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# The 'Partisan Constitution' and the corrosion of European constitutional culture

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Marco Dani\*

## Abstract

The paper examines the legal developments associated with new Hungarian Constitution, a text that, by entrenching the normative convictions and institutional solutions favoured by a contingent political majority, gives rise to a distinct institutional setting: the 'partisan constitution'. The analysis unfolds in three stages. Firstly, the new Hungarian Constitution is contrasted with the idea of pluralist constitution traditionally inspiring national European constitutions. Secondly, by investigating the reactions of European institutions to the approval and implementation of the partisan constitution, the difficulties in affirming EU values post enlargement are discussed. Finally, the Hungarian Constitution is assessed also in the light of the prevailing contemporary EU legal culture. It is argued that the Hungarian Constitution reproduces in amplified and grotesque form a more profound and pervasive phenomenon: the corrosion of European constitutional culture. Thus, rather than looking at it as a backward product and a contingent malaise, we should study and criticise it as the most emblematical example of a broader trend: the decline of the idea of pluralist constitution.

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# The 'Partisan Constitution' and the corrosion of European constitutional culture

## 1. Introduction

Over the last two years, public opinion received extensive information<sup>1</sup> on the adoption and implementation of the new Hungarian Constitution ("Fundamental Law", in the official denomination).<sup>2</sup> To the irritation of its authors, reports did not celebrate the event as the crowning of the transition in Central Eastern Europe – until then, Hungary had been the only country not to have approved an entirely new constitution after the fall of Communism. Most of the comments expressed concern for the dramatic political turn of a country that, back in 1989, had been at the forefront in the struggle for constitutional democracy. Despite many reassurances to the contrary by Hungarian constitution makers, the Fundamental Law was portrayed as a divisive document ushering in a potentially illiberal political and legal order.

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<sup>1</sup> See I. Deák, 'Hungary: The Threat', *New York Review of Books*, April 28, 2011; 'The Threat in Hungary: An Exchange', exchange between G. Schöpflin and I. Deák, *New York Review of Books*, June 23, 2011 and A. Ludány, 'A threat to whom?', <http://www.mbk.org/Article760.html> (last visited October 2013). See also P. Krugman, 'Depression and Democracy', *The New York Times*, December 11, 2011; J-W. Müller, 'The Hungary question could strengthen the EU', *The Guardian*, 2 April 2012; J-W. Müller, 'Europe's democracy dilemma – how and when to step in?', *The Guardian*, 19 July 2012; H. Kunzru, 'The Frightening Hungarian Crackdown' *The New Yorker*, 8 January 2013.

<sup>2</sup> For an English version of the text see [http://www.kormany.hu/download/2/ab/30000/Alap\\_angol.pdf](http://www.kormany.hu/download/2/ab/30000/Alap_angol.pdf) (last visited October 2013). The Fundamental Law was promulgated on 25 April 2011 and entered into force on 1 January 2012.

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According to the critics, the original sin of the Fundamental Law rests with the process leading to its adoption.<sup>3</sup> In the 2010 elections, the current conservative ruling coalition gained a broad parliamentary majority sufficient to seize constitutional politics. Following the amendment procedure of the previous constitution, it approved a new constitutional text regardless of the boycott of the opposition and protests in the streets. The genesis of the document influenced its contents: the text is ideologically overloaded, and also the institutional architecture betrays a dubious commitment to parliamentary democracy and the rule of law. Hence, the claim that the Fundamental Law is a 'partisan constitution', i.e. a text that, by entrenching the normative convictions and institutional solutions favoured by a contingent political majority, departs from mainstream European constitutional culture and its idea of a 'pluralist constitution'.

There are at least three reasons justifying an interest for the vicissitudes of the Hungarian constitution. The first is the most obvious: by looking at a 'negative' case-study, one can reassert the fundamentals of European constitutional culture and offer a constructive contribution to the ongoing Hungarian political and constitutional debate. The second reason involves the reactions of European institutions to the document and the problem of conditionality post enlargement. The adoption and implementation of the Fundamental Law attracted the attention of both the Council of Europe and the European Union and, by looking at their responses, one can evaluate Europe's capacity to affirm its fundamental values vis-à-vis national constitution making. This leads to a third motive of interest. The failings of Europe in defending the pluralist constitution reveal a broader scenario in which Hungary is not alone in corroding European constitutional culture.

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<sup>3</sup> K. L. Scheppele, 'Hungary's Constitutional Revolution', *The New York Times*, December 19, 2011, available at <http://krugman.blogs.nytimes.com/2011/12/19/hungarys-constitutional-revolution/> (last visited October 2013).

This is not just because the Council of Europe and the European Union have been so far unable to persuade the Hungarian government to reconsider its ill-conceived constitutional adventure. More critically, recent developments in EU law show that the Union is deeply implicated in a legal and political culture structurally similar to that it is expected to counter.

The paper touches upon all three aspects. Firstly, it illustrates the idea of pluralist constitution and its role in both enhancing and containing political conflicts. Then, it goes to the implications of the idea. As a rule, pluralist constitutions result from consensual constitutional politics reaching across party lines; they offer a common symbolic space allowing for citizens' collective identification and establish open structures for the recognition and mediation of their conflicts. While this notion was central to the constitutional setting established in post-1989 Hungary, it no longer holds true in the Fundamental Law. This is not only due to the biased genesis of the document. Also constitutional symbolism discourages collective identification, notwithstanding the obsessive references to nationalism and intergenerational solidarity employed to disguise the weak legitimacy of the text. This instrumental attitude towards the nation and solidarity comes at a high price: by investing in an ethno-cultural conception of the polity and a rhetoric mixing heroism, victimhood and conservative values, the Fundamental Law opens the door to unreflective and illiberal nation building. This aspect is somewhat downplayed in the norms concerning constitutional organisation, but also in this part of the text there are several elements departing from the idea of pluralist constitution.

Moving to the European reactions to the Fundamental Law, the paper examines three different institutional trajectories. The first is 'soft constitutionalism', the reaction of the Venice Commission of the Council of Europe. In its opinions on the Fundamental Law, the Venice Commission

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develops accurate examinations of its criticalities in the light of European constitutional culture. However, the impact of these documents seems limited, being mainly entrusted to peer pressure within the Council of Europe. A second trajectory is political in nature and takes place at the European Parliament. Here, the paper traces the main coordinates of the parliamentary debate on the new Hungarian constitution describing the unproductive dialectic between left-leaning criticism and the defence of national sovereignty by conservative MEPs. 'Low-profile legalism', the reaction developed by means of infringement proceedings by the Commission and Court of Justice, is only apparently more promising. Whereas the instrument employed may induce significant legal changes, it also entails a drastic depoliticization of the constitutional debate for infringement proceedings fragment the whole discussion on the Fundamental Law in a series of less salient and opaque administrative dossiers.

The inability of the Union to provide a meaningful defence of constitutional democracy brings in the third aspect of the problem: the corrosion of European constitutional culture. The paper argues that discredit of the idea of the pluralist constitution does not come only from opportunistic Hungarian rulers adventuring into constitutional politics. The corrosion of European constitutional culture has deeper roots connected with the rise of post-politics, a new common sense in which the role of the constitution and the place of partisanship are confounded. This is the point at which Hungary and the Union meet and this is also the point at which their different legal orders reveal unimagined assonances. Against a similar background, the Fundamental Law appears less of a backward document conceived by nostalgic political forces; rather, it emerges as a product of modernity exposing in a grotesque form the traits of an incipient legal culture led astray from the path of constitutional democracy.

## 2. European constitutional culture: the idea of ‘pluralist constitution’

### 2.1. The place of partisanship, the role of pluralist constitutions

European constitutional democracies are premised on a key distinction between constituent and constituted power.<sup>4</sup> The point was famously captured by Paine’s definition of modern constitutions: a constitution, he noted, “is a thing antecedent to a government, and a government is only the creature of a constitution”.<sup>5</sup> Indeed, the constitution “is not the act of its government, but of the people constituting a government”.<sup>6</sup> In Paine’s view, a clear correlation existed between the people, the constitution and government: the people (constituent power) create a constitution through which government (constituted power) is established. Government, therefore, neither makes nor can alter the constitutional laws which bind it; these can be modified only through an exercise of the constituent power by the people.<sup>7</sup>

Although the distinction between constituent and constituted power was anathema to more traditionalist political and legal thinkers,<sup>8</sup> the modern idea of constitution did not break entirely with earlier juridical experience. Its inherent dualism was rooted in previous legal tradition, where the dichotomy between justice and power or *ius ex parte societatis* and *ius ex parte principis* figured prominently.<sup>9</sup> But despite this venerable pedigree, in the 19<sup>th</sup> century modern constitutionalism gained foothold and stabilised only in the United

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<sup>4</sup> D. Grimm, ‘The Achievement of Constitutionalism and its Prospects in a Changed World’ in P. Dobner, M. Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010), 9.

<sup>5</sup> T. Paine, ‘Rights of Man’ in his *Rights of Man, Common Sense and other Political Writings* [1791-1792] (Oxford University Press, 1995), 122.

<sup>6</sup> *Ibidem*.

<sup>7</sup> M. Loughlin, *Foundations of Public Law* (Oxford University Press, 2010), 279.

<sup>8</sup> *Ibidem*, nt. 14.

<sup>9</sup> G. Zagrebelsky, *La legge e la sua giustizia* (il Mulino, 2008), 15-21.

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States<sup>10</sup>. In Europe, frequent political turbulences collapsed the distinction between constituent and constituted power, leaving (in the best of times) the operation of government constrained only by a "strong barrier of moral conviction".<sup>11</sup>

The modern idea of constitution revamped in continental Europe in the aftermath of World War II. Many factors contributed to its resurrection, but a renewed attitude to social conflicts figures on the top of the list.<sup>12</sup> European constitution makers had learnt that social conflicts could neither be suppressed nor wished away from existence. Thus, neither authoritarian rule nor liberal constitutions could deliver a stable political and legal order. The latter could be attained only by recognising both the value and the disruptive potential of the social question. As witnessed by previous political experience, excessive emphasis on the unity of the polity yields exclusion and alienation, while unbounded conflicts lead to disintegration.

It soon became clear that a more appropriate balance between conflict and cooperation could be achieved by means of pluralist constitutions<sup>13</sup>. Key to this new legal and political setting was the idea of institutionalising social conflicts.<sup>14</sup> Constitutions were not meant to recompose social divisions in an artificial unity, but to establish the formal and substantive prerequisites for political competition.<sup>15</sup> Accordingly, their task was firstly securing adequate room for political conflicts, then ensuring that their acting out did not

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<sup>10</sup> The distinctive spirit of the US Constitution has been best encapsulated in the concept of 'dualist democracy' proposed by B. Ackermann, *We the People. Foundations* (Harvard University Press, 1991), 6-7.

<sup>11</sup> J. S. Mill, *On Liberty* [1859] (Hackett Publishing Company, 1978), Ch. 1, at 13.

<sup>12</sup> R. Bin, 'Che cos'è la Costituzione?' (2007) XXVII *Quaderni Costituzionali*, 19-22.

<sup>13</sup> The most notable examples are the 1946 French Constitution, the 1947 Italian Constitution and the 1949 *Grundgesetz*.

<sup>14</sup> R. Dahrendorf, *The Modern Social Conflict: An Essay on the Politics of Liberty* (Weidenfeld and Nicolson, 1988), 107.

<sup>15</sup> M. Loughlin, *Sword&Scales. An Examination of the Relationship Between Law&Politics* (Hart Publishing, 2000), 189-195.

jeopardise political pluralism. As Mouffe has observed, “conflict, in order to be accepted as legitimate needs to take a form that does not destroy the political association. This means that some kind of common bond must exist between the parties in conflict, so that they will not treat their opponents as enemies to be eradicated, seeing their demands illegitimate [...]”.<sup>16</sup> This notion resonates deeply in the structure of pluralist constitutions. Here, partisanship and cooperation are conceptually separated giving rise to distinct domains in which constituted and constituent power acquire a renewed historical meaning.

In pluralist constitutions, constituted power came to be viewed as the province of partisanship and political contestation. In this respect, constitutional norms operated in the direction of broadening political participation and expanding the role of government. Firstly, they extended the franchise by abolishing the remaining class, gender and race restrictions. Secondly, they rendered *status quo* allocations and social positions negotiable<sup>17</sup> and contingent.<sup>18</sup> Within pluralist constitutions, the degree of protection of both property rights and social entitlements became in large part a function of the political process and majoritarian decision-making. Ultimately, social justice replaced property as the prevailing concern of the newly established strategy of integration.<sup>19</sup> This idea was sufficiently defined to exclude both socialist rule and unrestrained *laissez-faire*.<sup>20</sup> At the same time, its more specific meaning remained constantly exposed to the outcomes of political

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<sup>16</sup> C. Mouffe, *On the Political* (Routledge, 2005), 20.

<sup>17</sup> Dahrendorf, above n. 14, 21.

<sup>18</sup> A. O. Hirschmann, ‘Social Conflicts as Pillars of Democratic Market Society’ (1994) 22 *Political Theory*, 214.

<sup>19</sup> A more recent codification of this principle can be found in article 2 of the Polish Constitution.

<sup>20</sup> D. Miller, *Principles of Social Justice* (Harvard University Press, 2003), 3-4.

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and social disputes for the direction of government and the contents of legislation.<sup>21</sup>

In charge of the domain of societal cooperation, constituent power stood isolated from political conflict. The task of defining the terms of political association required political parties qua constitution makers to set aside their routine distributive struggles and engage in constitutional politics. This entailed a cooperative effort in which each party was requested to cross the boundaries of its particular worldview on behalf of peaceful coexistence.<sup>22</sup> The overall result was a peculiar form of consensual politics that, inaugurated at the outset of a new constitution, could subsequently re-emerge in the less spectacular forms of constitutional justice and constitutional amendment. Admittedly, even constitutional politics involved a certain degree of contestation as most of the times constitution makers could not attain more than a 'conflictual consensus'.<sup>23</sup> However, this was the only available form of political unity. Constitutions could no longer prescribe, entrench and impose the values and institutional solutions favoured by a particular segment of the society.<sup>24</sup> To make a claim of legitimate authority, constitutions had to offer a shared symbolic space allowing the identification of virtually all the segments of society.<sup>25</sup> Thus, as a genuine creature of the people, the constitution could not but reflect its elusive consensus and irreducible plurality.<sup>26</sup>

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<sup>21</sup> The under-determinacy of social justice has brought about the essentially procedural approach to the concept of *Sozialstaat*. On the relevant constitutional debate, see C. Joerges, 'Sozialstaatlichkeit in Europe? A Conflict-of-Laws Approach to the Law of the EU and the Proceduralisation of Constitutionalisation' (2009) *German Law Journal*, 336-338.

<sup>22</sup> Zagrebelsky, above n. 9, 153.

<sup>23</sup> Mouffe, above n. 16, 121, defines it as "consensus on the ethico-political values of liberty and equality for all, dissent about their interpretation".

<sup>24</sup> Zagrebelsky, above n. 9, 133-134.

<sup>25</sup> Mouffe, above n. 16, 121.

<sup>26</sup> Zagrebelsky, above n. 9, 140.

Of course, the pluralist nature of post-war constitution did not make them neutral documents. The idea of pluralism entails a strong normative commitment to active liberty and, as such, it stands in stark opposition to illiberal worldviews.<sup>27</sup> Yet, the political character of the constitution and constitutional politics should not be confounded with partisan politics. Obscuring this distinction can be a fatal mistake for the legitimacy of the constitution rests in the support of virtually all the components of the society.<sup>28</sup> If, by contrast, constitutional politics is carried out in the partisan register, certain political choices may end up being pre-empted and particular segments of the society excluded or underrepresented. Relegated to an unruly terrain outside the institutional perimeter, conflicts reacquire their disruptive potential undermining legal and political stability.

## 2.2. Constitution making, ideology and institutional setting

Sketched in its fundamental traits, the idea of pluralist constitution can now be explored in some of its implications. The first involves its genesis, an aspect for which some degree of precaution is in order. Although no necessary correlation exists between patterns of constitution making and constitutional models, the contents of constitutions are not impervious to their origins.<sup>29</sup> The making of a constitution plays a crucial role in the determination of its identity.<sup>30</sup> This applies in particular to European pluralist constitutions: whereas the variety of processes leading to their adoption can hardly be subsumed within a single model of constitution making, important

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<sup>27</sup> This is particularly evident in contexts of militant democracy, on which see J-W. Müller, *Constitutional Patriotism* (Princeton University Press, 2007), 22-23.

<sup>28</sup> Zagrebelsky, above n. 9, 138.

<sup>29</sup> M. Rosenfeld, *The Identity of the Constitutional Subject. Selfhood, Citizenship, Culture, and Community* (Routledge, 2010), 185.

<sup>30</sup> *Ibidem*, 185-186.

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congruencies can be identified at a more abstract level. European pluralist constitutions share the attribute of social norms resulting from or, at least, reflecting the autonomy of the main political forces in a polity.<sup>31</sup> Indeed, the making of a pluralist constitution involves the negotiation of an agreement whose clauses not only encapsulates the compromise between the current most influent political actors, but reflects also the claims of the historically most significant political cultures in a polity.

The challenge of defining the terms of political association has profound implications on the attitude of political actors embarking in constitutional politics. Given that in contemporary societies no single party can claim to fully embody the will of the people,<sup>32</sup> each of them is invited to make concessions and abandon the idea of incorporating in the constitution its preferred project of society and government.<sup>33</sup> The circumstances of constitutional politics inspire a form of constitutional loyalism<sup>34</sup> in which parties demise their more factional interests and accept to have their political identity transformed by the experience of constitution making.<sup>35</sup> Specific institutional solutions are arranged to achieve this outcome. Constituent forces are traditionally gathered in sites ideally insulated from routine parliamentary activity such as constitutional assemblies or conventions.<sup>36</sup> More recently, experiments in constitution making have also been attempted

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<sup>31</sup> Zagrebelsky, above n. 9, 150-151. As noted by S. Chambers, 'Democracy, Popular Sovereignty, and Constitutional Legitimacy' (2004) 11 *Constellations*, 153, "... successful constitution-making is not only about entrenching the right first principles, it is also about including citizens in the process of constitution-making in the right way. I call this move to inclusion, the democratization of popular sovereignty".

<sup>32</sup> A. Arato, 'Conventions, Constituent Assemblies, and Round Tables: Models, principles and elements of democratic constitution-making' (2012) 1 *Global Constitutionalism*, 174.

<sup>33</sup> Zagrebelsky, above n. 9, 143.

<sup>34</sup> *Ibidem*, 325.

<sup>35</sup> *Ibidem*, 143.

<sup>36</sup> *Ibidem*, 133.

through roundtable talks.<sup>37</sup> Conceived in the context of pacted transitions from authoritarian to democratic regimes, this solution offers a way out in situations of stalemate between incumbent regimes and their democratic opponents.<sup>38</sup> By favouring an initial compromise between opponents, roundtable talks ensure a break without violence from the previous regime opening the door to elections and, finally, democratic constitution making.<sup>39</sup>

A second implication of the idea of pluralist constitution concerns its ideological dimension. We are faced here with the most vocal parts of constitutions, those in which their educational task and contribution to nation building are more explicit.<sup>40</sup> In this regard, pluralist constitutions are not exception to a more general rule: coherently with their origins, they set out a rich ideological apparatus aiming at a collective identification of the people in all its component parts.<sup>41</sup> Symbolism and iconography, however, are not only reflective but also constitutive of social and political reality.<sup>42</sup> The educational propensity of the constitution manifests itself in a certain predisposition to shape the people at a both collective and individual level.<sup>43</sup> Whereas individuals are target of normative claims and regulatory strategies consistent with the idea of free and equal citizenship, polities are encouraged to rationalise their collective identities reinterpreting national culture, values and history in the light of universalist constitutional principles.<sup>44</sup>

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<sup>37</sup> The most complete instantiation is the South African constitutional process, see Arato, above n. 32, 179-184. For the Hungarian experience, see below 2.3.

<sup>38</sup> *Ibidem*, 180.

<sup>39</sup> In this respect, the process leading up to the adoption of the Spanish constitution is exemplary. See Rosenfeld, above n. 29, 136-146.

<sup>40</sup> Loughlin, above n. 7, 306-307.

<sup>41</sup> See, for example, article 2 of the French Constitution.

<sup>42</sup> On the descriptive as well as rationalizing character of pluralist constitutions see Chambers, above n. 31, 158-161.

<sup>43</sup> The processes of subjectification of individuals are explored in N. Rose, *Inventing Our Selves. Psychology, Power and Personhood* (Cambridge University Press, 1998), 119-122 and 152.

<sup>44</sup> Müller, above n. 27, 27-30.

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It is in this context that constitutions enter in a complex relation with the past. Earlier constitutional experiences are reprocessed to be reclaimed or repudiated in the text.<sup>45</sup> In most of the cases, constitutions propose a mix of condescending and critical postures, highly dependent on the political judgment on pre-constitutional identity. Choices expressed in this regard have an obvious impact on the educational profile of the constitution: the more pre-constitutional materials are reincorporated, the more the constitution will amplify the characters of the nation; the more pre-constitutional materials are repudiated, the more national threatening tendencies will be countered.<sup>46</sup> This latest approach has been best articulated by constitutional patriotism, the political theory requiring political attachment to centre on the norms, values and procedures of liberal democratic constitutions.<sup>47</sup> Conceived in post-World War II Germany as a substitute for liberal nationalism,<sup>48</sup> constitutional patriotism has more recently appealed also other jurisdictions coping with the dilemmas of nation building in post-traditional societies.<sup>49</sup> Under constitutional patriotism, identity formation is no longer viewed as the glorifying celebration of the past or the trite repetition of sacralised rituals. Individual and collective belonging is sought through processes of renegotiation of the past in the public sphere,<sup>50</sup> giving rise to a more complex sense of attachment.<sup>51</sup> As Müller noted,<sup>52</sup> constitutional patriotism resists the temptation to tell “comforting (or disquieting) stories about the past”; rather, by reflecting critically on history, it seeks to provide

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<sup>45</sup> Rosenfeld, above n. 29,187.

<sup>46</sup> C. Sunstein, 'On property and constitutionalism' (1992-1993) 14 *Cardozo Law Review*, 922.

<sup>47</sup> Müller, above n. 27, 1.

<sup>48</sup> *Ibidem*, Ch. 1.

<sup>49</sup> *Ibidem*, 2-5.

<sup>50</sup> *Ibidem*, 32-34.

<sup>51</sup> *Ibidem*, 29-30.

<sup>52</sup> *Ibidem*, 8.

“the concepts, the languages, to allow citizens to rethink what they might or might not have in common, and what they perhaps should have in common”.

The third implication of the idea of pluralist constitution goes directly to the institutional setting. In accordance with their vocation to institutionalise conflicts, pluralist constitutions put in place an open architecture devised to enhance and contain political contestation.<sup>53</sup> Indeed, contemporary complex societies seldom embark in authoritative decisions of conflicts through exclusionary rules.<sup>54</sup> More frequently, constitutions employ different tools. Once the most intractable conflicts are resolved or at least silenced, irreducible diversities may still persist. In their respect, pluralist constitutions show a much more benign attitude revealed by their attempt to embed them in their structures.<sup>55</sup> This aspect can be noted at both a substantive and procedural level. At a substantive level, conflicts are often legitimated through the definition of principles.<sup>56</sup> This may be done by either elevating opposing normative claims to the status of fundamental rights or codifying as fundamental norms open-textured notions of justice. At a procedural level, instead, political conflicts are key to institutions and procedures designed to voice and mediate rival claims.<sup>57</sup> It is through similar devices and, notably, the recourse to the majority principle<sup>58</sup> and representative institutions<sup>59</sup> that antagonism can be civilised, transforming potentially destructive conflicts into more manageable and, possibly, productive forms of political competition.

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<sup>53</sup> G. Azzariti, *Diritto e conflitti. Lezioni di diritto costituzionale* (Laterza, 2010).

<sup>54</sup> *Ibidem*, 182-183, observing that conflicts suppressed by authoritative decisions often re-emerge in aggravated forms.

<sup>55</sup> *Ibidem*, 276.

<sup>56</sup> On the integrating capacity of principles, see R. Smend, *Costituzione e diritto costituzionale* (translated by J. Luther), [1928] (Giuffrè, 1988), 103.

<sup>57</sup> Azzariti, above n. 53, 216.

<sup>58</sup> Smend, above n. 56, 91.

<sup>59</sup> V. Onida, *Le Costituzioni. I principi fondamentali della Costituzione italiana*, in G. Amato, A. Barbera (eds), *Manuale di diritto pubblico*, I (il Mulino, 1997), 107.

### 2.3. An application: the 1989 constitution of Hungary

To a large extent, the constitutional setting introduced in Hungary post 1989 fulfilled the requirements of a pluralist constitution. Indeed, only in the official denomination the new document prolonged its 1949 communist antecedent.<sup>60</sup> This element of formal continuity symbolised what came to be known as the Hungarian “constitutional revolution”.<sup>61</sup> Rather than being a product of revolutionary outbreak, the transition from the former socialist regime took place gradually,<sup>62</sup> and respect for the amendment procedure of the 1949 constitution was the main guarantee for such a peaceful change.<sup>63</sup> Accordingly, it fell to the socialist Parliament to approve the first constitutional amendments leading up to constitutional democracy. But only formally was that document originated in the Parliament; the text had been negotiated by the incumbent socialist regime and opposition parties in ‘Roundtable talks’, the informal site governing the transition that had *de facto* obtained a constitution making mandate.<sup>64</sup>

The constitution resulting from this process enjoyed a dubious legitimacy. On the one hand, the main political forces took part to negotiations and approved a text that functionally was in line with the European standards of constitutional democracy. On the other, serious flaws could be detected in the procedure for its adoption: not only had the new text been approved by a largely discredited Parliament, but also the parties sitting at the Round Table did not possess a clear political mandate by the electorate. No meaningful

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<sup>60</sup> The official denomination of the 1989 constitution was “Act No. XX of 1949 (as amended)”. For an English version of the text, see [http://lapa.princeton.edu/hosteddocs/hungary/1989-90%20constitution\\_english.pdf](http://lapa.princeton.edu/hosteddocs/hungary/1989-90%20constitution_english.pdf) (last visited October 2013).

<sup>61</sup> P. Paczolay, ‘Constitutional Transition and Legal Continuity’ (1992-1993) 8 *Connecticut Journal of International Law*, 560-561.

<sup>62</sup> I. Szikinger, ‘Hungary’s Pliable Constitution’, in J. Zielonka (ed), *Democratic Consolidation in Eastern Europe* (Oxford University Press, 2001), Volume 1, 406.

<sup>63</sup> The most important amendment was Act No. XXI of 1989.

<sup>64</sup> Szikinger, above n. 62, 409-414

public deliberation took place in the workings of the Round Table and, once the text had been agreed, no referendum was organised to make up for those shortcomings.<sup>65</sup> As a result, the newly enacted constitution was surrounded by an elitist flavour as in no sense it could be argued that its text was a genuine achievement of the people.

Undoubtedly, Hungarian constitution makers were conscious of the weak popular support of the 1989 constitution. They proclaimed it in a bashful and non-ceremonial way<sup>66</sup> and they wrote in the preamble that the text approved was not the final one.<sup>67</sup> In the intentions, the document adopted was a quick fix of the 1949 Constitution,<sup>68</sup> laying the floor for a second stage of constitution making entrusted to the newly elected parliament or, ideally, a constituent assembly.<sup>69</sup> The fact that a new constitution never materialised and that the 1989 constitution remained in effect for more than twenty years has a lot to do with the hostile political climate characterising the Hungarian transition, but also with the substantial satisfaction with the existing text of the political elite.<sup>70</sup>

In the years following the approval of the 1989 constitution, however, constitutional stability was repeatedly challenged by several amendments adopted by the parliament.<sup>71</sup> Because of a highly disproportionate electoral system, the formal requirement for constitutional amendment – a two-thirds

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<sup>65</sup> *Ibidem*, 412-414.

<sup>66</sup> Paczolay, above n. 61, 567-568.

<sup>67</sup> The preamble reads as follows: “In order to facilitate peaceful political transition into a constitutional state ready establish a multiparty system, parliamentary democracy and a social market economy, the Parliament of the Republic of Hungary hereby establishes the following text as the Constitution of the Republic of Hungary, *until the country’s new constitution is adopted*” (Italic added).

<sup>68</sup> Szikinger, above n. 62, 413.

<sup>69</sup> A. Arato, ‘Post Sovereign Constitution-making in Hungary: After Success, Partial Failure, and Now What?’ (2010) 26 *South African Journal on Human Rights*, 24-28.

<sup>70</sup> Szikinger, above n. 62, 427-430.

<sup>71</sup> T. Drinóczi, ‘Revisione e manutenzione costituzionale nell’ordinamento ungherese’, in F. Palermo (ed), *La “manutenzione” costituzionale* (Cedam, 2007), 437.

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majority in Parliament – did not prevent political parties from pursuing their partisan agenda through constitutional politics.<sup>72</sup> Occasional amendments, however, did not make the idea of a comprehensive constitutional reform go away. The most serious attempt was endeavoured in the 1994-1998 legislature, when the governing coalition between Socialists and liberal Free Democrats obtained a two-thirds parliamentary majority. Rather than taking advantage of this situation, the coalition resumed the spirit of the Roundtable talks and lifted to four-fifths the parliamentary majority required to enact a new constitution.<sup>73</sup> Moreover, a Constitutional Commission consisting of an equal number of representatives from each party represented in Parliament was entrusted with the task of preparing a draft text.<sup>74</sup> In this preliminary stage, the approval of a new text required the support of five parties out of the six represented, and two-thirds of the delegates of the Commission.<sup>75</sup> After a promising start, this attempt aborted in 1996 and so did further proposals put forward in 2003 and 2005-2008.<sup>76</sup> Those efforts, however, were not entirely worthless: in particular, the so-called '4/5 rule' consolidated a sense that constitution making ought to originate from consensual politics.

But how did Hungarian constitution makers translate the idea of pluralist constitution in 1989? A first striking feature of the Hungarian constitution was its essential wording. No magniloquent formula appeared in the preamble and also fundamental rights provisions were framed with terse language. This sober tone was coherent with the choice for legal continuity operated by Hungarian constitution makers. Due to the role played by the Socialist Party in Roundtable talks, a more outspoken preamble was probably

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<sup>72</sup> Szikinger, above n. 62, 415, referring to the 1989 constitution as "pliable constitution".

<sup>73</sup> See Act XLIV of 1995, introducing article 24(5).

<sup>74</sup> Drinóczi, above n. 71, 460-463.

<sup>75</sup> Szikinger, above n. 62, 427-428.

<sup>76</sup> Drinóczi, above n. 71, 473-475.

unconceivable. For the same reason, no explicit position was taken in respect of Hungary's communist past. Likewise, the interim character of the constitution discouraged any other rhetorical foray for the purpose of nation building. For instance, no reference was made to the Hungarian religious and historical heritage. Paucity in symbolism, however, did not make that document un-inspirational. Several provisions were unequivocal in distancing the constitution from the previous political and legal regime,<sup>77</sup> and the transformation in political and social life brought about by the Constitutional Court is the most eloquent testimony to the potential of that text.<sup>78</sup> The modesty of constitutional language, therefore, was no obstacle to the fulfilment of the educational task of the constitution: in that document citizens could find sufficient textual resources to articulate the normative claims and the conflicts of a modern market oriented constitutional democracy.

Legal continuity and a clear commitment to constitutional democracy were confirmed in the norms on the institutional setting. No express provision was made against the 'enemies' of democracy and the rule of law, and an open architecture for the legitimation and mediation of conflicts was delineated in its essential traits. The constitution laid down the usual substantive coordinates of social conflicts,<sup>79</sup> but democratic life was articulated also along multi-cultural lines.<sup>80</sup> On the institutional side, the form of government was structured according to the classic parliamentary model,<sup>81</sup> with the President

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<sup>77</sup> The most telling examples are articles 2 (democratic constitutional state), 3 (free political association and distinction between the state and political parties), 6 (repudiation of war), 8 (human rights protection), 9-10 (market economy and private property).

<sup>78</sup> Paczolay, above n. 61, 565.

<sup>79</sup> See the provisions on market economy (article 9), social rights (artt. 16-17 and 66, 70/B, 70/D, 70/E) and the role of trade unions (articles 4 and 70/C).

<sup>80</sup> See article 68, declaring national and ethnic minorities living in Hungary "constituent part of the State".

<sup>81</sup> See articles 19 and 33, 33/A and 39/A.

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of the Republic defined as an eminent nonpartisan figure.<sup>82</sup> A strong emphasis was given to consensual democracy: given the uncertainties for the results of the first democratic elections,<sup>83</sup> the constitution made significant recourse to the two-thirds majority requirement for the adoption of legislation regarding the functioning of the state and, more controversially, the discipline of most fundamental rights.<sup>84</sup> Finally, the constitution assigned an influential role to the Constitutional Court, a body perceived in the public opinion as a “quasi-upper house of parliament”.<sup>85</sup> To many commentators, the Court’s jurisprudence on human rights acquired a special significance, somehow compensating for the precarious legitimacy of the 1989 constitution.<sup>86</sup> As a matter of fact, constitutional justice prolonged the life of this document, even though the Constitutional Court could not appeal far beyond the circle of its aficionados and supply the sense of achievement associated with democratic constitution making. Thus, the elitist flavour surrounding the 1989 constitution came to encompass also constitutional adjudication, leaving the idea of completing the constitutional transition to populist and anti-establishment forces.

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<sup>82</sup> See article 29.

<sup>83</sup> Drinóczi, above n. 71, 443.

<sup>84</sup> See, e.g., articles 58 to 65.

<sup>85</sup> Szikinger, above n. 62, 425.

<sup>86</sup> Arato, above n. 69, 31.

### 3. Questioning the ‘Partisan Constitution’

#### 3.1. The usurpation of constitutional politics

Hungarians went to the ballots in 2010 in a situation of deep political and social strife. In 2009, the financial crisis had taken a dramatic turn bringing Hungary close to financial disaster. The incumbent socialist and liberal government appeared unable to cope with the economic situation. Besides, it was perceived as politically and morally discredited given that its rule had been opaque and plagued by clientelism. A ‘government of experts’ was appointed to replace it and to enforce a plan of austerity measures that further aggravated political resentment. In this context, elections delivered a clear and predictable result: the conservative coalition between Fidesz and the Christian Democratic People’s Party gained 52.7% of the votes<sup>87</sup> which, thanks to a disproportionate electoral system,<sup>88</sup> were translated in a two-thirds parliamentary majority. This was sufficient to activate article 24 (3), the procedure to amend the 1989 constitution. It is disputed whether the conservative coalition had received an explicit constituent mandate;<sup>89</sup> be that as it may, it decided to seize the opportunity and adventure into constitutional politics.

Firstly, the conservative coalition approved a number of controversial constitutional changes on disparate issues such as taxation, media, the reduction of the number of MPs, the reform of the judicial system and

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<sup>87</sup> Turnout had been relatively low: 64% at the first round; 46% at the second one. The results of other parties were the following: Socialist Party, 19.3%; Jobbik, 16.7%; “Politics can be different”, 6.7% (See <http://www.electionresources.org/hu/assembly.php?election=2010> – last visited October 2013).

<sup>88</sup> Arato, above n. 69, 32.

<sup>89</sup> For two opposing views, see L. Trócsányi, ‘The Creation of the Basic Law of Hungary’, in L. Csink, C. Schanda, A. Zs. Varga (eds), *The Basic Law of Hungary. A First Commentary* (Clarus Press, 2012), 7, and K. Kovács, G. A. Tóth, ‘Hungary’s Constitutional Transformation’ (2011) 7 *European Constitutional Law Review*, 196.

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modifications on the composition and jurisdiction of the Constitutional Court.<sup>90</sup> Critically, it repealed article 24 (5), the '4/5 rule'. Then, the Parliament decided to set up an *ad hoc* committee for constitutional reform. Initially, the committee represented all political parties, but it was soon boycotted by the left opposition after that proposals to curb the jurisdiction of the Constitutional Court had been aired. The workings of this committee culminated in a document of regulatory principles adopted by the Parliament in March 2011. Yet, this was just a working document for the task of drafting a new constitution was conferred to a three members committee appointed by the ruling coalition. At this stage, a popular consultation was organised sending to all citizens a questionnaire on selected topics to be included in the constitution. Only at this point was the draft constitution presented to the Parliament, which approved it after only a nine days discussion.<sup>91</sup>

Few doubts can be cast on the legality of this process: once the '4/5 rule' was repealed, article 24 (3) was the only available legal route to amend the 1989 constitution.<sup>92</sup> However, it is the legitimacy of this process that can seriously be questioned.<sup>93</sup> By requiring a two-thirds majority, article 24 (3) signalled that constitutional politics ought to be conducted with a view to reaching an agreement in which the whole or large part of the political spectrum could identify. This notion was not only inherent in the rationale of the norm but, as seen, it was also coherent with earlier Hungarian constitutional practice.<sup>94</sup> Fidesz and its coalition partner decided to break with this tradition, and hiding behind legality was the expedient to mask their usurpation of constitutional politics. Indeed, this is the point at which the Fundamental Law

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<sup>90</sup> For a survey on these constitutional amendments, see Kovács, Tóth, above n. 89, 187-195.

<sup>91</sup> Kovács, Tóth, above n. 89, 196-198.

<sup>92</sup> Yet, what can be disputed is whether repealing the '4/5 rule' with a 2/3 majority was a legal move, see A. Arato, above n. 69, 40-43.

<sup>93</sup> This is acknowledged also by authors otherwise supportive of the Fundamental Law, see F. Horkay Hörcher, 'The National Avowal', in L. Csink, C. Schanda, A. Zs. Varga, above n. 89, 29-30.

<sup>94</sup> See above section 2.3.

departs radically from European constitutional culture and that is why talking of a ‘partisan constitution’ seems appropriate.

The distance between the pluralist and the partisan constitution emerges as soon as one turns to comparative constitutional history. In the Spanish transition to democracy, for instance, Prime Minister Adolfo Suárez decided to legalise the Communist Party to enable all political parties to participate to parliamentary elections antecedent to constitution making.<sup>95</sup> In South Africa, all political parties were included in constitution making and remarkable concessions had to be granted to keep everyone on board.<sup>96</sup> Ironically, the closest example of a partisan exercise of constitutional politics can be found in Communist dictatorships, where the basic law was viewed as a tool through which the dominant political party could achieve its policy goals.<sup>97</sup>

The precarious legitimacy of the Fundamental Law emerges also by considering the tension existing between its contents and the procedure employed to approve it. Unlike its more modest predecessor, the Fundamental Law is a pretentious text full of revolutionary ambition.<sup>98</sup> In the preamble (‘National Avowal’), we may read that “after the decades of the twentieth century which led to a state of moral decay” Hungarians have “an abiding need for spiritual and intellectual renewal”. Accordingly, the 1949 constitution is invalidated and other passages of the text express eloquently

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<sup>95</sup> Rosenfeld, above n. 29, 140.

<sup>96</sup> See, for instance, chapter 11 of the South African interim Constitution (1993), allowing the establishment of *Volkstaat* by Boer and Afrikaners minorities. On the inclusive character of South African constitution making see A. Lollini, *Constitutionalism and Transitional Justice in South Africa* (2010, Berghahan Books), ch. 2.

<sup>97</sup> Szikinger, above n. 62, 408. Of course, one can argue that the Spanish and the South African examples are scarcely pertinent given that Hungary had already gone through those initial stages of constitutional transition. Yet, the fact that Hungary could be situated at a more advanced stage of its transition does not seem to exempt it from an equally considerate approach to constitution making. Indeed, only by observing similarly inclusive principles in constitutional politics could the constitution claim to be the achievement of the people of Hungary rather than of a contingent ruling coalition.

<sup>98</sup> Similarly pompous is the text of the ‘proclamation on statement of national co-operation’ approved by the Parliament immediately after the elections, see Kovács, Tóth, above n. 89, 196.

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the need of a re-foundation.<sup>99</sup> Similar language would justify a clear rupture with previous constitutional experience. Yet, in closing provision n. 2, we read also that “the Parliament shall adopt the Fundamental Law pursuant to Sections 19 (3) a) and 24 (3) of Act XX of 1949”, which is the (invalidated) 1949 Constitution. The impression of an irredeemable contradiction is difficult to dispel and the obvious question to be asked is: if the Fundamental Law had to be the product of a revolution and a new social contract, why following the previous discredited and allegedly invalid constitution? Fidesz and its coalition partner ground the legitimacy of their constitutional deed in their capacity to fulfil the legal requirement prescribed for constitutional revision.<sup>100</sup> We may suppose that had they received a lower majority, they probably would have not dared to embark on a constitutional undertaking or, if they did, they would have tried harder to involve opposition parties. As said, all this is perfectly in line with the letter of previous constitutional rules, but it is precisely this attachment to legality that is suspect for a constitution that from its preamble proclaim no less than the invalidity of the previous constitutional regime. Arguably, if the ruling coalition really perceived that there was consensus in the society for a revolution of the constitutional regime, if it thought that there were really sufficient energies around to break with the past and establish a new social and political order, it could have simply disregarded previous norms on constitutional amendment and, for instance, call a referendum to ratify the Fundamental Law. The very fact that this did not happen and that legal continuity was retained is telling. To a closer look, legality is all that Hungarian constitution makers can claim in support of their constitutional deed. That is why they try to camouflage the legality of their text as legitimacy, and that is why they need to stick, for sure

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<sup>99</sup> For a more detailed analysis of the National Avowal, see below section 3.2.

<sup>100</sup> The point is made in Trócsányi, above n. 89, 8-9.

reluctantly, with the previous constitutional order, while pretending they are disposing of it.

Admittedly, it cannot be ruled out that with the passing of time the importance of the process leading to the adoption of the Fundamental Law will become relative and that its text will be embraced by a wider spectrum of political forces.<sup>101</sup> But also those who downplay the contribution of process to the legitimacy of a constitution admit that *ex post* legitimacy requires a text fulfilling democratic and constitutional credentials.<sup>102</sup> This is what needs to be ascertained by looking at whether the Fundamental Law, irrespective of its biased genesis, put in place textual resources sufficient to arouse collective identification.

### 3.2. Strategic ideological re-traditionalisation

A good place to start this insight is looking at the ideological dimension of the Fundamental Law and, in this respect, the National Avowal is undoubtedly the most immediate reference. A text of literary and quasi-religious tone,<sup>103</sup> the National Avowal merges religious and patriotic motives in a prevalently retrospective narrative. The text employs a celebrative register, revealing an inclination towards condescending rather than self-examining nation building. In this document, the reader can easily detect an exercise of ideological re-traditionalisation<sup>104</sup> proposing an idealised narrative about the customs and values of the Hungarian people.

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<sup>101</sup> *Ibidem*, 9.

<sup>102</sup> A. Jakab, 'On the Legitimacy of a New Constitution. Remarks on the Occasion of the New Hungarian Basic Law of 2011', available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2033624](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033624), 8-10.

<sup>103</sup> Horkay Hörcher, above n. 93, 30-32

<sup>104</sup> M. Loughlin, 'What is Constitutionalization?', in Loughlin, Dobner (eds), above n. 4, 52.

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Sure, the invention of tradition is a widespread phenomenon, particularly frequent in periods of rapid transformation of the society.<sup>105</sup> Tradition is felt as providing the symbols of social cohesion and belongingness to a community;<sup>106</sup> it can also help to divert the attention from existing tensions and encourage the acceptance of the *status quo*. Paradoxically, ideological re-traditionalisation is a prevalingly modern phenomenon. As Hobsbawm notes, "modern nations ... claim to be the opposite of novel, namely rooted in the remotest antiquity, and the opposite of constructed, namely human communities *so 'natural' as to require no definition other than self-assertion*".<sup>107</sup> Much of this could apply to the Fundamental Law and its National Avowal, but it is particularly Hobsbawm's reference to the natural, its capacity to enable self-assertion and exempt a polity from other justifications that seems useful to decipher the role of tradition in the Hungarian context. One should not be misled by the turn to kitsch and the melancholic tone of the National Avowal. Aesthetics only superficially performs a celebrative and consolatory role; its function is more strategic and is deeply connected with the genesis of the document. As seen, pluralist constitutions as a rule may vaunt the historical support of the main political forces and cultures present in a polity, but for Hungarian constitution makers this source of legitimacy had become unavailable. Self-assertion was the only remaining option and tapping into tradition and its natural aura turned out as the most convenient way to proceed.

If this is true, it is the impossibility to claim the support of the people, i.e. the actual political community including the opposition, to justify the abundant references to history and Hungarian values in the National Avowal. More in

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<sup>105</sup> E. Hobsbawm, 'Introduction: Inventing Traditions', in E. Hobsbawm, T. Ranger (eds), *The Invention of Tradition* (Cambridge University Press, 1983), 4.

<sup>106</sup> *Ibidem*, 9.

<sup>107</sup> *Ibidem*, 14 (Italic added).

particular, it can be argued that the National Avowal offers substitutes for both the people and the compromise between its constituent parties. In this light one should read the strong emphasis on the nation, the fictitious entity behind which the ruling coalition stands for the whole community, and intergenerational solidarity, the notion replacing the agreement between opposing political forces. As will be shown, both concepts generate a potentially illiberal sort of nationalism that is likely to obstacle the type of collective identification associated with the idea of pluralist constitution.

First, the nation: The National Avowal is framed as a proclamation in which the subject speaking is “We, the members of the Hungarian nation”. The formula is repeated obsessively throughout the text with a clear intention to create a mythic aura around the Fundamental Law. As said, the strategy is by no means original as it harks back to 19<sup>th</sup> century constitutionalism, where concepts such as the nation or sovereignty figured prominently in constitutional rhetoric to strengthen the political body. Critically, also in that context sovereignty and nation performed a strategic function for it was through them that particular political forces could objectify their dominance and confer it legal shape.<sup>108</sup> Much of this can be found now in the National Avowal. Behind invocations of the Hungarian nation, it is easy to see the attempt to stir up the country in a difficult historical moment, but it is also possible to notice Fidesz and its coalition partner standing for the whole polity in the hope of perpetuating their particular values and policy goals.<sup>109</sup>

In this titanic effort of self-assertion, further resources are mobilised. The first obvious candidate is religion. The text opens with God’s blessing, and goes on evoking episodes of Hungary’s Christian history such as the foundation by

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<sup>108</sup> Zagrebelsky, above n. 9, 356.

<sup>109</sup> Tellingly, the National Avowal opens with the following words: “We, the Members of the Hungarian nation, at the beginning of the new millennium, *with a sense of responsibility for every Hungarian*, hereby proclaim the following ...” (Italic added).

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Saint Stephen or the struggles to defend Christian Europe. The most outspoken association of nation and religion, however, comes with the recognition of “the role of Christianity in preserving nationhood” – a passage that portrays Hungary not only as a community of fate, but also a community of faith.

A further contribution in specifying the characters of the Hungarian nation is offered by culture. Also in this respect the National Avowal is lavish with references to the “outstanding intellectual achievements of the Hungarian people” and Hungary’s unique language, culture and man-made and natural assets. This leads to reclaim the “intellectual and spiritual unity” of the nation “torn apart in the storms of the last century” – probably a reference to the Treaty of Trianon in which Hungary lost three quarters of its territory and more than half of its population.

Imbued with religious and cultural contents, the Hungarian nation manifests itself to its members and the outside world in more assertive terms than before. All the elements recalled do not necessarily impede a serious commitment to democracy and the rule of law – religion,<sup>110</sup> culture<sup>111</sup> and the recognition and support of nationals abroad<sup>112</sup> appear conspicuously also in other European pluralist constitutions. Yet, other elements contained in the National Avowal justify some concern and, taken together, may explain the preoccupied reactions aroused by the Fundamental Law.

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<sup>110</sup> See, e.g., § 4 of the Constitutional Act of Denmark, the preamble of the Irish Constitution, article 3 of the Greek Constitution, articles 1-3 of the Constitution of Malta and, of course, the place of the Church of England in England.

<sup>111</sup> See, e.g., the references to language in articles 2 of the French Constitution and 8 of the Irish Constitution.

<sup>112</sup> See, e.g., articles 48, 56 and 57 of the Italian Constitution.

For one, the emphatic language employed regarding the rights of the Hungarians leaving abroad<sup>113</sup> has made neighbouring countries nervous about the possibility of interferences by the Hungarian government in their territory.<sup>114</sup> Some doubt can also be expressed regarding the role assigned to Christianity in nation building. Even those inclined to recognise a role in the public sphere to religion may agree that in the Fundamental Law Christian values are overemphasised. Of course, the National Avowal does not omit to “value” other religious traditions – a term that probably means more than ‘tolerate’ but, probably, also less than recognising an equal role in nation building.

Other passages are similarly exposed to exclusionary interpretations. That on nationalities is probably the most ambiguous. The National Avowal declares: “the nationalities living with us form part of the Hungarian political community and are constituent parts of the State”. The passage echoes article 68 of the 1989 Constitution and, on its face, it seems a rather innocuous petition, even one pointing to an open conception of the political community: nationalities, we are told, form part of the polity. To a closer look, however, the sentence contrasts with the conception of the political community postulated in 1989. This emerges first by looking at the part of article 68 discarded by the National Avowal: “the national and ethnic minorities living in the Republic of Hungary share the power of the people”. A plain reading of the text testifies that back in 1989 national and ethnic minorities were constituent parts of a polity conceived in essentially civic terms; as such, they shared the power of the people. According to the new formula, nationalities remain constituent parts of the state and of the Hungarian political

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<sup>113</sup> See also article D.

<sup>114</sup> ‘Slovakia on edge as Hungary passes a new Constitution’ *The Daily.SK*, available at <http://www.thedaily.sk/slovakia-on-edge-as-hungary-passes-new-constitution/>

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community,<sup>115</sup> but they no longer share the power of the people. The omission is all the more relevant if one considers that, in the meantime, the nature of the people has undergone considerable change. In the National Avowal the people has become “we, the members of the Hungarian nation”, the putative author of the Fundamental Law. Nationalities are not part of it as they are constituent parts only of a different entity, the “Hungarian political community”. It is not entirely clear what one should make of the distinction between “Hungarian nation” and “Hungarian political community” and, correspondingly, what consequences for nationalities could follow from it. On the one hand, that seems an inoffensive formula as in no part of the constitution individuals belonging to nationalities are restricted in their political rights. On the other hand, as far as polity building is concerned they are downgraded to an inferior position for they cannot claim to be part of the subject proclaiming the National Avowal and establishing the new constitutional regime. This sheds a dim light on status and rights of the individuals belonging to nationalities: are they still fully-fledged political subjects or have they become second-class citizens with no role in constitutional politics? Are they still individuals endowed with fundamental rights or have they become subjects benefiting from some generous concessions by the Hungarian nation? The text renders plausible both scenarios, but one thing is rather clear: from a symbolical point of view, nationalities receive a treatment equivalent to that reserved to non-Christian religious traditions. Once the people acquires a more assertive ethnic and cultural connotation, cultural and religious minorities are pushed at the border of the political community and relegated to enclaves. This is not just speculation because in the quoted passage nationalities are also described as “living with us”, i.e. living with “we, the member of the Hungarian nation”. It

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<sup>115</sup> See also article XXIX.

might certainly be that this is just unfortunate drafting, and perhaps one should not read too much into a single sentence. Yet, one should also not forget that language is open to interpretation even beyond the intentions of its authors and, more worryingly, that also the collective unconscious may manifest itself in slips of the pen.

Strong weight on intergenerational solidarity – the temporal projection of the nation – is the other strategy put forward to disguise the absence of a demos sustaining the Fundamental Law. Also this concept is expressed loudly: “our Fundamental Law ... shall be a covenant among Hungarians past, present and future; a living framework which expresses the nation’s will and the form in which we want to live.” This concept leads the National Avowal to exhume the doctrine of the Holy Crown and flirt with evolutionary constitutionalism;<sup>116</sup> but this is also the passage summing up the abundant references to future generations included in the text.<sup>117</sup> Both dimensions of intergenerational solidarity – the past and the future – perform a strategic function; yet, it is in particular the approach to past history that is worth exploring to unearth the ideological profile of the Fundamental Law and its potential for abuse.

Pride is the first sentiment towards national history inspiring Hungarian constitution makers. Celebration of the past is a rather common motif in public rhetoric meant to reinforce self-esteem<sup>118</sup> through idealization and

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<sup>116</sup> The idea was famously exposed in E. Burke, *Reflections on the French Revolution* [1790], paragraph 165, with the following words: “As the ends of such a partnership cannot be obtained in many generations, [the state] becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born”.

<sup>117</sup> The National Avowals declares: “We bear responsibility for our descendants; therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources” and “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 ...”

<sup>118</sup> Horkay Hörcher, above n. 93, 30.

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moralistic discourses.<sup>119</sup> With its extensive references to history, the National Avowal goes a long way into glorifying Hungarians' deeds and achievements. This narrative, however, is not exhausted in celebration of the past, and other parts of the text express a different mood.

The other sentiment figuring conspicuously in the National Avowal is victimhood. References to foreign occupations abound, leaving the reader with a deep sense of the suffering inflicted on Hungarians by Nazi and Communist occupiers. Arguably, it is in this respect that the National Avowal manifests itself as a genuinely contemporary artefact. Memory studies have recently observed that nationalisms are no longer interested in narratives of heroic martyrdom.<sup>120</sup> Due to the sympathy aroused on a global scale by innocent victims, narratives of victimhood have become more popular. This has given birth to 'victimhood nationalism', a specific form of nationalism relying on the memory of collective suffering and having in the sacralisation of memories its epistemological mainstay.<sup>121</sup>

Undoubtedly, Hungary suffered enormously both the involvement in World War II and Communism, thus tribute to victims is not only justified but it is also a good way to start dealing with the past. Reverence to victims, however, should not make us blind to their possible strategic exploitation. As Lim notes, "victimhood nationalism [does not] necessarily mean to pay homage to concrete victims. What is at issue is not the agony and anguish of concrete victims but the idea of abstract victimhood".<sup>122</sup> In this idea and in their unique past, "nationalists can find a mental enclave where they can enjoy a morally comfortable position, very often disregarding the fact that the[se] heirs of

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<sup>119</sup> Mouffe, above n. 16, 74-75.

<sup>120</sup> J-H. Lim, 'Victimhood Nationalism in Contested Memories: National Mourning and Global Accountability', in A. Assmann, S. Conrad (eds), *Memory in a Global Age. Discourses, Practices and Trajectories* (Palgrave Macmillan, 2010), 138.

<sup>121</sup> *Ibidem*, 139-140.

<sup>122</sup> *Ibidem*, 147-148.

historical victimhood have become today's perpetrators".<sup>123</sup> To the eyes of reckless rulers, victimhood may be even more attractive than heroic nationalism. The status of victim offers several concrete advantages: it hides or confuses responsibility for the past; it confounds the often ambiguous and complex relationships existing between victims and victimizers; it waives or eschews responsibility for the present by proclaiming collective innocence.<sup>124</sup> Most of all, victimhood nationalism prevents the criticism of sceptics and outsiders,<sup>125</sup> granting immunity or, at least, justification for future abuses.<sup>126</sup>

It is therefore against this background that the references to past occupations in the National Avowal could also be read. If this is done, several passages may sound suspicious. For instance, it is said that the country lost its self-determination on 19 March 1944 – a statement that, by alluding to Nazi occupation, provides also a tactical waiver for the atrocities perpetrated by the Hungarian collaborationist regime in the final months of World War II. Similarly, the National Avowal exculpates Hungarians also from other responsibilities. It is said that from 1944 to 1990 there was no self-determination. As known, this is in large part true and the bloody suppression of the 1956 uprising is there to testimony that Hungarians did try to resist and overthrow foreign occupation. The same sentence, however, goes also in a dangerous direction when it seems to imply that no Hungarian was involved in tyrannical rule<sup>127</sup>. This sense of collective innocence is reinforced if one looks at the omissions of the National Avowal. In a narrative so rich of historical references, it is striking that all the interwar period is overlooked,

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<sup>123</sup> *Ibidem*, 140.

<sup>124</sup> *Ibidem*, 148.

<sup>125</sup> *Ibidem*, 140.

<sup>126</sup> I. Zertal, *Israel's Holocaust and the Politics of Nationhood* (Cambridge University Press, 2005), 9.

<sup>127</sup> The Fourth Amendment of the Fundamental Law has introduced article U, declaring the responsibility of the Hungarian Socialist Worker's Party and its leaders for foreign occupation and other crimes committed prior to 1989.

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leaving the reader wonder on what Hungarians ought to think of the 'White Terror' or a controversial figure such as Miklós Horthy. Is that a period for which Hungarians can be proud? Or should it also be included in the "decades of the twentieth century which led to a state of moral decay"?

It is difficult to predict the impact of the National Avowal on Hungarian public discourse. From its tone, it seems unlikely that it will encourage a process of self-examination and critical reconsideration of the past. Its condescending register and self-pitying predisposition may nourish a dangerous inclination to sentimentalise the past and derive consolation from it, while remaining politically passive in the present.<sup>128</sup> Another possibility is that the combination of pride and victimhood, especially in a period of economic distress, will produce a toxic political environment corroding the quality of democratic and civic life. But to discover the potential for abuse inherent in the Fundamental Law, one does not need to speculate too much on such looming scenarios. Other elements in the National Avowal already indicate that the strategies pursued to disguise the contested genesis of the Fundamental Law come at a high price in terms of democratic and constitutional viability.

Indeed, a sense of thick and exclusionary communitarianism exudes from the Fundamental Law. As usual, this is expressed loudly in the National Avowal with references to nothing less than a moral palingenesis after decades of decay.<sup>129</sup> In this context, conservative values are proclaimed uncompromisingly: "we hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love". This bold assertion preludes to more

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<sup>128</sup> Müller, above n. 27, 112.

<sup>129</sup> Also the section codifying the ideological underpinnings of the Fundamental Law is eloquently named "Foundation".

specific clauses defining the marriage only in its heterosexual version<sup>130</sup> and protecting embryonic and foetal life from the moment of conception.<sup>131</sup> Other provisions substantiate this communitarian shift.<sup>132</sup> We learn from the National Avowal that “[...] the strength of the community and the honour of each person are based on labour [...]” and that “[...] individual freedom can only be complete in cooperation with others”. The individualist paradigm is rejected and replaced with a more vocal and engaged notion of citizenship. Accordingly, Hungarians not only have a right but also an obligation to legal resistance,<sup>133</sup> and the same applies to work.<sup>134</sup> Within this mind-set, employees and employers are expected to cooperate on behalf of national economy.<sup>135</sup> This and other ideas<sup>136</sup> give a corporatist flavour to the constitution – an impression reinforced also by another part of the text encouraging regular physical exercise.<sup>137</sup>

To be sure, nothing of this is *per se* wrong or authoritarian, and much could be said in favour of conceptions of freedom alternative to individualism, let alone of regular physical exercise. It is the sum of all these and the above elements to seem potentially illiberal. The National Avowal and the Fundamental Law depicts the good Hungarian citizen as someone who lives in an heterosexual family, has children, does sport, cherishes the environment and national culture, participates cooperatively in work and, although sceptical of social conflicts, tolerates pluralism and enjoys liberal freedoms

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<sup>130</sup> Article L. See also article 1 of the Fourth Amendment.

<sup>131</sup> Article II.

<sup>132</sup> See Horkay Hörcher, above n. 93, 38, identifying in this regard a “[...] shift of emphasis from the defence of individual rights to a double focus on the defence of both individual rights and the socio-political values of the whole political community [...]”.

<sup>133</sup> Article C.

<sup>134</sup> Article XII.

<sup>135</sup> Article XVII.

<sup>136</sup> See, e.g., article XVI (4), “adult children shall be obliged to look after their parents if they are in need”.

<sup>137</sup> Article XX.

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(but without exceeding). In other words, the constitution does not portray the identikit of a dangerous enemy of civic values, but the more common and normally benign image of the average supporter of Fidesz and its coalition partner – an image to which probably most European conservatives could subscribe.<sup>138</sup> Precisely for this reason doubts can be cast about the capacity of this document to promote collective identification beyond the ranks of Hungarian conservatives. This goes to the social legitimacy of the Fundamental Law, but also to the quality of democratic and civil life that Hungarians will enjoy in the next years. It is often when alternative life styles are marginalised, minority worldviews disenfranchised and, more generally, the room for deviancy enlarged that conflicts risk becoming intractable and social bonds weakened.

### 3.3. The 'efficient part' of the Partisan constitution: continuity and corrosion

There is a lot in the ideological apparatus of the Fundamental Law justifying a worried assessment, and the fact that constitutional provisions are to be interpreted in accordance with the National Avowal is all the more alarming.<sup>139</sup> Legitimate concern for the ideological stance of the constitution, however, should not distract from an overall evaluation of the text. Paraphrasing Bagehot,<sup>140</sup> it might well be that the 'dignified part' of the Fundamental Law fails in exciting and preserving the reverence of (all) the people; yet, its 'efficient part' could still offer an institutional setting that, relieved of ideological burdens, allows the operation of a constitutional democracy. It is this last hypothesis that needs to be verified prior to

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<sup>138</sup> J.-W. Müller, 'The Hungarian Tragedy' (2011) *Dissent*, 8, refers to the concept of *Bürgerlichkeit*.

<sup>139</sup> Article R (3).

<sup>140</sup> W. Bagehot, *The English Constitution* [1867] (Cambridge University Press, 2001), 5.

dismissing the Fundamental Law as entirely contradicting European constitutional culture.

Once this standpoint is taken, a good deal of continuity can be detected between the efficient part of the Fundamental Law and the previous constitutional setting.<sup>141</sup> Principles such as democracy, rule of law and separation of powers are confirmed, and also the protection of fundamental rights is reasserted through a catalogue that seems largely consistent with the ECHR and the EU Charter of Fundamental Rights.<sup>142</sup> EU membership is reaffirmed<sup>143</sup> and also international cooperation is widely supported.<sup>144</sup> In certain constitutional norms there is language to soften some of the most assertive passages of the National Avowal. This is the case of religion: whereas the National Avowal prioritises Christianity for the purpose of nation building, article VII provides a plain formulation of the principles of freedom of and from religion and separation between the State and Churches.<sup>145</sup> A more pluralist posture emerges also in the socio-economic sphere, where the constitution lays down a rather conventional list of economic freedoms<sup>146</sup> and social rights.<sup>147</sup> The same can be said about the fundamental traits of the institutional architecture. True, the powers and responsibility of the President of the Republic have been probably

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<sup>141</sup> For a similar assessment, see A. Arato, 'Orbán's (Counter-) Revolution of the Voting Booth and How it was Made Possible', in <http://www.verfassungsblog.de/de/orbans-counter-revolution-of-the-voting-booth-and-how-it-was-made-possible/> (last visited May 2013).

<sup>142</sup> To a closer look, also in this respect some deficiency can be identified. For instance, article VIII (2)-(5) recognises freedom of association with no limit for armed political organizations (see, instead, article 63 (2) of the 1989 Constitution). It seems, however, that similar lacunae can be overcome through interpretation also with reference to international human rights treaties.

<sup>143</sup> Article E.

<sup>144</sup> Article Q.

<sup>145</sup> In this respect, the formula employed in article VII is more advanced than that used in article 60 (3) of the 1989 Constitution. More worryingly, Act CCVI of 2011 (Act on Churches) has made the recognition of churches conditional on prior approval by the parliament by a two-thirds majority.

<sup>146</sup> Articles XII (freedom of enterprise) and XIII (right to property).

<sup>147</sup> Articles XI (right to education), XII (right/duty to work), XV (equality), XIX (social security), XXII (housing).

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increased,<sup>148</sup> but the Parliament retains its role of “supreme body of popular representation”,<sup>149</sup> with legislative, budgetary and controlling powers on government. Finally, also the role of the Constitutional Court, despite important changes to its composition and modalities of access, seems confirmed and broadly consistent with European standards.<sup>150</sup>

Should we therefore conclude that, beyond all the fuss about ideology, the Fundamental Law is in line with European constitutional culture? Unfortunately not. There are at least three areas in which also the efficient part of the Fundamental Law runs afoul of the idea of a pluralist constitution, thus revealing that corrosion has undermined deeper strata of the constitutional structure.

The organisation of the judiciary is the first area in which the constitutional structure may be found wanting. This is only in part attributable to the Fundamental Law for, when it comes to courts the constitutional text is rather laconic. In particular, the prerogatives of judges and the administration of courts receive scant discipline from the constitution, leaving to a largely unconstrained legislature the power to intervene. The perils of allowing such broad latitude to Parliament have soon materialised. Legislation has assigned the administration of courts to a National Office for the Judiciary, a one-person body of dubious independence which, under unspecified circumstances, has the power to move legal cases between courts. Other legislative norms betray the inclination of the current ruling coalition to interfere with the judiciary and other independent authorities. Among these,

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<sup>148</sup> See articles 9 (3) and (5).

<sup>149</sup> Article 1, echoing the formula employed in article 19 of the 1989 Constitution.

<sup>150</sup> The most strident exception is perhaps article 37 (4), restricting judicial review of legislation on statutes involving public finance as long as state debt exceeds half of the Gross Domestic Product. More limitations to the powers of the Constitutional Court have been introduced by articles 12, 17 and 19 of the Fourth Amendment.

the provision lowering judges' retirement age from 70 to 62 stands out.<sup>151</sup> Presented as a move to rejuvenate the judicial branch, the norm has been rapidly unmasked as an awkward attempt to dispose of experienced judges on behalf of a cohort of younger government loyalists.

Another field in which the Fundamental Law departs dramatically from the idea of a pluralist constitution are its frequent references to cardinal laws, i.e. acts of Parliament requiring the approval of a two-thirds majority.<sup>152</sup> As seen, already the 1989 Constitution made large use of this tool,<sup>153</sup> a choice soon regarded as "an irrational obstacle to effective government action".<sup>154</sup> In the context of the Fundamental Law, charges of irrationality could seem even more justified: why on earth assigning to consensual decision-making the task of detailing partisan constitutional norms such as those on family?<sup>155</sup> Isn't this an absurd reversal of the logic inherent in pluralist constitutions, whereby consensual decision-making is for constitutional principles and partisanship for their articulation? Isn't this a way to co-opt political minorities into the implementation of a biased normative project? Much of this may be true on a theoretical level, but at a practical one the idea of expanding the use of cardinal laws corresponds to lucid political strategy. In the current political environment, references to cardinal laws are no longer to be associated with consensual decision-making. Rather, they can best be viewed as references to the contingent parliamentary majority that will have the first word in implementing the constitution. Only in a subsequent period, when probably no one else will be able to aggregate a comparable majority, will the consensual nature of cardinal laws be revived, granting a veto position to

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<sup>151</sup> See cardinal law n. 162/2011.

<sup>152</sup> Article T (4).

<sup>153</sup> See above section 2.3.

<sup>154</sup> Paczolay, above n. 61, 569.

<sup>155</sup> See article L (3).

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current rulers. In analysing this aspect, therefore, one should not be misled by comparisons on the quantity of references to cardinal laws contained in the Fundamental Law and the 1989 Constitution – yes, numbers are roughly similar. What is crucial to understand is that by means of cardinal laws, the current political majority is empowered to entrench its preferences on critical institutional issues<sup>156</sup> and, perhaps more controversially, on the definition of civil rights<sup>157</sup> and policy issues normally left to majoritarian political competition.<sup>158</sup> Underlying this use of cardinal laws, therefore, is an opportunistic approach to representative institutions, one that not only devalues the idea of competitive democracy but that establishes also the premises for future political inaction and rapid obsolescence of legislation.

Disdain for democratic decision-making emerges also from other aspects of the constitutional setting, namely the architecture built around the state budget. In this respect, the constitution expresses a clear pro-austerity stance. This is evident in article 36 (4), where the Parliament is prevented from adopting a budget act allowing state debt to rise above half of the Gross Domestic Product. This notion is reinforced in article 36 (5), requiring Parliament to reduce state debt as long as this exceeds that threshold.<sup>159</sup> Respect of these rules is not entrusted only to the Parliament and the Constitutional Court. The Fundamental Law institutes the Budget Council, a technocratic body assisting the Parliament in its legislative and budgetary activities.<sup>160</sup> Tasks of the Budget Council are controlling that the budget meets

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<sup>156</sup> See, e.g., the references in article 5 (7), on the rules of procedure of Parliament, and article 25 (7) on the organisation and administration of courts.

<sup>157</sup> See, e.g., article G (1) and (4) on citizenship.

<sup>158</sup> This is the case of articles 38 and 40, on the use of national assets, taxation and pensions.

<sup>159</sup> Only Article 36 (6), for cases of enduring economic recession, mitigates the rigour of the preceding paragraphs.

<sup>160</sup> Article 44. The Budget Council is composed of three members: its President, appointed for six years by the President of the Republic, the Governor of the National Bank of Hungary, appointed for six years by the President of the Republic (art. 41 (2)) and the President of the State Audit Office, elected for twelve years by a two-thirds parliamentary majority (art. 43 (2)).

article 36 requirements on state debt and, if so, consenting to it. Without consent of the Budget Council, the state budget act cannot be adopted,<sup>161</sup> a circumstance this that may have far-reaching consequences on the democratic process well beyond budgetary issues. Indeed, if the Parliament fails to adopt the budget by 31 March, the President of the Republic may dissolve it.<sup>162</sup> With the Parliament under such a constant technocratic threat, it is easy to predict that the political process will be infantilised and the room for legitimate political contestation even more restricted.

In the end, this seems the crude reality from which massive doses of nationalist propaganda tend to divert popular attention. Once ideology is set aside, the text portrays only a debilitated form of constitutional democracy in which the rule of law is weakened and the political process emasculated. What the Fundamental Law has on offer is just a recipe for rampant nationalism and austere technocracy, hardly for a vibrant constitutional democracy. That is why, even after an analysis of its efficient part, doubts on its capacity to generate the sort of collective identification associated with the idea of pluralist constitution seem all the more founded.

#### 4. Dilemmas of conditionality post enlargement

In Europe, constitution making is no longer an undertaking carried out in isolation by national communities. Although national sovereignty remains a pillar of democratic political and legal orders, its exercise is subject to a variety of constraints reflecting the broader range of principles characterising European constitutional culture. Different international and transnational

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<sup>161</sup> Article 44 (3).

<sup>162</sup> Article 3 (3) b).

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institutions oversee constitutional politics in accordance with distinct mandates and styles of intervention. Their characteristics and effectiveness have been tested during the approval and implementation of the Fundamental Law.

### 4.1. Soft Constitutionalism

The exercise of constitution making power is first of all conditioned by 'soft constitutionalism', the supervisory activity carried out by the European Commission for Democracy through Law operating at the Council of Europe (hereinafter: 'Venice Commission'). Entrusted with the task of giving legal advice on the democratic functioning of institutions, the Venice Commission is often requested to scrutinise constitutional politics in the light of the ECHR and European standards of democracy and rule of law.<sup>163</sup> This has occurred also in the case of Hungary, where the new constitution and its implementing acts have originated a series of opinions touching upon several of their most controversial aspects.<sup>164</sup> Although this is still an on-going process, the merits (and flaws) of soft constitutionalism can already be assessed in particular with reference to the two opinions issued on the Fundamental Law.<sup>165</sup>

No institution better than the Venice Commission has highlighted the criticalities of the new Hungarian Constitution. Firstly, it has censured the process leading to its adoption. Already in its first opinion, the Venice Commission manifests openly its unease for a process in which opposition

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<sup>163</sup> Article 1, Resolution (2002)3, Revised Statute for the European Commission for Democracy through Law.

<sup>164</sup> The complete list of opinions issued by the Venice Commission on Hungary is available at <http://www.venice.coe.int/webforms/documents/?country=17&year=all> (last visited October 2013).

<sup>165</sup> These are the "Opinion on three legal questions arising in the process of drafting the new constitution of Hungary" (Opinion no. 614/2011), 28 March 2011, and the "Opinion on the new constitution of Hungary" (Opinion no. 621/2011), 20 June 2011.

parties were excluded, transparency and public deliberation were not ensured, civil society was inadequately consulted. All these elements led the Commission to conclude that the key requirements of a democratic constitution making process were not satisfied.<sup>166</sup> Secondly, the broad usage of cardinal laws is blamed and suggestion is made to enlarge the scope for majoritarian politics.<sup>167</sup> Thirdly, the Venice Commission expresses concern also for the weakening of the powers of parliamentary majorities and the prerogatives of the Constitutional Court in the field of public finances.<sup>168</sup> Many other institutional aspects are examined and, among these, also the National Avowal is object of specific analysis. The Venice Commission does not openly engage with the ideology and ethos inspiring this document. Its opinion retains a strictly legal register and explores a number of aspects which could make the interpretation of constitutional norms according to the National Avowal problematic.<sup>169</sup> The vagueness of certain concepts is censured as well as the possible implications of the declaration of invalidity of the 1949 constitution. In addition, concerns are raised over the axiological thickness of the document and its potential extra-territorial effects.

Thus, much could be said in favour of the activity performed by the Venice Commission in respect of the Fundamental Law: its opinions are authoritative and many of its suggestions, if listened to, could have contributed to a more considerate exercise of constitutional politics. The fact that this did not happen, however, is proof of the limits of soft constitutionalism. There is, indeed, an inverse relationship between the quality of the opinions issued by the Venice Commission and their legal and political impact. Its first Opinion, for instance, suggested that openness and spirit of compromise ought to be

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<sup>166</sup> Opinion 614/2011, above n. 165, § 15-19 and 71-73.

<sup>167</sup> Opinion 621/2011, above n. 165, § 24-27.

<sup>168</sup> *Ibidem*, § 89 and 120-129.

<sup>169</sup> *Ibidem*, § 34-40.

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the principles inspiring constitution making<sup>170</sup> but, as noted, Hungarian constitution makers carried on indifferent to such admonition. Sure, the solutions suggested by soft constitutionalism may reveal influential beyond constitutional politics, for instance inspiring judicial interpretations of the Fundamental Law or political and academic debate on it. Conscious of its limited role, the Venice Commission has invested most of its energies in the analysis of the bill of rights, suggesting interpretations in the light of the ECHR that could probably redress some of the most questionable provisions inserted in the Fundamental Law.<sup>171</sup> These are precious pieces of advice and it would be difficult to demand more from an institution whose mandate is just to provide legal assistance. Beyond rights adjudication, however, the problem of redressing partisan constitution making or, at least, curbing its most hideous implications remains and justifies the intervention of another set of institutions.

### 4.2. The EU political dead end

By becoming members of the EU, member states have contracted an obligation to respect its fundamental values.<sup>172</sup> This applies also to national constitution making for that obligation is all-comprehensive and extends beyond the fields covered by the EU Charter of fundamental rights. Interest of the EU, its member states and European citizens on the respect of values such as democracy, rule of law and pluralism rests on different assumptions. Firstly, there is a general interest of all these actors in the moral and political integrity of the Union, an aspect relevant also to its international credibility

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<sup>170</sup> Opinion 614/2011, above n. 165, § 73.

<sup>171</sup> See, e.g., § 66-67, on the balance between the freedom of the mother and the rights of the unborn child; § 69-70, on life imprisonment without parole and § 75-80 on the prohibition of discriminations on the ground of sexual orientation.

<sup>172</sup> Articles 2 and 49 TEU.

and that of its member states.<sup>173</sup> Secondly, respect of those fundamental values is instrumental to a correct functioning of free movement and the area of freedom, security and justice for breaches of fundamental rights may deter movement towards a jurisdiction and encourage migration towards others.<sup>174</sup> Finally, national compliance with fundamental values has an important bearing also on the democratic quality of Union. National institutions are structurally involved in supranational decision making and, as such, there is also a collective interest in preventing them from poisoning with toxic elements the EU legal and political process. For all these reasons, EU member states have conferred to the Union the task of contrasting slides into authoritarianism. According to article 7 TEU, in case of risk of a serious breach, the Council can pressure a member state into respecting fundamental values, or sanction it if that risk materialises. This is part of the EU civilising mission towards national polities, a system of pre-commitment responding to the interests of both individual member states and the Union at large.<sup>175</sup>

In the light of the above analysis, it could safely be argued that in the case of the new Hungarian constitution at least a risk of serious breach had materialised. Yet, activating article 7 is not an easy process, given the broad margins of political discretion granted to the institutions involved.<sup>176</sup> Several arguments could be advanced in support of opening an article 7 procedure. For one, EU monitoring and the threat of future sanctions could have helped

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<sup>173</sup> Article 3 (5) TEU.

<sup>174</sup> See the Opinion of AG Maduro in Case C-380/05, *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni and Direzione Generale Autorizzazioni e Concessioni Ministero delle Comunicazioni* [2008] ECR I-349, § 20-22. See also D. Sarmiento, 'The EU's Constitutional Core', in A. Saiz Arnaiz, C. Alcobarro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia, 2013), 193-195.

<sup>175</sup> J. H. H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999), 336-343. See also R. Keohane, S. Macedo, A. Moravcsik, 'Democracy-Enhancing Multilateralism' (2009) 63 *International Organization*, 1.

<sup>176</sup> Communication from the Commission to the Council and the European Parliament "on Article 7 of the Treaty on the European Union. Respect for and promotion of the values on which the Union is based" COM (2003) 606 final, 5-6.

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if not at the stage of constitution making, at least at those of amendment, implementation and interpretation of the constitution. Then, some degree of EU pressure could have supported political minorities in their efforts to uphold European constitutional culture in Hungary. Finally, also the legitimacy of the EU could have gained from a resolute action in this field, showing that the Union is ready to act not only when the Euro is jeopardised, but also when its fundamental non-economic values are at stake. However, cogent reasons could be put forward also against the use of article 7: especially in states of recently reacquired sovereignty such as Hungary, external pressures are likely to be perceived as illegitimate interferences, thus resulting counterproductive for the constitutional democratic cause.

Be that as it may, EU institutions preferred not to open an article 7 procedure against Hungary. There are not official documents stating the reasons for this decision. Concerns that a bold EU action could backfire may have certainly be influential, alongside doubts about the possibility of reaching the high voting thresholds required in the Council and the European Parliament.<sup>177</sup> Moreover, the political affiliation of Fidesz and its coalition partner with the European People Party must have certainly played a role, considering the embarrassment that a charge of violation of EU fundamental values would have generated for the largest European political party.

Despite the failure in activating article 7 procedure, EU institutions have not remained idle over the new Hungarian constitution. The most vocal reaction has come from the European Parliament, where two resolutions censuring the Fundamental Law and its implementation have been approved.<sup>178</sup> Both the

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<sup>177</sup> The determination of a clear risk of a serious breach requires a four-fifths majority in the Council (art. 7 (1) TEU) and two-thirds of the votes cast representing the majority of the component members in the Parliament (art. 354 TFEU).

<sup>178</sup> See European Parliament Resolution of 5 July 2011 on the Revised Hungarian Constitution (2011/2655(RSP)), and European Parliament Resolution of 16 February 2012 on the recent

contents of those documents and the debate leading to their adoption reveal all the limits of a purely political approach to such kind of issues.

First of all, during the debate<sup>179</sup> the contents of the Fundamental Law received only cursory attention.<sup>180</sup> It is rare to find in-depth analyses of its critical points, not to mention discussions of them in the light of European constitutional culture. Many of the critics preferred to take issue with particular aspects of the Fundamental Law to express their own legitimate, though equally biased, political beliefs. This is the case, for instance, of the norm banning gay-marriage, target of several MEPs attacking what they considered discrimination on the ground of sexual orientation.<sup>181</sup> In their statements, no consideration is given to the fact that, on this issue, a European consensus is far from being consolidated.<sup>182</sup> Their claims seem to be formulated to please their particular constituency and not to advocate the notion that, on controversial issues, constitutional norms ought to recognise rather than decide conflicts. But justified as they seem by the dynamics of European politics, such positions are hardly more legitimate than those they strive to criticize: it is not by replacing a conservative constitutional norm with a liberal one that bias goes away.

Similarly misguided are the views put forward by the advocates of the Fundamental Law. In this camp, two are the main strategies followed by the intervening MEPs. The first mirrors the positions expressed by the critics: a number of MEPs take the floor just to praise the Fundamental Law as a

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political developments in Hungary (2012/2511(RSP)). A further important resolution has been approved on July 3 2013. On this development, see below section 6.

<sup>179</sup> European Parliament, debate of 8 June 2011, 11. Revised Hungarian constitution.

<sup>180</sup> Particularly striking is the passage in Resolution 2011/2655 referring to a non-existent incorporation of the Charter of Nice in the Fundamental Law (see letter h).

<sup>181</sup> See, e.g., the statements by Lunacek and Willmot in the debate of 8 June 2011.

<sup>182</sup> Opinion 621/2011, above n. 165, § 46-50.

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manifesto for European conservatism.<sup>183</sup> Others, instead, follow the slightly more sophisticated tactic of “debating the debate”<sup>184</sup>, i.e. contesting the right of the European Parliament to voice its opinion on a newly enacted constitution with arguments based on national sovereignty<sup>185</sup> or, softer version, national diversity.<sup>186</sup>

In such a climate, few are the voices following the principles that should inspire the Parliament on these issues: respect of national constitution making and strong assertion of European values, in particular political pluralism.<sup>187</sup> It is not surprising, therefore, that the impact of the resolutions has been negligible so far. Although their contents incorporate some of the remarks made by the Venice Commission, their calls for a new constitution or a more inclusive attitude in its implementation have remained dead letter. Indeed, it is difficult to believe that the views expressed by the European Parliament will have a significant impact beyond the circle of the aficionados of European politics and, especially, in Hungary. Given their liberal imprinting, a far more realistic scenario is that those resolutions will be felt as another product of an elitist cosmopolitanism that, short of political support in Hungary, preaches liberal values in an attempt to overrule the products of genuine self-government.<sup>188</sup>

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<sup>183</sup> See, e.g., the statements by Manfred Weber and Kurski in the debate of 8 June 2011.

<sup>184</sup> In the words of Tavares, see debate of 8 June 2011.

<sup>185</sup> These are the positions expressed in the debate of 8 June 2001 by the (Hungarian) Presidency of the Council, and MEPs from the EPP such as Busuttill, Ader and Brok.

<sup>186</sup> See the statements by Mauro and Gal in the debate of 8 June 2011.

<sup>187</sup> For an isolated exception, see the statement by López Aguilar in the debate of 8 June 2011.

<sup>188</sup> See the statement by Kurski in the debate of 8 June 2011.

### 4.3. Low-profile legalism

If politics comes to nothing (or little more), what is left is law. This is particularly evident in the debate at the Civil Liberties Committee of the European Parliament,<sup>189</sup> where proposals of opening an article 7 procedure<sup>190</sup> were rejected and, at least for the moment, shelved with the argument that “European law must be the cornerstone of [EU] action”.<sup>191</sup> The same notion resonates also in one of the resolutions adopted by the European Parliament: as attention turns to the implementation of the Fundamental Law, its most tangible decision is asking the European Commission to intensify control through the infringement procedure.<sup>192</sup>

This brings in low-profile legalism, currently the main course of EU action vis-à-vis the Hungarian legislation implementing the Fundamental Law. On January 2012 the Commission has started a series of infringement proceedings on several issues including the independence of the national central bank, the lowering of the retirement age of judges, prosecutors and notaries, the independence of the new data protection authority.<sup>193</sup> Compared with the political approach and soft constitutionalism, infringements proceedings present all the advantages of an essentially legal approach. They are certainly more effective than soft constitutionalism for they can result in a judgment and, possibly, in fines. Besides, their recourse to legal language avoids the political exposure associated with the article 7 procedure. Thus, infringement proceedings may well appear as the most appropriate candidate solution to

<sup>189</sup> See ‘Civil Liberties Committee debates Hungary’s controversial laws’, available at <http://www.europarl.europa.eu/news/en/pressroom/content/20120109IPR35005/html/Civil-Liberties-Committee-debates-Hungary's-controversial-laws> (last visited October 2013).

<sup>190</sup> *Ibidem*, referring to the proposals put forward by int’Veld, Alfano and Göncz.

<sup>191</sup> *Ibidem*, referring to the opinions of Voss and Gál.

<sup>192</sup> See Resolution 2012/2511 (RSP), points D and 4.

<sup>193</sup> See ‘European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary’, press release 17 January 2012, available at [http://europa.eu/rapid/press-release-IP-12-24\\_en.htm](http://europa.eu/rapid/press-release-IP-12-24_en.htm) (last visited October 2013).

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put pressure on the Hungarian government and redress the most contentious aspects of the new constitutional order.

Yet, low-profile legalism contains also a number of shortcomings. Firstly, within the framework of the infringement procedure, the overall debate on the Fundamental Law and its implementation is fragmented. Unlike in article 7, infringement proceedings require the Commission to formulate separately its charges through well-targeted initiatives addressing the specific criticalities of the constitution and its implementing legislation. Once fragmented, the debate on the Fundamental Law loses political and constitutional pathos. The problem is no longer the political project behind the constitution, its controversial genesis and its potentially negative impact on the quality of democratic life in Hungary. As the focus shifts to policing single legislative initiatives, the broad picture remains in the background and all the discussion is reconfigured in more professional and technical terms.

This is not only a consequence of the structure of the infringement procedure, but also of its ethos. Infringement procedures are notoriously an opaque affair. They are carried out through confidential relationships between the Commission and the national government, so their distinctive character is that of diplomacy and administrative management. This renders low-profile legalism a top-down exercise impermeable to political contestation, in which disenfranchised parties in Hungarian and European society may at most benefit of the vicarious representation by the Commission.

The drastic depoliticization inherent in low-profile legalism emerges finally in the yardstick and the language employed by the Commission in infringement proceedings. Analysis and discussion of specific issues are not framed with constitutional language, but with the grammar and syntax of EU legislation. This results in the transformation of the debate on constitutional democracy

into a more detached debate on compliance with EU legislation. In this regard, an emblematic example is offered by the infringement procedure concerning the lowering of the retirement age of judges, prosecutors and notaries. It will be remembered that the issue had been investigated also by the Venice Commission, which expressed its criticism with the following words: “[...] the Commission finds this measure questionable in the light of the core principles and rules pertaining to the independence, the status and immovability of judges. According to different sources, this provision entails that around 300 of the most experienced judges will be obliged to retire within a year. Correspondingly, 300 vacancies will need to be filled. This may undermine the operational capacity of courts and affect continuity and legal security and might also open the way for undue influence on the composition of the judiciary”.<sup>194</sup> A totally different approach emerges from the ruling of the European Court of Justice on the same issue.<sup>195</sup> Here, the case is no longer one concerning judicial independence but one of age discrimination. The good protected is not the adequate functioning and the independence of the judiciary; the lowering of retirement age is treated as a routine labour law case, one in which the goods at stake are the professional activity of judges, their legitimate expectations on wage and the coherence of the pension system. Nowhere in the judgment are the constitutional implications of the measure discussed, with the result that the issue is framed and resolved against the colder and more dispassionate background of anti-discrimination law and proportionality review.<sup>196</sup> This is probably the most that the EU institutions are able to deliver nowadays: a low-profile legal approach in which constitutional culture cannot be defended openly due to the Union’s political and constitutional fragility.

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<sup>194</sup> Opinion 621/2011, above n. 165, § 108.

<sup>195</sup> Case C-286/12, *Commission v. Hungary*, not yet reported.

<sup>196</sup> *Ibidem*, respectively at § 48-54 and 55-56.

## 5. The Union's guilty conscience

The incapacity of the Union to induce a more considerate exercise of constitutional politics in one of its member states requires careful consideration. As the Hungarian tragedy advances, most of the comments tends to circumscribe the issue and tell the story of a single country abandoning European constitutional culture. Of course, more informed opinions have also highlighted the difficulties encountered by the Union in dealing with conditionality after enlargement, calling for the use of article 7 TEU or the introduction of more effective and accessible mechanisms to reorient Hungary into the correct constitutional path.<sup>197</sup> Also these contributions, however, share the same assumption: were it not for Hungary, European constitutional culture would be healthy and thriving. Unfortunately, the situation is more alarming: Hungary is not the black sheep of the Union and - what is worse - its situation may be a harbinger of difficult times to come for European constitutional culture as a whole.

My diagnosis is that the Hungarian tragedy reproduces in amplified and grotesque form the more profound and pervasive phenomenon of the corrosion of European constitutional culture. Thus, rather than looking at the partisan constitution as a backward product and a contingent malaise, we should study and criticise it as the most emblematical example of a broader trend in European legal culture, namely the decline of the idea of pluralist constitution. To capture this notion, we should set aside for a moment the most vocal aspects of the Fundamental Law, and focus on its critical structural element: the confusion between the role of the constitution and the place of partisanship or, in other words, the entrenchment in the constitution of a

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<sup>197</sup> See, for instance, the debate 'Hungary: Taking Action' hosted by Verfassungsblog.de, <http://www.verfassungsblog.de/en/category/themen/antworten-auf-ungarn/#.UYEVxsrgfPo> (last visited October 2013).

partisan political project and the corresponding foreclosure of routine political competition.

From this standpoint, the Fundamental Law seems perfectly in line with contemporary European legal and political culture. As Chantal Mouffe observes in her analysis on the political, we have entered an era in which partisan conflicts are regarded as a thing of the past and are silently replaced by post-politics.<sup>198</sup> According to this new common sense, the political does not disappear but is played out in the moral register: in place of a struggle between right and left, post-politics develops as a struggle between right and wrong.<sup>199</sup> Mouffe does not examine the legal implications of post-politics, but it is easy to see how this concept could hardly fit with that of a pluralist constitution. Indeed, post-politics operates the same inversion between the place of partisanship and the role of the constitution detected in the structure of the Fundamental Law: the constitution is no longer the place for an open compromise between left and right; it is the locus in which what is right is decided. Within the post-political vision, therefore, the room for legitimate political contestation is narrowed down, relegating politics (of what remains of it) essentially to the implementation of a pre-defined constitutional project. Opponents of this project are viewed as enemies and no longer adversaries for, in the new context, their claims appear illegitimate and against the course of history.<sup>200</sup> Thus, by drawing the political frontier in this way, the post-political vision is not conducive to vibrant democratic debate; it generates alienation or intractable and unmediated antagonism between the institutional establishment and its marginalised opponents.

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<sup>198</sup> Mouffe, above n. 16, chapter 3.

<sup>199</sup> *Ibidem*, 72-76.

<sup>200</sup> *Ibidem*, 49-50.

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There is a lot in the post-political vision that is valid for the European Union. Although it is impossible to elaborate here an accurate examination of its constitutional deficiencies, already a broad brush account will show that not only Budapest, but also Brussels contributes to the corrosion of European constitutional culture.<sup>201</sup>

The distinctive legal qualities of the Union are largely a product of the peculiar circumstances in which the European integration project was originally conceived. At its inception, the Union lacked the social and political preconditions implicit in the idea of pluralist constitution.<sup>202</sup> It could vaunt neither a shared national identity nor the sense of economic reciprocity necessary to activate a redistributive system and a circuit of representative democracy.<sup>203</sup> European institutions were established essentially as a means for sustaining the member states and their national pluralist constitutions by overcoming their deficiencies in a world of increasing economic interdependence.<sup>204</sup> Coherently with this notion, priority was accorded to the goal of building a common market.<sup>205</sup> Social policies and redistribution were left in the hands of the member states which, by means of their pluralist constitutions, were in a better position to deal with their related political conflicts.<sup>206</sup> As a consequence of this division of labour, supranational law developed a distinct attitude towards social conflicts. In stark opposition with the ethos inspiring pluralist constitutions, it did not aim at their

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<sup>201</sup> For a more developed version of this argument, see M. Dani, 'Rehabilitating Social Conflicts in European Public Law' (2012) 18 *European Law Journal*, 621.

<sup>202</sup> D. Grimm, 'Does Europe Need a Constitution' (1995) 1 *European Law Journal*, 294-297.

<sup>203</sup> R. Bellamy, 'The Liberty of the Post-Moderns? Market and Civic Freedom within the EU', LEQS Paper No. 1/2009, <http://www2.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper1.pdf>, 10-16.

<sup>204</sup> *Ibidem*, 16.

<sup>205</sup> D. Chalmers, 'The Single Market: From Prima Donna to Journeyman', in J. Shaw, G. Moore (eds), *New Legal Dynamics of European Union* (Clarendon Press, 1995), 55.

<sup>206</sup> M. Ferrera, *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection* (OUP, 2005), 90-95.

institutionalisation.<sup>207</sup> It nurtured a culture of consensus built upon ideals such as ‘integration’ and ‘cooperation’, where supranational policy objectives were presented as uncontested goals and their pursuit an undertaking in which no one would be worse off.<sup>208</sup>

This alternative rationale shaped also the nature of supranational legal structures. The legal texture of the common market and, notably, its regulatory principles reveal significant differences from the constitutive principles inserted in pluralist constitutions. Far from encapsulating a ‘conflictual consensus’ between opposing political parties, they are expression of a quasi-Schmittian decision whose overriding goal is access to market.<sup>209</sup> As such, they are not meant to define a shared space allowing for the identification of individuals with different views on market regulation. On the contrary, they are decisions spelling out a coherent regulatory project whose underlying objective is constraining national political autonomy as soon as it interferes with transnational trade.

Remarkable departures from the canons of the pluralist constitution could be noted also in the procedural side of the common market project. For one, supranational legislation was conceived of as interstitial legislation. This was a direct consequence of the thickness of Treaty norms and of the fact that EU legislative instruments most of the times fleshed out market principles as interpreted by the Court of Justice.<sup>210</sup> Within a similar framework, the direction of EU policies was insulated from political disagreement, while contestation was allowed only over the means to achieve those pre-defined

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<sup>207</sup> However, it could be argued that the original European legal framework institutionalized interstate conflicts related to the mobility of factors of production, see Dani, above n. 201, 628-632.

<sup>208</sup> On the ideological neutrality of the European integration process, see Weiler, above n. 175, 88.

<sup>209</sup> Joerges, above n. 21, 340.

<sup>210</sup> P. Craig, ‘The Evolution of the Single Market’, in C. Barnard, J. Scott (eds), *The Law of the Single European Market. Unpacking the Premises* (Hart Publishing, 2002), 4.

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objectives. Another peculiar trait of supranational decision making regarded the nature of the institutions involved in it. Originally, the supranational political process was monopolised by national and supranational executives and representative institutions relegated to a marginal and essentially advisory role. As a result, important political questions were displaced to modes of decision making implying a considerable degree of 'technocratic depoliticization'.<sup>211</sup> Supranational decision making, finally, was structured as consensual decision making. The unanimity requirement established by the Treaty and *de facto* prolonged under the Luxembourg Compromise discouraged the organisation of a political system along the lines of ideological cleavages. The normal modes of policy making were pragmatic negotiation and accommodation of national interests,<sup>212</sup> an aspect entirely consistent with the consensus culture pervading supranational law.

To be sure, the EU legal framework has evolved considerably from those early years. Its remit has been expanded including significant segments of social and economic policy. It has been enriched with the language of fundamental rights,<sup>213</sup> and also its political process has incorporated several democratic motives.<sup>214</sup> But for all their impact on the EU legal landscape, these developments have not entailed a structural modification of the EU regulatory framework and its legal culture. On the contrary, they have confirmed that "the past of law ... is not simply part of its history; it is an authoritative significant part of its present".<sup>215</sup>

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<sup>211</sup> P. Lindseth, *Power and Legitimacy – Reconciling Europe and the Nation-State* (OUP, 2010), 81-82.

<sup>212</sup> U. Everling, 'The European Union Between Community and National Policies and Legal Orders', in A. von Bogdandy, J. Bast (eds), *Principles of European Constitutional Law* (OUP, 2007), 690-691.

<sup>213</sup> Article 6 TEU.

<sup>214</sup> Article 10 TEU.

<sup>215</sup> M. Krygier, 'Law as Tradition' (1986) 5 *Law and Philosophy*, 245.

The influence of original structures on the current EU legal framework emerges in form of qualification of all the listed evolutionary trajectories. For instance, in expanding EU competences towards the social domain, the treaties have not dismissed the original regulatory style of supranational intervention. By going social, the Union has not embarked in meaningful redistribution of resources.<sup>216</sup> As a result, the degree of political mobilisation associated with its policies has remained below national standards. Moreover, member states have retained within their jurisdictions the most critical aspects of social policy. In conferring legislative power to the Union, the treaties are careful to avoid interferences with the fundamental principles of national social security systems as well as with key issues of national industrial relations.<sup>217</sup>

The weight of the past is evident also when it comes to the incorporation of fundamental rights in the EU legal framework. Originally developed by the Court of Justice to buttress the primacy of EU law over national constitutional principles,<sup>218</sup> fundamental rights have never been meant to question the objectives and regulatory strategies inspiring the European integration process.<sup>219</sup> As a result, their impact on EU legislation and adjudication has been limited. Albeit included in the procedures of impact assessment,<sup>220</sup> they

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<sup>216</sup> According to the Financial Framework 2007-2013, the Union budget is 1,23% of the GDP, while on average national budgets account for 44% GDP, see [http://ec.europa.eu/budget/figures/fin\\_fwk0713/fwk0713\\_en.cfm](http://ec.europa.eu/budget/figures/fin_fwk0713/fwk0713_en.cfm) (last visited October 2013).

<sup>217</sup> Article 153 (4) and (5) TFEU.

<sup>218</sup> See, e.g., Case C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

<sup>219</sup> Eloquent of this are provisions such as articles 6 (1) TEU and 51 (2) of the EU Charter of Fundamental Rights establishing that the provisions of the Charter do not extend the competences of the Union as defined in the Treaties. Similarly telling is the Preamble of the Charter where it confirms that “the Union ... ensures free movement of persons, services, goods and capital, and the freedom of establishment”.

<sup>220</sup> Communication from the Commission, ‘Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’ (2010) 573 final.

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have not brought about a shift towards a culture of rights in legislation.<sup>221</sup> In adjudication, the language of fundamental rights has not called into question the original market paradigm. More modestly, fundamental rights have been taken into account in the enforcement of free movement principles. Although this has prompted important reconsideration in the standards of review of the Court of Justice,<sup>222</sup> a notorious series of cases shows how the culture of rights in the EU is still subordinate to the original commitment to market integration.<sup>223</sup>

Similar considerations can be formulated also in respect to the developments in the political process. Even in the newly acquired policy areas, the goals of EU intervention continue to remain insulated from legitimate political contestation. By entrenching price stability as the sole objective of monetary policy,<sup>224</sup> the Treaty makes the Keynesian model of macroeconomic management illegitimate.<sup>225</sup> By channelling employment policy uniquely towards employability and empowerment,<sup>226</sup> emancipation is excluded from the range of the available social policy alternatives.<sup>227</sup> This managerial conception of policy-making overshadows important innovations introduced in the EU form of government such as qualified-majority voting and the increased role of the European Parliament. But also in this regard, some consideration is in order. In assessing the democratic virtues of the Union, one

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<sup>221</sup> I. Butler, 'Ensuring compliance with the Charter of Fundamental Rights in legislative drafting: the practice of the European Commission' (2012) 37 *European Law Review*, 397.

<sup>222</sup> Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich* [2003] ECR I-5659.

<sup>223</sup> Case C-438/05, *The International Transport Worker's Federation and The Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti* [2007] ECR I-10779.

<sup>224</sup> Article 119 (2) TFEU.

<sup>225</sup> F. W. Scharpf, 'Monetary Union, Fiscal Crisis and the Preemption of Democracy' LEQS Paper No. 36/2011, disponibile at <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper36.pdf>>8-20

<sup>226</sup> Article 145 TFEU.

<sup>227</sup> A. Somek, 'What is political union?' (2013) 14 *German Law Journal*, 578-580.

should always remember that the process of democratisation of the political process has gone hand in hand with the rise of political administration.<sup>228</sup> As a result, even after the democratisation of the legislative process, most of the law approved at supranational level derives its legitimacy from the technocratic paradigm. It is not only the original technocratic character of the EU decision making that has been perpetuated; also its consensus culture has been maintained. Despite the shift to qualified majority voting, most of the items in the Council agenda are decided by consensus,<sup>229</sup> and also the ordinary legislative procedure is increasingly managed through consensual practices such as ‘trialogues’ and ‘first reading agreements’.<sup>230</sup>

All of this boils down to the frustration of political conflict in the EU and, as a reflection, to a dubious commitment to pluralist constitutionalism by the Union. Were it not for some measure of constitutional disguise, it is difficult to imagine how this type of legal and political culture could have passed serious constitutional scrutiny in the member states. Indeed, as the post-political vision became dominant in the efficient part of the EU legal framework, a corresponding constitutional narrative gained foothold in its dignified part. It started by rediscovering the myth of citizenship and fundamental rights with the Treaty of Maastricht, and the process came to a head in the failed Constitutional Treaty, where the Union too engaged in a strategy of ideological re-traditionalisation to conceal its precarious legitimacy. In that occasion the invention of tradition did not celebrate nationalism and religion, although the proposal to insert an *invocatio Dei* in

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<sup>228</sup> R. Dehousse, ‘Misfits: EU Law and the Transformation of European Governance’ in C. Joerges, R. Dehousse (eds), *Good Governance in Europe’s Integrated Market* (OUP, 2002), 207.

<sup>229</sup> More than 80% of the decisions of the Council have been decided by consensus, see D. Chalmers, G. Davies, G. Monti, *European Union Law* (CUP, 2010), 72.

<sup>230</sup> H. Farrel, A. Héritier, ‘Formal and Informal Institutions Under Codecision: Continuous Constitution-Building in Europe’ (2003) 16 *Governance*, 577.

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the preamble of the treaties was famously aired.<sup>231</sup> The object of ideological re-traditionalisation was European constitutional culture itself, employed by European constitution makers as “a credible disguise for a culture that refuses to admit the truth about itself”.<sup>232</sup>

Recent reforms adopted to cope with the financial crisis have increased the distance between the EU legal framework and the idea of pluralist constitution.<sup>233</sup> The introduction at a supranational level of redistributive instruments<sup>234</sup> has not brought about a constitutional turn.<sup>235</sup> The *quid pro quo* of transnational financial assistance has been an accentuation of the regulatory traits of the Union.<sup>236</sup> Post-politics and its corresponding legal culture have been exported towards policy areas in which previously political contestation and the idea of a pluralist constitution were undisputed.<sup>237</sup> Austerity has been elevated to a quasi-constitutional status,<sup>238</sup> and competitiveness and structural change have been prescribed as mandatory directions for national economic and social policies.<sup>239</sup>

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<sup>231</sup> J. H. H. Weiler, *Europa Cristiana. Un saggio esplorativo* (BUR, 2003).

<sup>232</sup> U. Haltern, 'Europe Goes Camper. The EU Charter of Fundamental Rights From a Consumerist Perspective', *ConWEB* No. 3/2001, 7.

<sup>233</sup> For a comprehensive analysis, see M. Dawson, F. de Witte, 'Constitutional Balance in the EU after the Eurocrisis' (2013) 76 *Modern Law Review*, 817.

<sup>234</sup> See Decision 2011/199/UE amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, and the Treaty Establishing the European Stability Mechanism (ESM).

<sup>235</sup> The Court of Justice has declared that the ESM complements the coordination of national economic policies, see Case C-370/12, *Thomas Pringle v. Government of Ireland, Ireland e The Attorney General*, not yet reported, § 58-59 and 69.

<sup>236</sup> D. Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 *European Law Journal*, 667-669.

<sup>237</sup> See, in particular, 'The Euro Plus Pact – Stronger Economic Policy Coordination for Competitiveness and Convergence', 24-25 March 2011, and the 'Compact for Growth and Jobs', 28-29 June 2012.

<sup>238</sup> Articles 3 (1) – (2) and 8 of the Treaty the Treaty on Stability, Coordination and Governance (TSCG).

<sup>239</sup> See, e.g., Communication from the Commission, 'EUROPE 2020 – A strategy for smart, sustainable and inclusive growth' COM (2010) 2020 final.

Such acceleration has provoked important changes in both the substantive and procedural dimensions of the EU legal framework. In the substantive dimension, the Six-Pack<sup>240</sup> and the Fiscal Compact<sup>241</sup> have transformed the constitutional landscape of redistribution. Economic and social rights have ceded to macroeconomic indicators and quantitative criteria,<sup>242</sup> with the result that national economic policies are no longer evaluated in the light of their capacity to give substance to the rights and entitlements listed in national bill of rights; their performances are measured through a variety of scoreboards, yardsticks and thresholds whose rationale and accuracy are beyond political contestation.<sup>243</sup>

Similarly depressing is the procedural side of the reforms approved. A sense of democratic anaemia pervades decision-making at both national and supranational level. Through the “European Semester”<sup>244</sup> and the “Common budgetary timeline”,<sup>245</sup> co-administration by the Commission, the ECOFIN and national governments replaces representative democracy as the preferred course of action to govern national fiscal policy.<sup>246</sup> At supranational level, the direction of economic policy is assigned to intergovernmental and informal

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<sup>240</sup> See regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area, regulation 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, regulation 1175/2011 on the strengthening of the surveillance of the budgetary positions and the surveillance and coordination of economic policies, regulation 1176/2011 on the prevention and correction of macroeconomic imbalances, regulation 1177/2011 on speeding up and clarifying the implementation of the excessive deficit procedure, Directive 2011/85 on requirements of budgetary frameworks of the member states.

<sup>241</sup> See title III of TSCG, above n. 238.

<sup>242</sup> See *Pringle*, above n. 235, § 179-181.

<sup>243</sup> See, e.g., article 4 of regulation 1176/11 introducing a macroeconomic imbalance scoreboard. The list of macroeconomic imbalance indicators is available at [http://epp.eurostat.ec.europa.eu/portal/page/portal/macroeconomic\\_imbalance\\_procedure/indicators](http://epp.eurostat.ec.europa.eu/portal/page/portal/macroeconomic_imbalance_procedure/indicators) (last visited October 2013).

<sup>244</sup> Article 2-a, regulation 1466/1997 as amended by regulation 1175/2011.

<sup>245</sup> Article 4, regulation 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.

<sup>246</sup> Chalmers, above n. 236, 687-692.

fora, traditionally not the best sites to articulate political contestation.<sup>247</sup> Surveillance on national budgets by the tandem ECOFIN/Commission is similarly shielded from political opposition. Indeed, for all the hypotheses of "Economic Dialogue" inserted in EU legislation,<sup>248</sup> it is difficult to see how the European Parliament could exert any meaningful influence if debt reduction and welfare reform are the only legitimate policy directions.

## 6. Conclusion

At the end of his account for the process of European integration,<sup>249</sup> Bickerton notes that technocracy and populism are emerging as the two dominant trends in contemporary European political life.<sup>250</sup> He argues that, despite their several discrepancies,<sup>251</sup> these political doctrines converge in expressing scepticism on representative democracy and, more broadly, on social and political pluralism.<sup>252</sup> The analysis developed in this paper points somehow in the same direction: European constitutional culture is being corroded by populist and technocratic forces alike. As seen, it is not just Hungary trying to divert the attention from its contemporary vicissitudes by restoring the aura of a glorious past. Also the Union is implicated in precisely the same strategic use of symbolism, trying to evoke the aura of an otherwise waning constitutional culture to hide its incapacity to constitute a collective self and transcend its regulatory nature.<sup>253</sup> Admittedly, this is also where similarities end, for there remain important differences between the exaltation of illiberal

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<sup>247</sup> Dawson and De Witte, above n. 233, 826.

<sup>248</sup> See, e.g., article 2-ab, regulation 1466/1997 as amended by regulation 1175/2011.

<sup>249</sup> C. Bickerton, *European integration. From Nation-States to Member States* (OUP, 2012).

<sup>250</sup> *Ibidem*, 182-185.

<sup>251</sup> *Ibidem*, 185

<sup>252</sup> *Ibidem*, 186-187.

<sup>253</sup> Haltern, above n. 232, 13-14.

nationalism and the praise of constitutionalism. Yet, it would be wrong to dismiss as a mere coincidence the illustrated assonances as one may even suspect the existence of a cause-effect relationship linking technocracy and populism.<sup>254</sup>

However, if, as we maintain, the idea of pluralist constitution can still offer a valid contribution to governing contemporary societies and their conflicts, a number of strategies are needed to counter its corrosion. Important steps in this direction would be challenging the post-political vision, reasserting the role of the constitution and the value of partisanship. Also the terms of engagement between the Union and national democracies should be reconceptualised: if the Union is unable to offer a supranational equivalent for the pluralist constitution, it should at least contribute effectively to defending the original concept at national level.

Unfortunately, there are no signs that the Union will accomplish these expectations any time soon. On the one hand, the Union appears unable to transcend its post-political ethos and regulatory style; on the other, it seems reluctant to react even against the most evident departures from its fundamental values. The most immediate result of this impasse is that the state of constitutional democracy in Hungary is all the more alarming.<sup>255</sup> In the period following the entering into force of the Fundamental Law, Hungarian political authorities not only have disregarded the invitation for a more transparent and inclusive approach to constitutional implementation formulated by the Venice Commission,<sup>256</sup> but have embarked in a series of

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<sup>254</sup> Mouffe, above n. , 66-72.

<sup>255</sup> See K. L. Scheppele, 'Constitutional Revenge', *The New York Times*, March 1, 2013, available at <http://krugman.blogs.nytimes.com/2013/03/01/guest-post-constitutional-revenge/>, and 'The Fog of Amendment', *The New York Times*, March 13, 2013, available at <http://krugman.blogs.nytimes.com/2013/03/12/guest-post-the-fog-of-amendment/> (last visited May 2013).

<sup>256</sup> Opinion No. 621/2011, above n. 165, § 144.

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constitutional amendments fulfilling the bleakest of the predictions. In particular the Fourth amendment to the Fundamental Law exacerbates some of the most contentious aspects of the original text.<sup>257</sup> The communitarian inclination of the constitution is reinforced with provisions reaffirming the traditional notion of family<sup>258</sup> or conditioning financial support to higher education studies to periods of employment in the service of the nation.<sup>259</sup> Increased concern is justified also in respect of provisions concerning the efficient part of the constitution. Just to name a few, the amendment entrenches the role of the National Office of the Judiciary and its case assignment power<sup>260</sup> and, even more disquieting, it repeals the case-law of the Constitutional Court rendered prior to the entry into force of the Fundamental Law.<sup>261</sup>

To contrast these developments, European institutions have followed the usual unproductive trajectories. In its Opinion on the Fourth Amendment,<sup>262</sup> the Venice Commission has repeated its criticism on the process of constitution making and, more broadly, it has censured the “instrumental attitude towards the constitution” inspiring the current Hungarian governing coalition.<sup>263</sup> Also the European Parliament has expressed its criticism in a comprehensive and detailed report covering the deficiencies of the Fundamental Law and its subsequent amendments.<sup>264</sup> But despite the

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<sup>257</sup>An English version of the Fourth Amendment is available at <http://lapa.princeton.edu/hosteddocs/hungary/Fourth%20Amendment%20to%20the%20FL%20-Eng%20Corrected.pdf> (last visited October 2013).

<sup>258</sup> See article 1, amending article L.

<sup>259</sup> See article 7, amending article XI.

<sup>260</sup> See articles 13-14 amending article 25 and 27.

<sup>261</sup> See article 20.

<sup>262</sup> See “Opinion on the Fourth Amendment to the Fundamental Law of Hungary” (Opinion no. 720/2013), 17 June 2013.

<sup>263</sup> *Ibidem*, § 135-136.

<sup>264</sup> European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130 (INI)).

increased quality of the remarks and heightened tone of the reproaches, the European Parliament has shown the same hesitations in the activation of the article 7 TEU procedure emerged in its previous resolutions. Thus, at the end of a long list of reprimands, the approved resolution has only repeated the request to the Commission to open infringement proceedings and invoked the introduction of a new independent institution entrusted with monitoring the respect of EU values.<sup>265</sup> It is telling of the crisis of European constitutional culture that, faced with an even more dramatic scenario, the only products the Union is able to deliver are toothless recommendations, hastily concocted proposals of institutional reform and low-profile infringement procedures.<sup>266</sup>

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<sup>265</sup> *Ibidem*, § 72-83.

<sup>266</sup> See 'The European Commission reiterates its serious concerns over the Fourth Amendment of the Hungarian Constitution', [http://europa.eu/rapid/press-release\\_IP-13-327\\_en.htm](http://europa.eu/rapid/press-release_IP-13-327_en.htm) (last visited October 2013).

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