Towards a Theory of "Unconventional Constitutional Amendments": Some Lessons from the *Baka* Case

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Abstract: Verso una teoria degli emendamenti costituzionali non convenzionali: alcune lezioni dal caso *Baka* – The article aims at proposing a theory of unconventional constitutional amendments. The introduction illustrates the scope and structure of the paper (Section A). The First Section briefly explains the main doctrines on the unconstitutionality of constitutional amendments. Section 2 presents the background of the case *Baka v. Hungary*. In the third Section, we analyse the reasoning of the ECtHR in the framework of this paper. Finally, the conclusion (Section 4) provides some ideas to implement a theory of unconventional constitutional amendments.

Keywords: ECHR; ECtHR; Constitutional Revision; Hungary; Baka.

1. Introduction

In the last decade, we have assisted to a dramatic shift towards illiberalism in many countries of Central and Eastern Europe, and particularly in Hungary.[1] While many political observers are pleading for European Union institutions to take action to stem this authoritarian drift, in this paper we argue that the European Court of Human Rights ('the ECtHR' or 'the Strasbourg Court') may also play a key role.

The Strasbourg Court is slowly transforming itself into a European Constitutional court,[2] and one of the crucial steps on this path is recognising its faculty to review the compatibility with the European Convention on Human Rights ('the ECHR' or 'the Convention') of constitutional amendments.

Hence, the first part of this paper will present the well-known doctrine of unconstitutional constitutional amendments in its different declinations. In particular, a special focus will be put on the *supra-constitutional* limitations. By analysing the case-law of constitutional courts that applied this theory, it will emerge that since the second half of the XXth century, constitutional judges began to affirm that some principles are above the Constitution.

[1] G. Halmai, *An Illiberal Constitutional System in the Middle of Europe*, in *European Yearbook of Human Rights*, 497 (2014).

[2] A. Stone Sweet, S*ur la constitutionalisation de la Convention Européenne des droits de l'homme: cinquante ans après son installation, la Cour Européenne conçue comme une Cour* constitutionnelle, in 80 *Revue trimestrielle des droits de l'homme*, 923 (2009).

Then, the core part of this paper will concentrate on a specific case-study: the judgment delivered by the ECtHR in the *Baka* case. This decision may be regarded as a first affirmation by the Strasbourg Court of its faculty to review the compatibility with the ECHR of constitutional amendments. Further, the interpretation this ruling gave of the rule of law represents a step forward the spread of *supranational constitutionalism*.

In the final section, a potentially innovative formulation of the theory of unconstitutional constitutional amendments will be assessed. Some theoretical support for a doctrine of unconventional constitutional amendments may be found in the ECtHR jurisprudence as well as in the writings of many scholars.[3] Nonetheless, significant changes are needed for a concrete implementation of this theory. Firstly, for this tool to be effective, it is mandatory to get the judgments delivered by Strasbourg executed in the respondent State, and this has been a critical aspect in recent years. Furthermore, a comparison with other regional courts - namely the Inter-American Court of Human Rights ('the IACHR') and the Central American Court of Justice - suggests that it will be necessary to allow the ECtHR to issue rulings with constitutive effects. However, as any change to the Convention and its Protocols requires the unanimous will of Member States, the perspectives for the Strasbourg Court are uncertain.

2. The theory of unconstitutional constitutional amendments: a comparative overview

The question of the possibility to have unconstitutional constitutional amendments has been widely debated by European constitutional law scholars,[4] since the problem was first raised by Otto Bachof in 1951[5]. The scope of this paper is limited to two main aspects of the issue.

The first one is the existence of limits on the constitutional amending power. The second one is the body who is in charge to enforce these limits. The very essence of this problem is the faculty of constitutional and supreme courts, institutions with an indirect democratic legitimacy [6], to declare the unconstitutionality of a provision which has been approved by the Parliament

[3] Y. Roznai, *The Theory and Practice of 'Supra-constitutional' Limits on Constitutional Amendments*, in 62 *International and Comparative Law Quarterly* 3, 571 (2013); J. Tapia Valdés, *Poder Constituyente Irregular: Los Límites Metajurídicos del Poder Constituynte Originario*, *Estudios Constitucionales* 2, 132 (2008).

[4] G. Dietze, *Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany*, in 42 *Virginia Law Review* 1, 1 (1956); .A. Barak, *Unconstitutional Constitutional Amendments*, in 44 *Israel Law Review* 3, 321 (2011).

[5] See: O. Bachof, *Verfassungswidrige Verfassungsnormen?*, Tübingen, 1951.

[6] The lack of democratic legitimacy has been used as an argument, especially by north-American scholars, also to contest the activism in the exercise of the "ordinary" judicial review of legislation by supreme courts. See: A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Indianapolis, 1962; R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, 2004.

sitting as Constituent power, that is to say, the highest expression of people's sovereignty. The problem of the limitations on the amending power is, in other words, also the problem of the judicial review of these amendments.

In order to precise the framework of this paper, it is necessary to make some preliminary remarks. Firstly, only the "formal" amendments which occur in the written constitution will be considered and not all the informal alterations which characterize the "living Constitution".[7]

Secondly, within the category of "formal" amendments, a distinction has to be made between "procedural limitations" and "substantive limitations". By "procedural limitations" we refer to the requirements set out in the Constitution that describe the process by which the Constitution can be validly modified. By "substantive limitations" we refer to those constitutional subjects and rights that can not be amended through the ordinary amending procedure. Only this second type of limitations are going to be treated.

Two different types of "substantive limitations" have to be pointed out: the "explicit limitations" and the "implicit" ones. The expression "explicit limitations" means that the Constitution itself holds that some of its provisions are unamendable. While many constitutions are using different terms to express this concept, «unamendable» can be considered the most accurate.[8] Indeed, although they are very often named "eternal clause" or "eternity clause" - the terms most utilized amongst scholars - these provisions are not unchangeable, in the sense that at least a primary constituent power may overwhelm the whole former Constitution, hereby including its "eternal clauses". It has been noted that, by placing some provisions beyond the reach of the amending power, it is the Constitution itself that creates the possibility of unconstitutional constitutional amendments.[9]

These unamendable provisions may concern many different aspects of the legal order, from the system of government to the secular character of the State. As aforesaid, the enforcement of these limitations is normally assigned to constitutional courts. Given that this competence is already somehow implied in the Constitution, in these cases the possibility of judicial review of constitutional amendments is not actually argued. From the "explicit" unamendability are steaming two considerations.

Firstly, the necessity of a distinction between the constituent power and the amending power and secondly the existence of a hierarchy between constitutional norms, in which the unamendable provisions are placed on a higher rank than the others. Without these two features, the unamendable provision would end to be revisable, completely impeding their enforceability. This is demonstrated by the French system, in which no hierarchy between constitutional norms is recognised and where, notwithstanding the presence of

[7] The concept of "living constitution" is clearly expounded in: D. Strauss, *The Living Constitution*, Oxford, 2010.
[8] Y. Roznai, *Unconstitutional Constitutional Amendments*, Oxford, 2017, 25.
[9] G. Casper, *Constitutionalism*, in 22 *University of Chicago Law Occasional Paper*, 3 (1987).

an explicit limitation - notably Article 89 alinea 5 of the Constitution of 1958[10] - the Constitutional Council[11] has clearly stated that there are no limits to the amending power.[12]

The issue is far more complicated when it comes to implicit limitations. To a first approximation, by implicit limitations we are referring to the tendency of constitutional courts and scholars to hold the amending power limited, not only on formal aspects concerning the constitutional amendment enactment procedure but also substantively, even in the absence of an explicit clause in the Constitution. The case for the existence of implicit limitations may be based on different arguments.

The first asserts that it is the word "amendment" in itself that implies the existence of limitations. This doctrine has been expounded - amongst others - by the Indian Supreme Court in the landmark case *Minerva Mills*, where that Court affirmed that «the power to amend a constitution does not include the power to destroy it».[13] By virtue of this judgment, in India the amending power is bound, when enacting an amendment, to respect the «basic structure of the Constitution», that is a "substantive implicit" limitation elaborated by the Supreme Court's jurisprudence. This argument may be conceived with two different perspectives: one focusing on the meaning of the word "amendment",[14] and the other claiming that there is a substantial difference between constituent and amending power.

The first approach is contestable simply by noting that the word used for referring to amendment procedures varies from State to State. Just to give some examples, Article 138 of the Italian Constitution talks about «revisione costituzionale», while Articles 166-169 of the Spanish Constitution of 1978, regulate the procedure of «reforma constitucional». This term "brutally" translated into English would mean reform, a concept radically different from the one expressed by the word "amendment". The second one deserves more attention.

This argument, elaborated by North-American scholars and notably J. Rawls, is based on the assumption that, being the amending power a "constituted" power, it does not have the possibility to introduce a clause which contradicts another clause contained in the original Constitution, the product of the Constituent power.[15]

[10] Article 89 at alinea 5 affirms: "La forme républicaine du Gouvernement ne peut faire l'objet d'une révision".
[11] C.C., décision n° 2003-469 DC du 26 mars 2003.
[12] R. Déchaux, *L'unité formelle de la production constitutionnelle. Retour sur un (faux) paradoxe de la théorie constitutionnelle*, available at: www.droitconstitutionnel.org/congresLyon/CommLE/E-dechaux_T2.pdf, last accessed 25 June 2019.
[13] See: *Minerva Mills Ltd. v. Union of India*, 1981 S.C.R (1) 206, 207.
[14] K. Gözler, *Judicial Review of Constitutional Amendments. A Comparative* Study, Bursa, 2008, 68.
[15] J. Rawls, *Political Liberalism*, Washington, 1995, 227-230.

But this would imply the possibility to build a hierarchy between the clauses added by the amending power and those written by the constituent power and such a conclusion - and this assumption from a positivistic point of view - is not supportable for many reasons. As it has been noted, «the authorisation to amend the will of the constitution is tantamount to an authorisation to amend the will of the constituent power proper. Consequently, the original constitution and the revised constitution enjoy the same level of normative validity».[16] The wording of the above sentence brilliantly synthesizes the two facets of the issue. On the one hand, since the amending power derives its power from the Constitution, the amending power does not hold any "authorisation" to amend provisions which the Constitution declares to be unamendable. But, on the other hand, we can affirm that *solely* concerning unamendable provisions - and consequentially amendment rules - a distinction between constituent and amending power is conceivable, with the unamendable provisions standing beyond the reach of the amending power and on a higher rank in comparison with other constitutional norms. The structure of many contemporary constitutions stands against such a theory, inasmuch generally - with the relevant exception of the US Constitution - the amendments are not distinguishable from the original text. To summarize we can say that the amending power holds all and only the powers attributed by the constituent power. Therefore, we can share the conclusion that, from a positivistic point of view, there are no limitations on the amending power, except those contained in the Constitution itself.

Notwithstanding what aforesaid, even in the hypothesis of a Constitution without explicit limitations on the amending power, many constitutional courts have affirmed their power to declare the unconstitutionality of a constitutional amendment by using, as a parameter for judicial review, principles derived from natural law.[17]

The first application of this doctrine dates back to 1954 when the Federal Constitutional Court of Germany showed all the limits of a "positivistic approach" to the problem: «From this it follows that on the constitutional level itself there cannot exist, in principle, superior and inferior norms that can be evaluated against each other [...]» but then it goes on in affirming that "there must, in extreme cases, exist the possibility to put the principle of material justice above that of legal security, the latter being reflected, as a rule, in the validity of positive law».[18] This doctrine has known, in its history, several declinations and in the foregoing pages we will refer to it as the "supra-constitutional" theory.[19] Amongst the courts who have used this doctrine to

[16] U. K. Preuss, *The Implications of "Eternity Clauses": The German Experience*, in 44 *Israel Law Review* 3, 432 (2011).
[17] L. Garlicki and Z. A. Garlicka, *External review of Constitutional Amendments? International Law as a Norm of Reference*, in 44 *Isreael Law Review* 3, 354 (2011).
[18] The passage has been retrieved in: G. Dietze, (n 4) 18.
[19] L. Favoreu, *Souveraineté et supraconstitutionnalité*, in 67 *Pouvoirs* 67, 72 (1993; S. Arné, *Existe-t-il des normes supraconstitutionnelles*, in *Revue du droit public* 2, 460 (1993).

affirm their power to review constitutional amendments, we also find the Constitutional Court of Italy ('the ICC').

On this matter, the landmark case of the ICC is judgment no. 1146 of 1988. In this case, the ICC had to examine the constitutional validity of a "special" regional statute. The Government contested the possibility for the ICC to even receive the complaint, given that in Italy "special" regional statutes enjoy constitutional status. On the contrary, the ICC affirmed its faculty to review any kind of constitutional norms and amendments, with regards not only to constitutional norms - and in particular Article 139 of the Italian Constitutional [20] - but also to «supreme principles» that are somehow above the Constitution, and which the Constitution has only recognised. [21] According to the ICC jurisprudence, can be considered supreme principles the unalienable human rights (judgments nn. 183/1973; 170/1984; 238/2014) and the secular character of the State (judgments nn. 30/1971; 12/1972; 18/1982), even tough this catalogue has to be considered an open one.

Although the ICC recognises the existence of principles that are on a higher rank in comparison with the other parts of the Constitution - and consequently beyond the reach of the amending power - these "supreme principles" have been invoked only as a counter-limit to the entry into the domestic legal system of international norms, [22] and recently against those coming form the European Union [23]. This theory - firstly elaborated in the

[20] The Italian Constitutional Court in its whole history has been called only once to decide on a case in which Article 139 was assumed violated. In the ordinance 480/1989 it was called to review the constitutionality of articles 497 - 498 of the Criminal Code with reference to Articles 3, 24, 112, 139 of the Constitution and XIII Final and Transitory Disposition, which prohibited to all males descendants of the former royal family to enter the Italian territory. Given the presence of this disposition, a criminal trial in the Turin Court of Appeal, in which Vittorio Emanuele di Savoia was accused of defamation, couldn't go on because of the lawful impediment - represented by the constitutional provision - of the defendant. The Italian Constitutional Court declared the question inadmissible, given the too vague formulation of the *petitum*. But reading between lines it is possible to see that the question should have been about the unconstitutionality of the constitutional norms contained in the XIII Final and Transitory Disposition with regard to Article 24 of the Constitution which grants judicial protection against violations of rights. Anyway, given the structure of the Italian system of constitutional justice this interpretation of the question was barred for the Constitutional Court.

[21] However, the question was declared inadmissible.

[22] See, for instance the Judgment of the ICC n. 238 of 22/10/2014. For a comment on this judgment see: T. Groppi, *La Corte costituzionale e la storia profetica. Considerazioni a margine della sentenza n. 238/2014 della Corte costituzionale italiana*, in *Giurcost.*, (2015), available at http://www.giurcost.org/studi/groppi.pdf last accessed 25 June 2019; M. Luciani, *I controlimiti e l'eterogenesi dei fini*, in *Questione Giustizia* 1, 84 (2015).

[23] With the Order 24 of 26 January 2017, the ICC submitted a preliminary reference to the European Court of Justice threatening to trigger Article 25 of the Constitution, which enshrines the principles of legality in criminal matters, against the interpretation of Article 325 TFEU given by the Grand Chamber of the European Court of Justice in the Taricco case (C-105/14). However, with a rather accommodating answer, the Court of Justice avoided such a danger (C-42/17, M.A.S. et M.B.). For a comment on the whole "Taricco saga" see: M. Bonelli, *The Taricco Saga and the consolidation of judicial dialogue in the European Union: CJEU, C-105/14 Ivo Taricco and others, ECLI:EU:C:2015:555; and C-42/17*

judgment 170/1984 of the ICC - has been called by constitutional scholars "teoria dei controlimiti". In conclusion, the idea itself of judicial review of constitutional amendments has not found yet concrete application in the Italian constitutional justice system, also given the scarce number of amendments to the Constitution that has been approved.[24]

Having briefly analysed the case-law of the ICC on the subject and before moving on to consider this doctrine as elaborated by the ECtHR in the *Baka* case, it is necessary to have a closer look at the constitutional situation in Hungary in the years 2011 and 2012, which represents the factual and political background of the case.

3. The Baka case: factual and normative background

Following the 2010 elections, in which the national conservative party (*Fidesz*) obtained a landslide victory, the ruling majority began a process to adopt a new Constitution, which the Government decided to call «Fundamental law». The Venice Commission, who rendered an opinion on the draft version of the text, criticized the new Constitution under many aspects for undermining some of the classic values of contemporary constitutionalism.[25]

Amongst the many relevant novelties- spacing from a redefinition of the concept of marriage to the introduction of the Cardinal Law - the new Constitution of 25 April 2011 entailed significant changes to the powers and composition of the Hungarian Constitutional Court ('the HCC'),[26] and it substituted the Supreme Court with the Kúria, the new highest judicial body.[27] It is worth noting that initially, this substitution should have been only of a formal nature, as expressed in numerous interviews released by the members of the parliamentary majority. In particular during a TV interview broadcasted on 19th October 2011, the State Secretary of Justice declared that this legislation «will certainly not provide any legal ground for a change in the person of the Chief Justice».[28]

M.A.S., M.B., ECLI:EU:C:2017:936 Italian Constitutional Court, Order no. 24/2017, in 25 *Maastricht Journal of European and Comparative Law* 3, 357 (2018).

[24] T. Groppi, *Constitutional Revision in Italy. A Marginal Instrument for Constitutional Change*, in X. Kontiades (ed.), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and USA*, London, 2012, 203.

[25] European Commission for Democracy through Law. CDL-AD(2011)016, O*pinion on the New Constitution of Hungary*, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), paras 141-149.

[26] For further information on this aspect of the Fundamental Law, see: A. Vincze, *Wrestling with Constitutionalism: The Supermajority and the Hungarian Constitutional Court*, in 8 *Vienna Journal of International Constitutional Law* 1, 86 (2014).

[27] A. Vincze, *The New Hungarian Constitution: Redrafting, Rebranding or Revolution?*, 6 *Vienna Journal on International Constitutional Law* 1, 88 (2012).

[28] In particular during a TV interview broadcasted on 19 October 2011, the State Secretary of Justice declared that this legislation «will certainly not provide any legal ground for a change in the person of the Chief Justice». Cfr. *Baka v. Hungary*, 20261/12, 23-06-16, § 24.

Notwithstanding this, the highest judicial body got new competences in 2012. The most important one is the judicial review of the decrees of local governments. It is worth noting that, before the Fundamental Law came into effect, the HCC was the only forum which had the power to review and annulate legal norms. From this point of view, the regulations on the highest judicial body before and after 2012 are substantively different. But this difference does not flow from the change of the body's name – "Legfelsőbb Bíróság" (Supreme Court) or "Kúria" (Curia) – but rather from the modification of the HCC's and the judicial branch's competences.

András Baka - a former judge of the European Court of Human Rights from 1991 to 2008 was, at the time the Fundamental Law was being approved by the Parliament, the President of the Supreme Court.

Due to his position, he was entitled to express opinions on legislation concerning the judiciary [29]. Consequently, in his professional capacity, he expressed views, mostly negative, on the various legislative reforms that were discussed in the Parliament from April 2010 until December 2011, notably: the so-called "Nullification Bill" (Act XVI of 2011), the Organization of the Court and Administration Act,[30] and, especially, the article 26 of the Fundamental Law of Hungary. This last norm, in fact, provided for a new retirement age for all judges, that was 70 under the previous Constitution, and that was lowered to 62.[31] Moreover, the President of the Supreme Court challenged before the HCC the constitutionality of bill no. T/3522 on the ground that it violated the right, also enshrined in Article 6 ECHR, to have an impartial tribunal previously established by the law. In particular, he impugned the provisions regarding the power attributed to the Attorney General to pick the forum where to try certain cases by derogation to the principle of the natural judge established by the law. The HCC, on the 19th December 2011 quashed the bill,[32] also affirming the incompatibility of the above-mentioned provision with the ECHR.

After the annulment of this disposition, the Parliament rushed to insert the same rule in the Act on Transitional Provisions, approved on the 30 December 2011. The introduction of this rule at a constitutional level was meant to substantially impede any further review by the HCC. [33] Section 11 of the Transitional Provisions provides, at paragraph 2, the termination of the

[29] In particular, the Section 45 (1) of Parliamentary decision 46/1994. (IX.30.) OGY granted the Supreme Court President the right to take part in Parliamentary sittings. See: *Baka v. Hungary*, § 46.
[30] Act CLXI of 2011.
[31] This provision was struck down by the European Court of Justice with the ruling in the case Case C-286/12, *Commission v. Hungary*, in which the Luxembourg Court held that the provision resulted in an unjustified age discrimination.
[32] Decision 166/2011. (XII. 20.) AB of the Constitutional Court of the Republic of Hungary, ABH 2011.
[33] European Commission for Democracy through Law, CDL-AD(2012)001, *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), para. 90.

«mandates of the President of the Supreme Court and the President and members of the National Council of Justice». But this transitional provision was only the last piece of the puzzle. On 9 November 2011, in fact, the Organisation and Administration of the Courts Act was amended in order to add an additional criterion for the election of the new president of the Kúria. This new criterion provided that the president would be elected by Parliament from among the judges having served at least five years as national judge (section 114(1) of Act CLXI of 2011). Soon after, on 28 November of the same year, an amendment to the Constitution was adopted, which stated that the Parliament would elect the new president of Kúria by the 31 December 2011.[34]

These three provisions read in conjunction led to the premature termination of Baka's mandate and also to his ineligibility for the role of President of the Kúria, not counting, for the new regulation, his experience as European judge. Anyway, the former president continued his judicial career in Hungary serving as an ordinary judge in the civil bench of the Kúria. Then, in March 2012, Baka applied to the Strasbourg Court.

Before proceeding to analyse the decision of the Strasbourg Court, we should carefully examine the judgment no. 45/2012 of the HCC,[35] delivered in the afterwards of Baka's application to the ECtHR, which is of the utmost importance for our scope.

After the Ombudsman impugned the Transitional Provisions before the HCC, the Parliament adopted the first amendment of the Fundamental Law; which expressly affirms that the "Transitional Provisions" are parts of the Fundamental Law. The Parliament's intention was clearly to impede the judicial review of these provisions - that before the amendment were not even in the list of the sources of law - by assigning them the rank of constitutional norms. Notwithstanding this, in the reasoning of the decision, the HCC affirms that «[i]t has been the constant practice of the HCC ever since its very first decisions on the possibility of reviewing the Constitution [rulings 293/B/1994. AB and 23/1994 (IV. 29) AB] that it has no competence to review and annul the provisions of the Constitution.». But, as mentioned in the decision, this position has changed through the years, in particular with the Decision 61/2011 the HCC held that «the scope of competence of the Constitutional Court cannot be excluded with regard to reviewing the Constitution's provisions concerning their invalidity under public law». In other words, the HCC had already affirmed, in 2011, its possibility to review constitutional amendments for their conformity with the procedural requirements set out in the Constitution. However, the HCC decided to go further by exercising an (almost) substantive review of the Transitional Provisions. The HCC considered that the amendments to the Constitution approved during the 2011 - notably ten approved on the basis of individual motions by MPs - and lastly the Transitional

[34] (Amendment) Act (Act CLIX of 2011), Section 1.
[35] Decision 45/2012(XII. 29.) AB of the Constitutional Court of the Republic of Hungary, ABH 2012.

Provisions, fundamentally jeopardized the rule of law in Hungary by introducing into the text of the Constitution many heterogenous provisions not of a constitutional nature. According to the HCC one of the requirements for a State under the rule of law is the "constitutional unambiguity", namely the possibility to determine «beyond doubt at any time the extent and the contents of the Fundamental Law». Given the ambiguity they created, the HCC held that the Transitional Provisions were not part of the Fundamental Law. Henceforth it affirmed its competence to receive the complaint of the petitioner. Moreover, the HCC deemed necessary to clarify that any amendments to the Fundamental Law must be incorporated into it, in order to render the text of the Constitution in force clearly intelligible and to avoid that a parliamentary supermajority could, by simply amending the Transitional Provisions, distract the regulation of a subject from judicial review.

Once affirmed its jurisdiction, the HCC goes on to consider whether the Transitional Provisions violated the Fundamental Law. The decision established the violation of Article B(1) of the Fundamental Law which, in its English version, states: «Hungary shall be an independent, democratic rule-of-law State». The decision of unconstitutionality is based on an argument of a formal nature, namely the fact that the amending power has exceeded the authorisation received by the Fundamental Law. The HCC noted that the authorisation given to Parliament by Section 3 of the Closing Provisions of the Fundamental Law was limited to enforce norms to secure the transition from the former Constitution to the new one. Notwithstanding this restricted authorisation, the Transitional Provisions contained many norms not of a temporary nature.[36] Thus, the HCC declared null and void all the provisions with permanent effects, and not only the ones impugned by the petitioner, without even examine the contents of the annulled dispositions.

The first observation that can be made on the decision is that the HCC made use of a very common judicial review technique, namely the lack of authorisation from the higher source.[37] This technique, applied at a constitutional level, implies the recognition of a hierarchy between constitutional norms. In the judgment of the HCC this is of all evidence: the HCC, in fact, has implicitly affirmed the higher rank of the constitutional amendment rules, by holding that the amending power is a constituted power subject to the Constitution, at least for what it concerns the amendment rules. Secondly, it is worth noting that Section 11(2) of the Transitional Provisions - containing the termination of Baka's mandate - is not amongst the provisions annulled by the HCC. This means that the HCC thought that this provision was compatible with the requirement of the transitionality. At this point, we can move on to analyse

[36] On the scope and nature of Transitional Provisions, see: S. Bisarya, *Performance of Constitutions. Transitional Provisions*, in T. Ginsburg, A. Z. Huq (eds.), *Assessing Constitutional Performance*, Cambridge, 2016, 203-232.
[37] P. Craig, *Ultra Vires and the Foundations of Judicial Review*, in 57 *Cambridge Law Journal* 1, 63 (1998).

the reasoning which leads the Strasbourg Court to affirm that this provision constitutes a violation of the Convention.

4. The Baka case: the ECtHR judgment

The core of the application presented by the former president of the Supreme Court was that his mandate was prematurely terminated three years and a half in advance before its expected date of expiry, and that he didn't have any access to a Tribunal to contest his dismissal, in breach with the right to access to a tribunal granted by Article 6 of the Convention. The constitutional status of the norm was justified, in the applicant's view, only by the Government's will to exclude any possibility to formulate complaints about the validity of the bill before the HCC. Moreover, according to the applicant, the measure must be considered strictly connected with the opinions and views that he had expressed publicly in his capacity as President of the Supreme Court, this leading to a violation of his right to freedom of expression. Consequentially the applicant alleged that the Government violated Articles 6-1 and 10 of the Convention. The first judgment of the ECtHR on the case was delivered on the 27 May 2014 by the Second Section, that held that Hungary violated Articles 6 and 10 of the Convention. Hungary then requested for the ruling to be revised by the Grand Chamber.

The ruling of the Grand Chamber was delivered on 23 June 2016 and it confirmed in its entirety the ruling of the 2nd Section. The judgment, 114 pages long, includes four separate opinions - two concurring and two dissenting - which are useful for a deeper understanding of the meaning of the case in a comparative perspective. It is of articular interest the concurring opinion by the Portuguese and Russian judges - notably Pinto de Albuquerque and Dedov, for its focus on the constitutional *status* of the ECHR and on the power of the Strasbourg Court to review the compatibility with the Convention of constitutional reforms.

As we already mentioned, the Grand Chamber found Hungary in violation of Articles 6 and 10 of the Convention. We won't examine the issues concerning Article 10 to the case, which application - as underlined by one of the dissenting opinions - appears at least doubtful[38] and we will concentrate our attention on Article 6-1.

Beforehand, the ECtHR was called to verify the applicability of Article 6 to the case, the *Vilho Eskelinen Test* was therefore put into question.[39] This test sets out two conditions that have to be fulfilled by the State for Article 6-1 not to be

[38] Article 10 in the consistent jurisprudence of the ECtHR is a right enjoyed by individuals. In the present case, the applicant didn't speak as an individual but on the contrary, at least from what it results from the reading of the judgment, he expressed the position of the organ he represented. This form of expression, an official one, according to one of the dissenting opinion can not be covered by Article 10 of the Convention. See *Baka v. Hungary*, Dissenting Opinion of Judge Wojtyczek, 100-112.

[39] The *Vilho Eskelinen Test* was elaborated in: *Vilho Eskelinen and Others v. Finland*, 63235/00, 19th April 2007.

applicable in cases involving civil servants. First, domestic law must have expressly excluded access to a tribunal for the post or category of staff in question; secondly, the exclusion must be objectively justified in light of the State's interests. If one of these two conditions is not met, Article 6 is applicable. As regards to the first condition, the ECtHR stated that in order to determine whether domestic legislation barred access to a tribunal for the category to which the applicant belonged, it is necessary to refer to the time before the impugned measure was adopted. Otherwise, the impugned measure would represent at the same time the interference with the applicant's right and the legal basis for its exclusion. Consequently, the ECtHR affirmed that before Transitional Provisions entered into force, the domestic law didn't contain any legal basis to exclude the applicability of Article 6 ECHR. Therefore, the ECtHR held that Article 6 ECHR was applicable in the case at hand without even assessing the fulfilment of the second condition.

After having declared the applicability of Article 6 ECHR, the ECtHR went on to consider whether the limitation imposed on Baka was compatible with the requirement of the right to a fair trial. Also, the ECtHR affirmed that for a limitation to be legitimate two conditions have to be met: the limitation should pursue a legitimate aim and there must be a relationship of proportionality between the means employed and the aim sought to be achieved. The Strasbourg Court simply noted that the "lack of judicial review was the result of legislation whose compatibility with the requirements of the rule of law is doubtful"[40] and therefore declared the violation of the applicant's right to access to a tribunal.

The first observation to be made is about the application of the *Vilho Eskelinen test*. Notwithstanding what affirmed by Judge Sicilianos in his concurring opinion, namely that the Strasbourg Court, for the first time in its case-law, interpreted the right to "an independent and impartial tribunal previously established by law" as the right of judges to have their independence "guaranteed and respected by the state", the interpretation given to the Article is actually much narrower.

Indeed, the very fact that the ECtHR held applicable the *Vilho Eskelinen* test is a denial of the difference existing between a civil servant and a judge. As the Inter-American Court repeatedly affirmed[41], one of the main objectives of the separation of the public powers is to guarantee the independence of judges. By applying the *Vilho Eskelinen* test the Strasbourg Court - as it already did in its previous case-law[42] - refused to expand the applicability of Article 6 ECHR to

[40] *Baka v. Hungary*, §121.
[41] *Case of Reverón Trujillo v. Venezuela*, Preliminary objection, merits, reparations and costs, 30th June 2009, Series C No. 197; *Case of Herrera Ulloa v. Costa Rica*, Preliminary objections, merits, reparations and costs, 2nd July 2004, Series C No. 107; *Case of Palamara Iribarne v. Chile*, Merits, reparations and costs, 22nd November 2005, Series C No. 135.
[42] See in particular *Olujic v. Croatia*, 22330/05, 05th February 2009; *Harabin v. Slovakia*, 58688/11, 20th November 2012. Both cases concerned the dismissal of the applicant as

the right of judges to maintain their positions and thus it refused to conceive the latter norm as a bulwark for the independence of judges.

In conclusion, by omitting to underline the role judicial independence plays in ensuring the separation of power and in protecting the rule of law, the ECtHR provided the reader with a far less convincing argument rather than the one used by the IACHR.[43]

This latter court, indeed, when it had to deal with similar cases,[44] clearly stated that "the dimensions of judicial independence results in the subjective right of the judge that his removal from office is exclusively for the causes permitted, either by means of a procedure that complies with judicial guarantees or because the term or period of his mandate has ended. Therefore, when the permanence of judges in office is arbitrarily affected, the right to judicial independence established in Article 8(1) of the American Convention is violated".[45]

Secondly, the fact that the impugned provision was of a constitutional nature, does not seem relevant to the ECtHR, which affirmed that «any interference» with the rights enshrined in the Convention should be compatible with the rule of law, i.e. the interference "must in principle be based on an instrument of general application".[46]

Of course Section 11(2) of the Transitional Provisions - containing a measure which regarded only two persons - cannot be considered an instrument of general application, therefore the interference with the applicant's right to access to a tribunal was declared unlawful. But what is left unsaid by the Strasbourg Court, is that being the president of the Supreme Court - a constitutional body mentioned in the former Constitution, as well in the new Fundamental Law - the applicant belonged to a category which it was, basically, composed only by him. Hence, necessarily the provision couldn't be of general application.

Therefore what seems to sustain the ECtHR holdings on the violation of Article 6 ECHR, it is not the *tamquam non esset* argument, by which the ECtHR pretended to not consider the impugned provision, but rather, as suggested at

President of the Supreme Court, but in none of them the right for a judge to maintain his post is analysed in the light of judicial independence.

[43] In the ruling of the European Court of Justice on the forced retirement of judges in Hungary (C-286/12, *Commission v. Hungary*), the expression "judicial independence" does not even appear in the text. This is a sort of paradox if we consider that judicial independence is a prerequisite for joining both the Council of Europe and the European Union. (Vincze, 206).

[44] See in particular: *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, 28th August 2013, Series C No. 268. In this case the IACHR has to deal with the *ex-lege* termination of the mandates of eight Constitutional Court's judges. Unlike the *Baka* case, the termination was contained in a parliamentary resolution, but as happened in *Baka*, the Court found impossibile to reinstate the applicants in their position.

[45] *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Preliminary objections, merits, reparations and costs, § 199.

[46] *Baka v. Hungary*, § 117.

paragraph 121, the respect of the rule of law, which requires the prohibition of *ad personam* legislation such as Section 11(2) of the Transitional Provisions.

This circumstance appears quite clearly in the "Court's Assessment", at paragraph 117, where the Strasbourg Court seems to build a hierarchy between conventional norms, placing the respect of the rule of law on the higher step: recalling the Preamble to the Convention, the ECtHR states that all the Articles of the Convention should be interpreted in the light of the principle of the rule of law[47], hence conferring a sort of *supra-conventional status* to this principle.

At this stage, it may be useful to recall the judgment 45/2012 of the HCC. Both the judgments, indeed, make reference to the respect of the rule of law as a fundamental argument to decide the case. But there is a substantial difference: while the HCC made a wide-range recognition of the factual and political background on which it was called to intervene; the Strasbourg Court essentially limited itself to a reconstruction of the events related to the applicant. As a result, the HCC concluded that the numerous amendments to the Fundamental Law endangered the rule of law for being too heterogeneous and not of a constitutional nature, and consequentially declared null and void all the provisions not compatible with the requirement of transitionality.

The Strasbourg Court, on the contrary, could only award the applicant an amount of money for pecuniary and non-pecuniary damages, not enjoying the power to render a judgment with constitutive effects. Notwithstanding the merely compensatory nature of the ruling and the lack of a fully coherent motivation, the decision in *Baka* is, undoubtedly, a landmark judgment in the ECtHR case law. Hence, in the following Section, we will conclude by highlighting the relevance of the judgment in Baka to the scope of the present work and assessing the possibility of a theory of unconventional constitutional amendments.

5. Towards a theory of unconventional constitutional amendments?

As a preliminary remark, it is necessary to underscore that the *Baka* case is not the first in which an international tribunal stepped in to review the conventionality of a constitutional amendment, having a controversial precedent in the constitutional crisis of 2004-2005 in Nicaragua, which circumstances present some similarities with the case at stake.

In December 2004 the Nicaraguan President challenged before the Supreme Court of Nicaragua and the Central American Court of Justice ('the CCJ'),[48] a constitutional amendment which at the time was still waiting for the

[47] *Id.*, § 117.

[48] The Central American Court of Justice is a International Regional Tribunal which has jurisdiction only over 4 States, namely Guatemala, Honduras, El Salvador and Nicaragua. This Court, who heard its first case in 1994, does not have the competence to receive individual applications. For further reading see: I. J. A. Giammattei Avilés, *La Corte Centroamericana de Justicia como tribunal constitucional de la Comunidad Centroamericana*, in *Anuario de derecho constitucional latinoamericano*, 2003, 507-522.

second reading by the Parliament. The President contested that the constitutional amendment wasn't simply an amendment, arguing indeed that it would have transformed the system of government from a presidential system to a parliamentary one. Therefore the Parliament couldn't follow the procedure established in the Articles 192 and 194 of the Nicaraguan Constitution for "partial amendment", which requires two successive approvals with a majority of at least 60%, being obliged to enact the reform in compliance with the "total revision" procedure disciplined in Article 193 of the Constitution, which requires two successive approvals with a majority of two thirds and a final approval given by a Constituent Assembly elected by the people.

The CCJ declared its jurisdiction on the dispute recalling article 22(f) of the Court's Statute, which affirms that the Court has power to "*conocer y resolver a solicitud del agraviado de conflictos que puedan surgir entre los Poderes u Organos fundamentales de los Estados*"[49]. The final ruling of the CCJ affirmed that the Parliament, by giving final approval to the constitutional amendment, violated the Nicaraguan Constitution[50]: for implementing the changes contained in the impugned constitutional amendment, the CCJ held that it would have been necessary to follow the total revision procedure. This judgment may serve as a source of inspiration to implement the changes needed in the European context.

Firstly, as regards the effects of its judgments. In *Baka*, the ECtHR explicitly acknowledged the several violations of the rule of law perpetrated in Hungary, nonetheless, it had to limit itself to a declaratory judgment, not enjoying the power to oblige Hungary to repeal the impugned provisions and to reinstate the applicant in his place as President of the highest judicial body. On the contrary, the CCJ went in straightforward terms to declare that the acts enacted by the Nicaraguan Parliament «son jurídicamente inaplicables y su ejecucón hace encurrir en responsabilidad».[51] Thus, we can conclude that Article 41 ECHR, which allows the ECtHR only to afford just satisfaction to the injured party, is completely inadequate for a jurisdiction capable to review the conventionality of constitutional amendments. This necessity has been already adverted by the European judges who, in many cases, delivered rulings of a remedial nature. For example, in the case *Olexandr Volkov v. Ukraine*, which presents many similarities with *Baka*, the ECtHR ordered in the operational part of the ruling to reinstate the applicant in its position as Supreme Court judge.[52]

[49] Translation: «To know and resolve, at the request of the aggrieved party, conflicts that may arise between Powers and Organs of the States».
[50] *Resolución I*, de las 5:00 p.m., 29th March 2005, Gaceta Oficial [Corte Centroamericana de Justicia], no. 19, 24th May 2005.
[51] Translation: «Are legally inapplicable and their execution it is a cause of liability"». See: *Resolución I*, 29th March 2005, *Resuelve Quarto*.
[52] Notwithstanding the wording of Article 41 of the Convention and Article 75 of the Rules of the Court, the Strasbourg Court in the case O*lexandr Volkov v. Ukraine* ordered, in the operational part of the ruling, to reinstate the applicant in his position as Supreme Court judge. See: *Alexander Volkov v. Ukraine*, 21722/11, 9th January 2013, *Holds* no. 9.

Secondly, if the ECtHR is really to become the judge of the European Constitutions, the rules for the standing before it are to be changed. Section 22(f) of the Statute of the CCJ may be a source of inspiration as well. Even if the individual access to the Strasbourg Court constitutes a key feature of the Convention system, in order to fully implement the judicial review of constitutional amendments by the ECtHR, it is necessary to introduce the possibility for the ECtHR to solve conflicts arising between State powers. The power to settle organic litigation is a typical feature of the European model of constitutional justice, [53] as it aims at safeguarding the supremacy of the Constitution in the State and, consequentially, the rule of law. Allocating this competence in the Strasbourg Court would consent not only to enforce the rulings of the Constitutional Courts in any issue, especially on the constitutionality of a constitutional amendment, but also to verify the compliance of the impugned constitutional amendment with the Convention's Articles and, above all, with the rule of law. With this competence, it wouldn't have been necessary to "stretch" the interpretation of the Convention articles like the ECtHR did in *Baka*; the case would have been solved by directly affirming in straightforward terms that Section 11(2) violates the rule of law, for negatively affecting judicial independence.

Going back to the premise of the paper, it is now time to establish the theoretical possibility to build a theory of "unconventional constitutional amendments".

First of all, it has to be underlined that in its more recent case-law the ECtHR affirmed its competence to review the conventionality of constitutional provisions.[54]

In the case *Anchugov and Gladkov v. Russia*,[55] for example, the ECtHR interpreted Article 27 of the Vienna Convention on the Law of Treaties, as impeding Member States to invoke the constitutional nature of a provision to not faithfully execute the judgments of the Strasbourg Court. So, to that extent, the possibility for the ECtHR to review the compliance with the Convention of constitutional amendments can be considered merely as a consequence of this statement. But there is more.

[53] Only 6 states out of the 47 of the Council of Europe, namely Denmark, Ireland, Luxembourg, Monaco, Norway, and Turkey do not recognise this power to their Constitutional and Supreme Courts. (*General Report of the XVth Congress of the Conference of European Constitutional Courts*, 26).

[54] See: *Anchugov and Gladkov v. Russia*, 11157/04, 04th July 2013; *Sejdić and Finci v. Bosnia*, 27996/06, 34836/06; 22nd December 2009; *United Communist Party of Turkey and Others v. Turkey*, 19392/92, 30th January 1998.

[55] In this case the ECtHR declared that Article 32 par. 3 of the Russian Constitution, which contains an absolute ban on the right to vote for prisoners, was not compatible with Article 3 of Protocol 1 to the Convention. For an insight on the execution of this judgment see: L. Mälksoo, *Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No 21-П/2015*, in 12 European Constitutional Law Review 2, 377-395 (2016).

As already argued in the first paragraph, in order to hold the amending power substantially limited there are two strategies. The first one is the introduction of explicit limitations - in the form of unamendable provisions - in the text of the Constitution; the second one is to refer to some *supra-constitutional* supreme principles, which are recognised - and not established - by the Constitution and that are binding even for the amending power. As regards this second strategy, many constitutional scholars already affirmed that the theory of *supra-constitutional* limits «might appear today in the form of international law».[56] Although this argument has been used only to hold the amending power limited by international norms with *jus cogens* status such as the prohibition of torture, genocide, apartheid and the abolition of slavery,[57] some authors think that limitations on the constitutional amending power should include at least all the human rights that are universally recognised because they serve as a "moral ground for any amendments universal acceptability".[58]

Therefore, the last step that needs to be done is to apply this theory to the rights enshrined in the Convention, to see if they can act as external norms of reference to evaluate a constitutional amendment.[59] The main "inconvenient", is represented by the status of the Convention in the hierarchy of norms of the Council of Europe member States that is, almost without exception,[60] *infra* - and not *supra* - constitutional.[61]

This paradox may be solved if we consider the Convention as the European *ius constitutionale commune*.[62] Notwithstanding the status of the Convention in the domestic legal systems, the rights and principles enshrined in its text are, under a substantive aspect, the "hard core values", the "constitutional essentials" of European constitutionalism,[63] shared by all the European Constitutions, that ultimately are *supra-constitutional*.[64] Hence, it is not necessary a reference to natural law, a feature that has been heavily criticized by many constitutional scholars.[65]

[56] Y. Roznai, (n 3), 571.
[57] J. Tapia Valdés, (n 3) 132.
[58] V. J. Samar, *Can a Constitutional Amendment Be Unconstitutional?*, in *33 Oklahoma City University Law Review* 3, 693 (2008).
[59] L. Garlicki and Z. A. Garlicka, (n 16) 357.
[60] An exception is represented by the Constitution of Bosnia and Herzegovina of 1995. The Article 2(2) read in conjunction with Article X(2) recognises a *supra-constitutional* status to the rights guaranteed by the Convention.
[61] For an overview of the status of the ECHR in national legal systems see: A. Stone Sweet and H. Keller (eds.), *A Europe of rights: the impact of the ECHR on national legal systems*. Oxford & New York, 2008.
[62] See: *Baka v. Hungary*, Concurring opinion of Judges Pinto de Albuquerque and Dedov, §25.
[63] E. Alkema, *The European Convention as a Constitution and its Court as a Constitutional Court*, in P. Mahoney et al. (eds.), *Protecting Human Rights: the European Perspective. Studies in memory of Rolv Ryssdal*, Köln, 2000, 38.
[64] Y. Roznai, (n 3), 558.
[65] L. Garlicki and Z. A. Garlicka, (n 16) 356.

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Of course, in order for the doctrine to stand, it is mandatory to consider the ECHR Articles only in their essential core. That is exactly what the European judges did in *Baka*: they affirmed that "the lack of judicial review was the result of legislation whose compatibility with the requirements of the rule of law is doubtful" and thus "the respondent State impaired the very essence of the applicant's right of access to a tribunal".[66]

In conclusion, albeit major changes would need to be implemented for a more effective action, the Strasbourg Court is in the right position to play a key role in verifying the compliance with the Convention - and above all with the rule of law - of constitutional amendments and provisions and thus in the dissemination of the idea of a *supranational constitutionalism*.

[66] *Baka v. Hungary*, §121.