

The relation between public and economic powers under the new Hungarian Economic Constitution and within the constraints of EU law

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Abstract: I rapporti tra poteri pubblici ed economici secondo la nuova Costituzione Economica ungherese ed entro i vincoli imposti dal diritto dell'Unione europea – The new Fundamental Law of 2011 has reformed and affected Hungary economic constitution in a way that it may be possible to observe the emergence of an “independent” economic model within the EU. The aim of the present study is to provide a critical understanding on the peculiarity of this economic model in respect to the EU framework having regard, in particular, to the strong political powers that the new Hungarian constitution leaves to the executive body. In addition, the ‘debt brake’ constitutional rule combined with restrictions on judicial review of legislative acts on fiscal matters for the Constitutional Court may represent a potential threat to the values on which, at least formally, the EU is rooted.

Keywords: Economic Constitution; Fundamental Law of Hungary; EU fundamental values; economic policy; fiscal rules.

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1. Introduction

Institutional and constitutional economics’ attention to the relationship between public institutions and economic processes have led to a thoughtful debate on how constitutional provisions can interact with the economy. On this regards, the Constitution, *per se*, has been understood as an “economic document”.¹ It provides the basic legal framework for public intervention in the economy and for market regulation. Some studies have also shown a correlation between constitutional provisions and economic developments. Indeed, different institutional set-ups may have an impact on economic growth and, in fact, evidence shows that the structure of the system of check and balances may influence economic growth in different ways.²

Last century’s unprecedented social and economic changes have affected the role of the state and its ability to control what happens in its territory, to the extent that some state’s functions, once considered its prerogatives, have shifted from the public to the private sector.³

¹ See, e.g., R.A. Posner, *The Constitution as an Economic Document*, in 56 *Geo. Wash. L. Rev.* 4 (1987).

² P. Cserne, *Constitutional Courts and the Limits of Economic Policy: Reflections on the Hungarian Experience*, Paper presented at the conference on “Constitutions and Markets”, European University Institute, Florence, 14–15 June 2007. Available at: www.eui.eu/Documents/MWP/Conferences/ConstitutionsMarkets/CserneConstitutionsMarkets.pdf.

³ A.C. Aman, *The Limits of Globalization and the Future of Administrative Law: From*

Western countries' economies, once rooted in the nation state as their ultimate regulator, have seen private sphere influence in the economy increasing and gaining an ever-growing role *vis-à-vis* public intervention. Initially, the rise of the welfare state had led to a significant interference of the 'public realm' in the economy. However, globalization along with neo-liberal strategies have redrawn public intervention's boundaries. Indeed, the tendency of delegating certain public functions to the private sector has resulted in one of the main causes of the welfare state's crisis, which has been legitimized by the assumption of market mechanisms' superiority over the regulatory capacity of public powers.⁴ Thus, private market forces has gradually replaced the public sector as the single regulator of the economy, particularly because of state's ineffective and costly solutions.⁵

There can be no denying that the world is current experiencing complex times of socio-economic upheaval, characterized by protests and increasing inequalities. In this respect, recent developments reveal a twofold trend. The free movement of goods, capital, services and people have certainly internationalized a particular segment of the 'global society' whilst at the same time, many communities still nurture deep and intense national sentiments. This contradiction between the open ranges of the market and the physical boundaries of national elements is visible, in some form, in the new Hungarian Fundamental Law (FL). Indeed, the new constitutional text seems to vigorously embrace the national dimension of Hungarian society and economy, even though Hungary is among those post-communist countries that during the 1990s had transited from a central-planned system to a market economy and sought their way towards democracy. Moreover, Hungarian People's Republic has been a member of the European Union (EU) since 2004 and, as such, it decided to adhere to the European common values.

After the Fall of the Berlin Wall, many economic and social reforms affected Eastern transition countries in a relative short time. According to some, the transition had a rather strong negative impact on the Hungarian economy that afflicted both domestic investors and consumers, despite leading the country to a democratic system.⁶ While deregulation and privatization, as the principal means of achieving the transition, were the main reasons for the inflow of foreign direct investment enabling Hungary's economy to grow,⁷ the underlying neoliberal principles strongly affected the Hungarian society by increasing inequality and pauperizing great segments of the population.⁸

The global economic crisis in 2007-2008, followed by the sovereign debt crisis plagued the entire European institutional framework that its own legitimacy has been seriously brought into question. Within this delicate international

Government to Governance, in 8 *Indiana Journal of Global Legal Studies* 379, 379-380 (2001).

⁴ J. Clarke, *Dissolving the Public Realm? The Logics and Limits of Neo-Liberalism*, in 33 *Journal of Social Policy* 27, 34-35 (2004).

⁵ N. Rose and P. Miller, *Political Power Beyond the State: Problematics of Government*, in 3 *British Journal of Sociology* 173, 197-198 (1992).

⁶ M.A. Piasecki, *Was Viktor Orbán's Unorthodox Economic Policy the Right Answer to Hungary's Economic Misfortunes?*, in 46 *International Journal of Management and Economics* 41, 47-49 (2015).

⁷ For a critical overview, see G. Matolcsy and D. Palotai, *The interaction between fiscal and monetary policy in Hungary over the past decade and a half*, in 15 *Financial and Economic Review* 5, 9-11 (2016).

⁸ Cf. U. Korkut, *Liberalization Challenges in Hungary: Elitism, Progressivism, and Populism*, Palgrave MacMillan, New York, 2012, 119-160.

political and economic context, Hungary had further confirmed the feeble results of the transition.⁹ The fragile economic situation, the public distrust and the discontent against the West liberal values, created the necessary environment for the neoconservative Fidesz-KDNP coalition to come to power in the 2010 general elections.¹⁰ The winning coalition led by Viktor Orbán¹¹ could present itself as “defender of the Hungarian national sovereignty against the European superpower, [...] and against global economic interests”.¹² Hence, thanks to an unrivalled parliamentary majority, the new leading coalition was able to amend the 1989 Hungarian Constitution, the first democratic constitutional text after the soviet regime since 1949, by promoting policies on the establishment of a workfare society as opposite to the decline of Western democracies and their proposed liberal socio-economic models.¹³ The current government has actually reformed the institutional and legal order, thus signalling a definitive break with the past.

This chapter is organized as follow. Section 2 deals with three main novelties in the Hungarian economic constitution: the division of constitutional powers among different public bodies and the overall balance; the relation between public and private economic powers; and the new fiscal constitutions and the ‘constitutionalization’ of the debt ceiling according to the new Fundamental Law. Then, in Section 3, the focus shifts to the analysis of the new Hungarian economic constitution’s degree of acceptance of European common principles and values as enshrined by the EU Treaties. In short, therefore, the aim of the present study is to assess to what extent different constitutional arrangements, institutional set-ups, and systems of checks and balances may interfere and shape a national economic order within the EU legal framework.

2. The role of the State in the economy under the new Hungarian economic constitution

2.1. The new institutional balance

The text of the FL reminds many of the 1989 constitution’s provisions but also presents many significant novelties.¹⁴ These include the reshaping of tasks and

⁹ Hungary’s Gross national debt increased by more than 25 percentage points between 2002 and 2010. See M.A. Piasecki, *supra* at 6, 49.

¹⁰ Two are the main political reasons that help to explain the victory of Fidesz in 2010 national elections. First, the Hungarian election system guaranteed to the winning coalition substantial benefits in terms of parliamentary seats. With a 52 percent of preferences, the coalition obtained more than two-thirds of the total members in the National Assembly. Second, the victory of the neoconservative party came in a political environment of tension and it could be seen as a protest against years of corruptions on the part of previous governments. Under the latter, Hungary had begun its transition towards a democratic system. See F. Hörcher, *Conservative or Revolutionary? Three Aspects of the Second Orbán-government (2010-2014)*, Danube Institute, Budapest, 2014, 2. Available at: danubeinstitute.hu/index.php?id_embed=32.

¹¹ Viktor Orbán is the current Prime Minister of the Hungarian People’s Republic. In office since the electoral triumph of Fidesz in 2010, he had already been in charge of the government between 1998 and 2002. Under his leadership, Fidesz gradually turned to neo-conservative political orientation in contrast with EU classical liberalism.

¹² F. Hörcher, *supra* at 10, 10-11.

¹³ D. Szikra, *Democracy and Welfare in Hard Times: The Social Policy of the Orbán Government in Hungary Between 2010 and 2014*, in 24 *Journal of European Social Policy* 486, 492 (2014).

¹⁴ F. Hörcher, *supra* at 10, 6.

powers among public institutions, an important reduction of Constitutional Court's competences on fiscal matters, as well as the 'constitutionalization' of the debt brake, accompanied by the empowering of the Budget Council in the annual budget process.

At first glance, the constitutional reform shapes the institutional structure similarly to the Western tradition state organization. Yet closer inspection reveals that substantial modifications have established a more centralized political system, which many have claimed to lack a proper democratic system of check and balances.¹⁵

According to the new FL, the National Assembly (NA) is the expression of popular sovereignty.¹⁶ The Members of the NA, the unique Chamber in the Hungarian institutional system, are elected by Hungarian citizens.¹⁷ The Parliament is the organ that must appoint the Government and elect the President. It is the main legislative body: it has the power to make laws and to adopt the central budget.¹⁸ The President virtually plays a ceremonial role except for the nomination and appointment of public officials and the possibility to refer legislation to the NA or the Constitutional Court for reconsideration,¹⁹ whereas the Prime Minister, who is elected by the majority of the members of the parliament,²⁰ has the general executive power. In addition, as being accountable to the parliament,²¹ the Prime Minister can be removed by a non-confidence vote.²²

The body entrusted with ensuring the constitutionality of ordinary law is the Constitutional Court,²³ albeit its judicial review's scope and substance have been amply reduced. The reorganization of the Constitutional Court's powers may be justified by the fact that it had enjoyed unprecedented political influence during the democratization of the country, following the fall of the communist regime.²⁴ Hence, after that emergency has passed, it is understandable that political powers should return to the hands of the representative bodies, i.e. the Parliament and the Government.²⁵ However, with the 'suspension' of the constitutional review powers on fiscal matters, this may actually leave ample room for manoeuvre to the Government in economic policy, without a proper system of check and balances.²⁶

¹⁵ See, e.g., J. Kornai, *The System Paradigm Revisited: Clarification and Additions in the light of Experience in the post-socialist region*, in 66 *Acta Oeconomica* 547 (2016).

¹⁶ Article 1, paragraph (1) of the Fundamental Law states: "HUNGARY's supreme organ of popular representation shall be the National Assembly". The use of capital letters can be found in the actual wording of the Hungarian constitutional text.

¹⁷ Article 2, paragraph (1) of the Fundamental Law.

¹⁸ Article 1, paragraph (2) of the Fundamental Law.

¹⁹ Article 9, paragraph (3) of the Fundamental Law.

²⁰ Article 16, paragraphs (3) and (4).

²¹ Article 15, paragraph (1) of the Fundamental Law.

²² See Article 20, paragraph (2), point (c) and Article 21, paragraph (3) of the Fundamental Law.

²³ Article 24 of the Fundamental Law.

²⁴ F. Hörcher, *supra* at 10, 10.

²⁵ G. Puppink and A. Pecorario, *Memorandum of the Hungarian New Constitution of 25 April 2001*, European Central for Law and Justice, 19 May 2011, 24. Available at: www.eui.eu/Documents/General/DebatingtheHungarianConstitution/MemorandumtheNewHungarianConstitution.pdf.

²⁶ See, e.g., M. Varju and N. Chronowki, *Constitutional Backsliding in Hungary*, in *Tijdschrift voor Constitutioneel Recht* 296, 298 (July 2015). While commenting on Article N, the Venice Commission had already expressed its concerns by stating that: "financial reasons can bear on the interpretation and application of norms, but they are not as such sufficient to overcome

Furthermore, the ‘cardinal acts’ deserve a special mention as this term is used extensively in the FL. It has been noted that cardinal acts may be a source of legal ambiguity. In fact, although they should safeguard parliamentary minorities from political decisions that may be taken by transient majorities, cardinal laws may actually confer rigidity to the constitutional framework by rendering harder to modify parliamentary decisions from one legislature to another.²⁷ To note, by requiring a qualified majority of two-third of the NA members present for their adoption as well as for any subsequent amendment,²⁸ cardinal acts have a twofold effect. On the one hand, in any eventual review of constitutionality, the Constitutional Court is deprived of considerable constitutional subjects from the standards at its disposal. On the other, future amendments on any sensitive issue regarding state’s functioning and institutional set-up would be hard without a strong political consent like the one enjoyed by the current leading coalition.

Against this backdrop, a preliminary consideration is already possible. The existing institutional set-up grants much power to current leading coalition that, with its two-third supermajority, is more than able to influence Hungarian policy.

2.2. The relation between public and economic powers

The concept of economic constitution was developed in Germany after the WWII and relates to constitutional arrangements regulating the relation between the state and economy. Today, after the economic and financial crisis that hit Europe, there is evidence of a constitutional tendency to regulate financial matters.²⁹ In this vein, not only the Hungarian economic constitution provides the “*principle of balanced, transparent and sustainable budget management*” but, according to Article N, this also become the primary objective for every state authority, even for the Constitutional Court.

Now, it is undisputed that public finance sustainability certainly is an entirely acceptable constitutional goal as other important democratic values.³⁰ However, a too strong emphasis on public finance sustainability may be the cause of some frictions with the pursuing of other constitutional goals and, in particular, with the respect of some fundamental values.

As to the relation between the state and the market, Article M requires a national economy based on work, which appears to be regarded as the main source of social value, freedom of enterprise, and fair competition. Yet, it should be noted that, over the past few decades, the interaction between the state and the market have been subject to significant institutional developments. Following Hungary’s

constitutional barriers and guarantees. They must not in any way hamper the responsibility of the Court to scrutinize an act of state and to declare it invalid, if it violates the Constitution”. See also the Venice Commission, *Opinion on the new constitution of Hungary*, Adopted by the Venice Commission at its 87th Plenary Session, Venice, 17-18 June 2011, 12. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2013\)012-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2013)012-e).

²⁷ For the role of cardinal laws within the Hungarian legal system, see M. Mazza, *The Hungarian Fundamental Law, the New Cardinal Laws and European Concerns*, in 54 *Acta Juridica Hungarica* 140, 142 (2013).

²⁸ Article T, paragraph (4) of the Fundamental Law.

²⁹ See J. Frölich and L. Csink, *Topics of Hungarian Constitutionalism*, in *Tijdschrift voor Constitutioneel Recht* 424, 434 (October 2012).

³⁰ On the importance of the principle of financial sustainability as a democratic constitutional value, see A. Jakab, *Sustainability in European Constitutional Law*, in *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 16* (2016).

accession to the rules of the EU Internal Market, a significant downsize in the role of the state as economic agent and market regulator is observable, and this has been mainly the result of privatization and deregulation policies. It is exactly for this reason that some commentators claim that the new FL would have failed to provide a clear definition of the boundaries of state's interventionism. Accordingly, although the provisions of Article M provide for a general obligation to maintain a market economy by including the duty for the state to protect consumers from anti-competitive market behaviours, only a broad constitutional mandate to regulate the economy is deductible.³¹

Nevertheless, to fully appreciate the scope of state interventionism in the economy, Article M should be read in conjunction with Article XII (on the freedom of economic activity), Article XIII (on the fundamental right to property), as well as with those provisions relating to the safeguard of other non-market values. In fact, it is only through Article XIII (on the social responsibility entailed by the right to property) that it is possible to infer state's commitment to safeguarding a market economy model. More precisely, an economic model surely based on the principle of private property, but where at the same time communitarian interests may prevail over individualistic approaches to property right. Under this economic order, state interventionism can therefore take place in area of common interests as long as, for example, it is justifiable by the promotion of a sustainable and responsible society.³² Furthermore, in front of such an unfulfilling definition, government's economic and fiscal policy may benefit from a too wide margin of discretion.³³

Being dependent from the time and space in which it has been conceived, the new FL is certainly not immune from its economic and political context.³⁴ As a matter of fact, the political rhetoric against the failures of the markets and of the Western level model, partly due to the escalation of the European sovereign debt crisis, may be somehow reflected in recent judgments of the Constitutional Court.³⁵ According to this case-law, the role of the state is intended to re-establish the social and economic order that has been damaged by global markets, and only the state has the capacity to take such action.³⁶

As regard to state ownerships, the FL provides that national assets have to be managed and protected with the ultimate objective to serve the public interest, to meet common needs and to preserve natural resource without neglecting future generations' well-being.³⁷ To ensure this, both public funds and national assets have to be managed in a transparent manner so that the purity of public life is guaranteed.³⁸ Existing jurisprudence adds that although state monopoly is

³¹ M. Varju, *Governance, Accountability and the Market*, in G.A. Tóth (Ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, Central European University Press, Budapest, 2012, 324-325.

³² Cf. Article XIII and Article XVII, paragraph (1) of the Fundamental Law. See M. Varju, *supra* at 31, 326-328.

³³ M. Varju and N. Chronowski, *supra* at 26, 300.

³⁴ J. Frölich and L. Csink, *supra* at 29, 437.

³⁵ See, e.g., Decision 20/2014 in case *Cooperative Banking Restructuring*. Notably, the case concerned government's economic policies aimed at restoring the national cooperative banking system by influencing banks' ownership structures.

³⁶ See M. Varju and N. Chronowski, *supra* at 26, 304.

³⁷ Article 38, paragraph (1) of the Fundamental Law.

³⁸ Article 39, paragraph (2) of the Fundamental Law.

constitutionally practicable,³⁹ public ownership should not however undermine the functioning of the market and free competition.⁴⁰ Moreover, the presence of Article XXII (on the conditional fundamental right of access to public services) may suggest that the FL recognizes the possibility for private economic operators to provide public services, however subject to the obligation under public law to guarantee a universal access based on fair prices.⁴¹

Under the new constitutional order, the current government has implemented several economic and fiscal measures that some claim to be in contrast with some democratic principles. The set of ‘unorthodox’ policy prescriptions, alternatively known under the term of “Orbanomics”, involves a number of policy initiatives with a view to revitalizing the national economy for the benefit of national consumers and investors, by means of growth-supporting fiscal policies of public finances at the expenses of foreign capitals.⁴²

2.3. The fiscal constitution

The ‘constitutionalization’ of the debt brake and the new role of the Budget Council are the two main novelties of the fiscal aspects of the Hungarian economic constitution.

The FL entrusts to the Parliament and the State the tasks to achieve and maintain the debt-ratio below 50 percent of the gross domestic product (GDP). Neither the Parliament nor the Government in the adoption and in the implementation of the central budget can take measures that would lead state debt to break the ceiling.⁴³ In addition, they are prevented from increasing public debt whilst it exceeds the ceiling.⁴⁴ Any derogation to the observance of public debt constraints is only possible in exceptional circumstances, such as in cases of special legal orders or as a result of the worsening of an economic recession.⁴⁵ Admittedly, the decision to address fiscal issues in a constitutional rule means that issues of public finances are taken seriously, but it is only with the strong commitment to the reduction of public debt by responsible institutions that this would be practicable.⁴⁶ However, it should be highlighted that since 2010, there has been a declining trend in the level of foreign debt, while apart from the year 2012 the GDP has recorded strong growth.⁴⁷

Moreover, given the wide discretion left to the NA and the government in matters of fiscal policy, the FL provides for powers of coercion for the fiscal independent authority, i.e. the Budget council⁴⁸, in supporting the legislative

³⁹ See Decision 1814/B/1991.

⁴⁰ See Decision 469/B/1997.

⁴¹ M. Varju, *supra* at 31, 329–330.

⁴² See, e.g., M.A. Piasecki, *supra* at 6; and G. Matolcsy and D. Palotai, *supra* at 7.

⁴³ Article 36, paragraph (4) and Article 37, paragraph (2) of the Fundamental Law.

⁴⁴ Article 36, paragraph (5) and Article 37, paragraph (3) of the Fundamental Law

⁴⁵ Article 36, paragraph (6) of the Fundamental Law.

⁴⁶ M. Varju, *supra* at 31, 313.

⁴⁷ OECD, *OECD Economic Surveys: Hungary*, May 2016, 10–17. Available at: www.oecd-ilibrary.org/docserver/eco_surveys-hun-2016-en.pdf?expires=1563193624&id=id&accname=ocid49017929&checksum=A53FF7E450D05B3F08340782C6970D85.

⁴⁸ The three members of the Budget Council are the President of the Budget Council, the Governor of the Hungarian National Central Bank, which are appointed by the President for a 6-year term (Articles 9(3) and (4) of the Fundamental Law), and the President of the State Audit Office, elected by the National Assembly for a 12-years term (Article 1(2) of the

activity of the Parliament.⁴⁹ By taking part to the preparation process of the Act of the central budget,⁵⁰ the Budget Council has the task of monitoring its “feasibility”.⁵¹ A review of the literature on the creation of independent fiscal council reveals that this is usually a convincing solution for promoting fiscal best practice.⁵² However, it seems that far too much power has been centralized around this independent authority. For example, the FL prescribes that the “*prior consent*” of the Budget Council must be required for the adoption of the central budget in order to guarantee compliance with the constitutional arrangements of the debt ceiling.⁵³ By granting this veto power to the Budget Council, but also considering that the President has the authority to dissolve the NA whenever the latter fails to approve the central budget by the end of March,⁵⁴ the institutional set-up of the unelected independent fiscal authority may be the cause of a serious challenge to the principle of democracy.⁵⁵

To fill this vacuum, the State Audit Office (SAO) is the body responsible for the audit of several public tasks, thus representing a further institutional element in the system of check and balances. Importantly, the SAO is responsible for the auditing of the execution of the central budget, the management of public finances, the use of public funds, and the management of public assets.⁵⁶ As an independent public institution, the SAO should be the main element of the system of check and balances by ensuring the respect of the principle of democracy in the annual budget process.⁵⁷ To complete the picture, it should be also mention the important contribution of the Hungarian National Bank in the oversight of fiscal policy.⁵⁸ Nevertheless, some observers have called into question the independence of the audit authority. On this regard, one main criticism relates to the unusual long term of office of the President of the SAO, as well as to a lack of proven professional auditing experience among the heads of the office, which may question the full independence and autonomy of the auditing body.⁵⁹

A further significant criticism of the accountability of the budget process relies in the conditional inability of the Constitutional Court to review and annul any economic and fiscal act until that the national debt is above the constitutional ceiling. Yet, it is only when a fundamental right to life, human dignity, protection

Fundamental Law).

⁴⁹ To note, it was with the adoption of the Stability Act adopted on 23 December 2011 that the Hungarian rule-based budgeting was definitely reformed. This cardinal law gave to the Council the status of independent institution and a public law mandate in relation to the central budget process. See, Á. Kovács, *The Fiscal council in the Hungarian fundamental Law*, in 61 *Public Finance Quarterly - State Audit Office of Hungary* 312, 318 (2016).

⁵⁰ Article 44, paragraph (2) of the Fundamental Law.

⁵¹ Article 44, paragraph (1) of the Fundamental Law.

⁵² See, e.g., X. Debrun, D. Hauner, and M.S. Kumar, *Independent fiscal Agencies*, in 23 *Journal of Economic Surveys* 44 (2009); and G. Kopits, *Independent Fiscal Institutions: Developing Good Practices*, in 2011/3 *OECD Journal on Budgeting* 1, 2011.

⁵³ Article 44, paragraph (3) of the Fundamental Law.

⁵⁴ Article 3, paragraph (3) of the Fundamental Law.

⁵⁵ M. Varju, *supra* at 31, 315-316.

⁵⁶ Article 43, paragraph (1) of the Fundamental Law.

⁵⁷ C. Lentner, *The New Hungarian Public Finance System – in a Historical, Institutional and Scientific Context*, in 60 *Public Finance Quarterly - State Audit Office of Hungary* 447, 455 (2015).

⁵⁸ Á. Kovács, *supra* at 49, 319.

⁵⁹ M. Bánkuti, G. Halmai, and K.L. Scheppele, *Disabling the Constitution*, in 23 *Journal of Democracy* 138, 144 (2012).

of personal data, freedom of thought, conscience and religion is involved that the Court has the power to intervene.⁶⁰ Therefore, because of a significant curtailment of the Court's competences on fiscal matters, whenever a fiscal policy aims at reducing the national debt, there will be no guarantee that the policy output is "*politically and socially optimal and acceptable*".⁶¹

Altogether, the non-exhaustive definition of a competitive market economy, the wider discretion of the executive power over economic policy, and the suspension of the constitutional review process on fiscal matters might have opened the floodgates for the implementation of Orbán's 'unorthodox' economic policies. The latter not only represent a reaction to the socio-economic effects of the global economic and financial crisis,⁶² but rather they could be an expression of an 'independent' economic model within the EU.

3. The Hungarian economic constitution within the boundaries of the constitutional principles and values of EU law

3.1. The relation between the Fundamental Law and the EU membership

Hungary has been a member of the EU since 2004 and, like each Member States, is party of the Union founding Treaties. Because of this, it is subject to the benefits and the obligations deriving from EU membership.

Actually, the FL not only prescribes that Hungary adheres to the standards of the international community and law,⁶³ but that it also joins in the cooperation to promote the European unity.⁶⁴ The relation between international and domestic law follows the principle of harmony and in order to ensure this principle, the Constitutional Court has the power to review conflicts between the international treaties and domestic law.⁶⁵ However, on the legal possibility to annul an act of domestic law in breach of international treaties,⁶⁶ it has been argued that this may actually be only an optional alternative.⁶⁷

If, on the one hand, it could be argued that the FL does acknowledge the importance of cooperating for the common European project; on the other, the definition of how Hungary operates as a Member State within the European institutional framework could be quite misleading. In fact, Article E only refers to competences deriving from the participation in EU. Accordingly, these competences can be 'jointly' exercised with other Member States by means of the EU institutions. Yet, the reality is that only EU institutions exercise those competences and thus, these competences should not be considered as jointly exercised.⁶⁸ The constitutional choice to refer to 'jointly' exercised rather than 'conferring' competences may appear an inappropriate wording, but it is a political

⁶⁰ Article 37, paragraph (4) of the Fundamental Law.

⁶¹ M. Varju, *supra* at 31, 321-322.

⁶² M. Varju and N. Chronowski, *supra* at 26, 300-301.

⁶³ Article Q of the Fundamental Law.

⁶⁴ Article E of the Fundamental Law.

⁶⁵ Article 24, paragraph (2), point (f) of the Fundamental Law.

⁶⁶ Article 24, paragraph (3), point (c) of the Fundamental Law.

⁶⁷ See N. Chronowski, *The New Hungarian fundamental Law in Light of the European Union's Normative Values*, in *Est Europea* 111, 121-122 (January 2012).

⁶⁸ *Ibid.*, 123-124.

move that seeks to emphasize (and reclaim) the concept of national sovereignty.⁶⁹

Beside this, the same Article E provides that binding rules may be required for fulfilling EU cooperation,⁷⁰ and to recognize such binding force the votes of two third of all the members of the Parliament are necessary.⁷¹ Now, the need of a supermajority to authorize any limits imposed by an international treaty produces a more rigid procedure. For instance, in relation to the possible future decision to join the euro area, a strong consensus among different political forces within the NA would be required. By analogy, the same supermajority would be needed to amend the constitution in order to adopt the euro, as by constitutional law the official currency of Hungary is the forint.⁷²

Recently, besides a failed attempt to further reform the constitution with its 7th Amendment, the Constitutional Court has ruled on the limits of EU law in the Hungarian legal system.⁷³ The Court has declared that it would review, albeit within its remits, the constitutionality of any joint exercise of competences according to different grounds: fundamental rights, national sovereignty, and self-identity rooted in its historical constitution. Interestingly, the Court argues that those competences cannot infringe Hungarian sovereignty and constitutional identity. In the Court view, the review of sovereignty would be legitimated by Article B, paragraph (1) according to which Hungary is an independent, democratic and based on the rule of law state. Therefore, through the application of the provisions of Article E, paragraph (4) the popular sovereignty would be indirectly represented and safeguarded. The identity control would be based instead on Article 4, paragraph (2) of the Treaty of the European Union (TEU), by which EU Member States as well as their national identities are equal before the Treaties. However, the content of Hungarian (self-)identity would be determined by the Court on a case by case basis, in accordance with the FL and in particular with the National Avowal.⁷⁴ Furthermore, the Court considers the constitutional identity itself as a fundamental value without, however, giving an exhaustive list of all the values encompassed in its definition. Following the reasoning of the Court, the result is that Hungarian constitutional identity has not been created but only recognized by the new constitution. In light of this, there are those who believe that Hungary cannot renounce to it by participation in a mere international treaty.⁷⁵

At this point, it should be recalled that within the EU legal framework Member States are free to define their national identity, but the Court of Justice of the European Union (CJEU) is entitled to assess the compatibility of Member

⁶⁹ See A. Jakab and P. Sonneveld, *Fact sheet on legal foundations for fiscal, economic, and monetary integration. Hungary*, in *EMU CHOICES – The choice for Europe since Maastricht*, Salzburg Centre of European Studies (2016). Available at: emuchoices.eu/wp-content/uploads/2016/08/HUNGARY.pdf.

⁷⁰ Article E, paragraph (3) of the Fundamental Law.

⁷¹ Article E, paragraph (4) of the Fundamental Law.

⁷² Article K of the Fundamental Law.

⁷³ See Decision 22/2016.

⁷⁴ As prescribed by Article N, paragraph (3) of the FL which states that: “The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution.”

⁷⁵ T. Drinóczy, Constitutional Court on the Limits of EU Law in Hungarian Legal System, in *Int'l J. Const. L. Blog* (29 December 2016). Available at: www.icconnectblog.com/2016/12/the-hungarian-constitutional-court-on-the-limits-of-eu-law-in-the-hungarian-legal-system/.

States' national identity with the obligations deriving from being part of the EU. However, the above-discussed case law may suggest that not only Member States can specify their constitutional identity, and that national constitutional courts may also review EU acts applying those identity principles to such an extent that national identity principles may eventually prevail on the primacy of EU law. Of course, as it has been observed, constitutional identities could not be used by the Hungarian Constitutional Court to review the legality of EU legislative acts.⁷⁶

3.2. The Hungarian economic constitution within the boundaries of European 'constitutional principles'

The EU does not have a constitution yet. The EU legal framework is however founded on two international treaties: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Admittedly, the reform of the EU Treaties has been a process of trials and errors that eventually led to the adoption of the Lisbon Treaty. What can be defined as the European constitutional development has established a "multilevel constitutionalism", whereby two formally autonomous systems of law coexist: the National and the European law.⁷⁷

While each Member States maintain their own constitutional identity, they share common constitutional traditions that underpins the constitution of the Union as a whole. However, the extent of Member States' constituent freedom should be bounded by EU membership criteria. According to Article 2 TEU, Member States accept the founding values upon which the Union has been built. As a consequence, if a member wishes to remain in the EU, it has to be bounded by this fundamental agreement.⁷⁸

On the issue, there has been a lively debate on whether the FL has marked a break with the EU membership criteria. The European Parliament itself commissioned a study. According to the findings of the Tavares Report, several provisions of the FL would not observe the EU shared values, especially the basic requirements of democracy and rule of law.⁷⁹

Undoubtedly, the FL has brought many important changes in the institutional framework that have had large impacts on the functionality of the Hungarian democratic system. Careful attention should be paid to some elements of the new institutional order as many criticisms relate to the establishment of a more centralized political system with a weaker system of check and balances. The Government does currently enjoy increasing powers, whilst the Constitutional Court's competences to review acts on fiscal matters have been drastically reduced. The Court cannot review fiscal and economic acts as long as the debt ratio is above the 50 percent of GDP constitutional reference values, so there might be the

⁷⁶ For a critical assessment from a constitutional point of view, see G. Halmai, *The Hungarian Constitutional Court and Constitutional Identity*, in *Verfassungsblog* (10 January 2017). Available at: verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity.

⁷⁷ On multilevel constitutionalism aspects of the EU law, see I. Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 *The Columbia Journal of European Law* 349 (2009).

⁷⁸ On the relation between Article 2 TEU and Hungary, see N. Chronowski, *supra* at 67, 111-114.

⁷⁹ European Parliament, "Report on the situation of fundamental rights: standards and practices in Hungary", A7-0229/20013, 24 June 2013.

risk that unconstitutional ways of state debt reduction occur.⁸⁰ If the presence of the Budget Council should ensure some kind of counter-balance to the executive powers on the central budget, but there might be an issue of democratic legitimization since the veto power of the fiscal authority may limit the parliamentary process.

Furthermore, the economic system created by the new economic constitution allowed the government to carry out policies that have threatened the principle of rule of law. Among those, for instance, special taxes regimes only for certain companies within the same market, measures for the benefit of national investors and consumers, and the nationalization of strategic assets that have strengthened the role of the state in the economy and, thus, hindered the smooth and competitive functioning of the market.⁸¹ If it is true that all of these elements could constitute a systemic violation of EU common values as recognized by Article 2 TEU,⁸² the EU has not yet shown any intention to trigger the application of the preventive mechanism provided for Article 7 TEU.⁸³ Under the assumption that all of this may represent a systemic breach of the EU constitutional principles and values, a more specific answer would be expected. Perhaps, there is a political reluctance at EU level to deal with social and political matters, whereas European institutions are much more involved in dealing with fiscal matters and especially with Eurozone's economic troubles.⁸⁴

As regards fiscal matters, the Hungarian new economic constitution shows significant dedication to debt management in line with the EU economic governance principles. Although Hungary has not yet adopted the single currency, the FL contains provisions on the debt ceiling. From the point of view of Hungary's prospective final accession to the economic and monetary union, the 'constitutionalization' of the debt brake can only be welcomed and it is also noteworthy that the limits on state debt are even stricter than those of the Maastricht criteria. Constitutional arrangements formalizing Hungary's efforts to reduce its stock of debt are nothing new in the European constitutional arena. In fact, many other countries in the aftermath of the crisis have established stringent fiscal constraints.⁸⁵ However, the Hungarian case is particularly interesting as the public debt curbing and public finance sustainability are constitutional priorities for all public authorities. Ultimately, while debt brake rules may further limit the parliamentary activity and, thus, the democratic functioning of the state, there is no chance to blame the way Hungarian public finances are managed as it is aligned with the European and international standards.

3.3. A new constitutional order for an 'independent' economic model within the Union

⁸⁰ Venice Commission, *supra* at 26, 25.

⁸¹ See, e.g., J. Kornai, *supra* at 15.

⁸² For a critical assessment of the new role of the state in the economy in Hungary in light of the EU law, see M. Varju and M. Papp, *The Crisis, National Economic Pluralism and EU law: What Can We Learn from the Hungarian case?*, in 53 *Common Market Law Review* 1647.

⁸³ According to which the EU may start an infringement procedure against Member States that have committed fundamental rights violations.

⁸⁴ See B. Bugarič, *Protecting Democracy Inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism*, in C. Closa and D. Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, Cambridge, 2016, 15-17.

⁸⁵ For a comparative analysis about constitutional provisions targeting the sustainability of public finances, see A. Jakab, *supra* at 30, 22-23.

Hungary's new economic constitution may have paved the way for the implementation of an "independent" economic model through fiscal and economic policies that would harm the funding principles of the EU Internal Market. This has raised concerns about the consistency with EU law, with special regard to the liberal democratic principles of the separation of powers and rule of law. However, the FL shows that the principle of sound financial management has been taken seriously. With the 'contitutionalization' of the debt break, Hungary commits itself to the reduction of public debt. The debt reduction below the constitutional threshold is, in the view of the wording of Article N, of primary importance. Indeed, not even the Constitutional Court can intervene on fiscal matters, except where certain fundamental rights are concerned.

In this context, the current government has put in place several 'unorthodox' economic and fiscal reforms, which have redrawn the relationship between public and economic powers. In Hungary's new economic order, the state has (re-)gained a prominent role. In one sense, this could be described as a "centrally planned capitalism".⁸⁶ However, the increasing role of the state and its national tendency to intervene in the economy may also create greater opportunity for corruption – a serious threat for the transparent management of public affairs and thus democracy.⁸⁷

What really significant is about the new Hungarian economic constitution is that, within the EU, there may be Member States that are "allowed" to suspend some of the European democratic principles and fundamental values on the pretext of pursuing national policies, especially if those policies aim at reducing public debt. Therefore, there is a dilemma. Firstly, it is worrying for the future of the Internal Market and EU itself that national governments can interfere in their respective economies, through national economic policies breaching EU law.⁸⁸ Nevertheless, as far as they are supported by broad political consensus, these should be considered as national policies with the risk for the EU to be in the unfortunate position of dealing with a Member States that is ruled by a supermajority experiencing some kind of 'independent' economic policy. However, in the view of the European integration process, if such a solid parliamentary consensus will be missing, Hungary's accession process to EU risks stalling. In this scenario, the future development of the Union itself would be more uncertain.

The EU is currently going through a very rough patch and its own stability has been at risk by several events. In particular, serious and persisting problems with high public debt level have been marring the economic performance of the EU as a whole. Especially within the Eurozone, some Member States are struggling to achieve both fundamental constitutional goals (e.g. social cohesion) and economic growth.⁸⁹ To make things even more complicate, there is also the possibility for UK to leave the EU by triggering the mechanism of Article 50

⁸⁶ See S. Djankov, *Hungary Under Orbán: Can Central Planning Revive Its Economy?*, in *Policy Brief No. PB15-11*, Peterson Institute for International Economics, July 2015. Available at: www.piie.com/sites/default/files/publications/pb/pb15-11.pdf.

⁸⁷ For a comprehensive discussion on the issue, see J. Kornai, *supra* at 15.

⁸⁸ See M. Varju and M. Papp, *supra* at 82.

⁸⁹ Cf. F. Zatti, *Diritti e coesione sociale tra governance economica e 'sovranità finanziaria'. Dalla Carta costituzionale del 1948 al Trattato c.d. 'Fiscal Compact'*, in *Persona e Mercato*, 19-23 (2015). Available at: flore.unifi.it/retrieve/handle/2158/1001945/35468/Zatti.pdf.

TEU.⁹⁰ In the midst of all this, a new geopolitical pole has been taking shape within the Union: a new version of the Visegrád Group.⁹¹ The latter was initially established in order to encourage closer cohesion for a mutually beneficial cooperation within the central European region, as the basis for future EU integration,⁹² and it could now pose a threat to the European project if its members' economic and social models would depart from EU law.

Indeed, among some Central and Eastern Europe Member States there is more consensus around Hungary's alternative economic model.⁹³ In fact, the Hungarian case shows that within the EU there may be countries where, although to the detriment of certain European fundamental values such as democracy and rule of law, governments can experiment 'unorthodox' policies as an alternative to the economically depressing EU diktats. With this in mind, it is not too much to expect a new EU political block emerging in Central Eastern Europe. In the hope that this would work towards closer cooperation for a more "*united in diversity Europe*"⁹⁴, together with the Eurozone and possibly also the UK.

4. Conclusions

Undoubtedly, the new constitutional order is in line with other EU Member States' tendency to concentrate power in the hands of the executive for having wider discretion in both economic and fiscal policy. The peculiarity of the Hungarian case is that there is a dual aim: the debt brake and the new role of the Budget Council. The reduced powers of the Constitutional Court in fiscal matters and the increasing role of state's budget authority may lead to unconstitutional way of debt reduction and EU law-conflicting policies on behalf of the interests of national politics, respectively. The effect is somehow curious – it is a mix of alternative economic declared aims with an infringement of the EU-style rule of law. Is all of this compatible with EU economic law? That is questionable!

⁹⁰ For more on the issue from a constitutional point of view, see e.g. P. Eeckhout and E. Frantziou, *Brexit and Article 50 TEU: A Constitutional Reading*, in UCL European Institute Working Papers Series, 2016. Available at: www.ucl.ac.uk/drupal/site_european-institute/sites/european-institute/files/brexit-article-50.pdf.

⁹¹ The Visegrád Group comprises four Central-Eastern European countries, namely Czech Republic, Hungary, Poland, and Slovakia.

⁹² For an historical analysis of the political cooperation between the Visegrád Group's countries, see M. Dangerfield, *The Visegrád Group in the Expanded European Union: From Preaccession to Postaccession Cooperation*, in *22 East European Politics & Societies* 630 (2008).

⁹³ See, e.g., N. Buckley and H. Foy, Poland's new government finds a model in Orban's Hungary, in Financial Times Online (6 January 2016). Available at: www.ft.com/content/0a3c7d44-b48e-11e5-8358-9a82b43f6b2f.

⁹⁴ "*United in diversity Europe*" (in Latin: "In Varietate Concordia") is the official motto of the European Union.