War of 1848-1849 up to the events of 1956.

34 AB decision 22/2016. (XII. 5.) of the Constitutional Court [64]

The resistance to and the opposition of an unconstitutional authoritarian international decision belongs in the same category of values and interests as the story of our armed freedom fights. In these fights, the nation took up arms again to fight for the protection of the constitution against an international power that was many times stronger than it; our constitution-restoring fights were not destructive ones, but legal freedom fights for the restoration of the constitution! Constitutional and national existence or the non-existence was at stake. In this respect, *our historical constitution carries an unprecedented collection of principles and moral values unlike forces and societies that never faced the danger of annihilation during their national history. The big Western societies never experienced, and thus they do not understand the crisis situations of independence and sovereignty of the countries of Central-Europe and through that the dangers based on the experience-validated facts of these countries plus the justification of their decisions for self-defence originating thereof.* Therefore these countries, precisely the ones being on the Warsaw-Prague-Bratislava-Budapest axis, furthermore the ones referred to in history as "countries of the Danube Valley", especially the country with a great historical past, experience and mission, called Hungary, cannot leave their destiny blindly in the hands of the Western world nor trust the decisions thereof.

4. *The manifestations of the people's sovereignty in Hungary deserve attention.* On one hand, it is typical that the legitimacy of the accession to the European Union was very weak, because during the election concerning the accession not even one half of the people entitled to vote participated in the voting process. On the other hand, the legitimacy associated with the respect of Europe's and Hungary's identity and the rejection of giving up this identity by the Hungarian voters was very strong; the enormous rejection of illegal immigration that carries the danger of changing the character of the country and its constitutional foundation, the parliamentary elections and consultations demonstrating the sweeping support of the constitutional political powers representing the national identity, and the results of the opinion polls are convincing.³⁵

35 The plebiscite of April 12, 2003 with a 45.62% participation of the voters showed results; 83.67% of the constituents casting valid votes supported the accession. "Do you agree with the Republic of Hungary's becoming the member of the European Union?" Who understood the importance of this question? Originally 60% indicated their intention to participate...

Finally the accession took place on May 1, 2004.

5. *Even international treaties cannot result in giving up the constitutional identity; only final cessation of sovereignty and independent statehood can deprive Hungary thereof.* When based on a specific motion, the Constitutional Court within its jurisdiction and power examines on a case by case basis if the common jurisdiction as defined in Article E), paragraph (2) of the Fundamental Law is in violation of – among other things – the identity based on the historic constitution, high priority should be given to the principle and the practice of independence, the historical facts and traditions of the people's sovereignty, furthermore the valid continuity of the right and claim to resist and oppose unconstitutional powers. The examination of these achievements requires beyond examining only the old laws also the processing of historical events and the legal publication up to the required depth.

6. *The significance of the reform of the constitution with its system-changing character that began in 2010 is without example when we look at the efforts to assimilate the historical constitution into the bloodstream of the current constitution. At that time there were some voices saying that now we have a window onto the historical constitution. Now, after the seventh amendment we can talk about wide-open gates too, provided the legislators, the Constitutional Court will use this opportunity in the future too.*

When we are looking at the three fundamental values, the importance of which we stressed in our study, and we are trying to prove this point, any damage to these may damage the sovereignty of Hungary (sovereignty control), furthermore it may seriously damage the constitutional identity (identity control). It is the duty of Hungary to reject the implementation of such decisions within the framework of the law on the basis of the laws of the European Union and the Fundamental Law of Hungary.

Hopefully our attempt was successful to provide evidence that the historical constitution is not a decoration or a colour-enhancing element on the structure of the constitution, but a solid block of strong foundation stones for the protection of the structure against all external and internal destructive powers.

Ps.: "...we demand the return of our ancient constitution, which was not a gift, but the result of mutual treaties and was built from the life of the nation; the constitution that at different times we adjusted to the requirements of the time and which we want to adjust in the future too; the constitution the fundamental principles were consecrated by centuries. To this we have

our right which is supported by the law..." (Ferenc Deák, May 13, 1861. Suggestion for inscription. In: Select works of Ferenc Deák, Edited by: Zoltán Ferenczi. Franklin p. 169-170.)

"The development of the Hungarian constitutional life has shown an unbroken and uniform line throughout centuries, and there are only a few peoples in Europe, who could state that amidst the varying chances of history they were holding on to the most important and most dignified doctrine of national coexistence, the constitutional principle with such consistency as the Hungarians did, which nation remained faithful even at times when enormous social upheavals forced very powerful nations too to suspend the constitutionality of their national lifestyle" (Sándor Márai: Flyer on the matter of the education of the nation. Budapest, 2004., First edition: 1942, Budapest, page 73.)