9

Political Integration through Constitutional Memory?

Historical Constitution and Community Building in Hungary

Kálmán Pócza

9.1 INTRODUCTION

'[C]an we build a community of states and peoples with a liberal-legalist constitutional imaginary?' – this is the question Jan Komárek puts in his essay on Joseph Weiler's masterpiece *The Transformation of Europe*.[1] Although, the fundamental *problematique* of Komárek's study concerns community building by various forms of constitutional imagination at the European level, it is of utmost importance to investigate the same question on a national level since it might have several implications concerning building a European community of states and peoples. Beyond the liberal–legalist way of community building, there are at least two other approaches to how this goal could be achieved. While both are moving away from the highly rationalistic strategy of legal constitutionalism, they differ on what the society's fundament should be: one finds material solidarity (i.e., class solidarity), the other one spiritual solidarity (i.e., national solidarity) as a crucial starting point for any community building project. While challenging the 'liberal-legalist constitutional imaginary' from the point of view of this spiritual solidarity shows several similarities with the challenge inspired by the idea of a social Europe, there are, of course, several points where the spiritual project diverges from the solidarity project.

Notwithstanding, it should be stressed that the present undertaking is a rather cautious one: it won't argue that it is advised *under any circumstances* to build a community on *emotional ties* connected to the idea of nation. This chapter is going to weigh arguments and counter-arguments and does not unambiguously defend one position. It will rather consider the dilemmas whether it is *useful* and *desirable* to reach back to the idea of the historical constitution and national emotions to create a sense of community. This chapter clearly goes against the 'liberal-legalist

[1] Jan Komárek, 'Why Read *The Transformation of Europe* Today? On the Limits of a Liberal Constitutional Imaginary', in Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press, 2023), 131.

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constitutional imaginary' and builds on the assumption that constitutional references to the historical constitution can contribute to the community building process in Hungary. While this assumption itself might be contended, this chapter puts aside the question of whether the Hungarian historical constitution could be revived in legal terms or whether it could have legally binding force in any way. Instead, it will approach the question from a non-legalistic point of view and consider the dilemmas whether references to the Hungarian historical constitution might be *useful* and *desirable* from the perspective of community building. To put it briefly: this chapter contends that it might be useful and desirable *but* only under certain circumstances. Unfortunately, whether these conditions prevail can only be established retrospectively.[2]

In what follows, this chapter starts with a brief literature overview on the role and functions of history and historical narratives in the constitutions. Next, it highlights the ahistorical character of constitutionalism in Hungary after the democratic transformation process in 1989/1990 to continue with outlining the historical turn in constitutional thinking after 2010. Afterwards, it presents the main argument of the chapter, contending that references to the historical constitution in the new Fundamental Law of Hungary *might* be useful and desirable from the perspective of community building. Nevertheless, the conclusion stresses that evaluation of the usefulness of the references to the historical constitution remains a task for future generations.

9.2 CONSTITUTIONAL MEMORIES AND HISTORICAL CONSTITUTION

Studying constitutional memory is an emerging research field with a growing theoretical and empirical literature which should be clearly distinguished from constitutional history. While the latter is a more or less linear narrative of the constitutional developments of a political community, the former refers to the manifestations of historical narratives and references to historical facts and symbols in present-day constitutional documents with a special focus on their implications for the current political communities. Surely, its subjects are mainly legal documents, but research on constitutional memories is less legalistic and takes inspirations mainly from the humanities and social sciences. While constitutionalized memory laws might have direct implications on how a society deals with its past, and regulations of transitional justice on the constitutional level have legally binding force, most of the constitutional manifestations of the past contribute rather to a (usually highly controversial) interpretation of the common past of the political community without having a direct legal effect on the everyday life of its citizens.[3]

[2] Martin Loughlin, 'The Constitutional Imagination' (2015) 78 *Modern Law Review* 1, 16.

[3] Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History* (Cambridge University Press, 2017); Uladzislau Belavusau and Aleksandra Gliszczyńska–Grabias, 'The Remarkable Rise of "Law and Historical Memory" in Europe: Theorizing Trends and Prospects in the Recent Literature' (2020) 47 *Journal of Law*

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Nevertheless, the constitutionalized past might have a legitimacy function, an ideological function or an imaginary incitement function, which are clearly beyond its legal-regulatory function.[4]

This chapter contributes to this literature, by exploring whether the references to the Hungarian historical constitution in the new Fundamental Law of Hungary might be *useful* and *desirable* in the community building processes. It should be stressed that the chapter does not analyse the use of history in constitutional documents *in general*. While constitutional documents might contain explicit and implicit historical narratives, and, consequently, constitutional memory is a complex phenomenon, this chapter deliberately narrows down its focus only on one element of a complex phenomenon. To be more precise, it abandons to analyse the grand historical narratives as manifested mainly in the preamble (National Avowal) of the new Fundamental Law of Hungary and disregards explicit and implicit references to historical events and symbols abounding in the new constitution adopted in 2011.[5] This is an inevitable and necessary limitation, since references to the history of the political community in constitutional documents might take various forms: they might include (a) explicit historical narratives which determine a rather unambiguous interpretation of historical facts and events (constitutional master narratives); (b) implicit references to historical events without clearly determining the master narrative of the national history (open-ended constitutional narratives); (c) explicit references to national symbols embedded in national history with an unambiguously determined semantic field (predefined historical references)[6]; and (d) references to

and Society 325; Grażyna Baranowska and León Castellanos-Jankiewicz, 'Historical Memory in Post-communist Europe and the Rule of Law' (2020) 5 *European Papers* 95.

[4] Martin Belov, 'Constitutional Memories: How do Constitutions Cope with Constitutional Past', in Martin Belov and Antoni Abat (eds.), *Revolution, Transition, Memory, and Oblivion. Reflections on Constitutional Change* (Edward Elgar, 2020), 115.

[5] For a more general assessments of the constitutionalized past in Hungary, see Miklós Könczöl, 'Dealing with the Past in and around the Fundamental Law of Hungary', in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds.), *Law and Memory* (Cambridge University Press, 2017), 246–262; Uladzislau Belavusau, 'Mnemonic Constitutionalism and Rule of Law in Hungary and Russia' (2020) 1 *Interdisciplinary Journal of Populism* 1, 16; Heino Nyyssönen and Jussi Metsälä, 'Highlights of National History? Constitutional Memory and the Preambles of Post-communist Constitutions' (2019) 31 *European Politics and Society* 323; Katalin Miklóssy and Heino Nyyssönen, 'Defining the New Polity: Constitutional Memory in Hungary and Beyond' (2018) 26 *Journal of Contemporary European Studies* 322; Marina Bán, 'The Governance of History via Law: An Overview' (2023) 63 *Hungarian Journal of Legal Studies* 315; Anna Gera and Boldizsár Szentgáli-Tóth, 'The Parliamentary Margin of Movement for Strengthening the Role of Historical Dimensions in Interpretation and Law-making: The Case of Hungary' (2023) 63 *Hungarian Journal of Legal Studies* 329; Mónika Ganczer, 'The Impact of Historical Traditions on the Regulation and Practice of the Preferential Naturalization of Hungarians Living Outside the Borders' 63 *Hungarian Journal of Legal Studies* 352.

[6] See the reference to the Holy Crown in the Fundamental Law with a rather exact semantic field: '… we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation'.

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phenomena and objects without a clearly defined semantic field (open-ended historical references). References to the historical constitution, if approached from a non-legalistic point of view, belong to this latter group.

The vagueness of the term 'historical constitution' triggered heavy debates in legal terms, mainly concentrating on the questions of formal and material indeterminacy of the term historical constitution or, alternatively, on the practical impossibility of the revival of the historical constitution in a legally binding way due to the incompatibility of its provisions with modern societies' circumstances or due to the disrupted constitutional traditions caused by the Soviet occupation of Hungary. While the theoretical and practical questions of the revival of the historical constitution in a legally binding form are intellectually highly appealing, here we are focusing only on the utility and desirability of the references to the Hungarian historical constitution from the extra-legal perspective of a community building process.

9.3 BACKGROUND: AHISTORICAL AND LEGAL CONSTITUTIONALISM IN HUNGARY, 1990–2010

History is a pervasive element of the Hungarian constitutional culture. Culture wars inspired by diverging and contradicting historical narratives were being waged as soon as in the early 1990s, that is, directly after the democratic transformation process. Debates on the state symbols or the potential re-emergence or re-establishment of the semi-authoritarian political system of the interwar period, restitution of property relations to post-WWII conditions and other questions of transitional justice were major topics of political and constitutional struggles in the 1990s.

Nevertheless, the past found no way into the emerging body of the new Hungarian constitution. Obviously, missing consensus on how to interpret Hungarian constitutional history (a quite long and rich one) and time pressure were major factors why, at the end of the day, no historical references have been included into the amended 1949 Communist constitution – which has been considered as a provisional constitution until a new one will be enacted. Members of the democratic opposition parties were firmly convinced that a completely new constitution should be adopted *after* the first democratic elections, since the new parliament will have a clear democratic mandate to shape the new political system. The only way history manifested itself in this provisional document is a negative one: it is a clear demarcation from the not-so-distant Communist past.

While Western liberal constitutional theory (based mainly on Dworkin's ideas) along with some innovation (like the theory of invisible constitution) became a dominant pattern of constitutional interpretation on the benches of the HCC (and even beyond that),[7] the quite long history of Hungarian constitutional thinking and

[7] Gábor Halmai, 'Silence of Transitional Constitutions: The "Invisible Constitution" Concept of the Hungarian Constitutional Court' (2018) 16 *International Journal of Constitutional Law* 969.

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practice was simply neglected or even declared as reactionary, feudal and outdated.[8] Undoubtedly, one can find reactionary, feudal and outdated elements in the writings and speeches of the protagonists of the Hungarian constitutional tradition – as in constitutional traditions of all other countries. The question is rather whether such references should prevent any linkage with the past and the constitutional history of the country and whether it is *useful* and *desirable* to bring back historical references into the constitutional thinking in order to promote community building.

This ahistorical and liberal approach to constitutionalism dominated the Hungarian constitutional imagination for approximately 20 years.[9] In the early 1990s, what is now termed 'legal constitutionalism' became the dominant view in the Hungarian legal scholarship, which almost unanimously supported the activist approach of the Hungarian Constitutional Court (HCC) concerning the first generation of fundamental rights.[10] The 'crown jewel' of legal constitutionalism emerged surprisingly rapidly as a key institution of the new Hungarian democracy: there was no public debate on the adequate role of constitutional courts in a young democracy and on questions like who should have the final word in political and social debates.[11] Politicians have never challenged its legitimacy, not even in situations when the HCC declared some parts of the austerity measures of the left-wing-liberal constitutional majority unconstitutional in the mid-1990s.[12] This fact is even more striking since empirically oriented normative democratic theories rarely prefer an institution separated from popular involvement. Democratic theories which stress the consensual, deliberative, egalitarian, participatory or the majoritarian dimension

[8] On the Hungarian constitutional history and the tradition of constitutional thinking, see: László Péter, *Hungary's Long Nineteenth Century. Constitutional and Democratic Traditions in a European Perspective* (Brill, 2012); Ferenc Hörcher and Thomas Lorman (eds.), *A History of the Hungarian Constitution: Law, Government and Political Culture in Central Europe* (Bloomsbury Publishing, 2018).

[9] The legal scholarship has been reserved if not hostile to the idea of the historical constitution after the 1990 democratic transition. On that, see: László Péter, 'The Holy Crown of Hungary, Visible and Invisible', in L. Péter (ed.), *Hungary's Long Nineteenth Century: Constitutional and Democratic Traditions in a European Perspective* (Brill, 2012), 109.

[10] Gábor Halmai, 'The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court', in Wojciech Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law Interntional, 2002); András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press, 2017).

[11] Kálmán Pócza, 'Judicial Review and Politics in Hungary 1990–2018', in Astrid Lorenz and Ellen Bos (eds.), *Politics and Society in Hungary: (De-)Democratization, Orbán and the EU* (Springer, 2023).

[12] Although the HCC has never become the bulwark of social rights, it focused on the first generation of fundamental rights or settling disputes among state organs. Either way, the HCC performed as a poster-child of liberal constitutionalists. See: Kim Lane Scheppele, 'Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe' (2003) 18 *International Sociology* 219. Kim Lane Scheppele, 'A Realpolitik Defense of Social Rights' (2004) 82 *Texas Law Review* 1921.

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of democracy are rather hostile to the liberal democratic theory, which is based on the idea of judicial supremacy.[13] In Hungary, as in other Central and Eastern European countries, this lack of debates on what kind of democracy we really want implied that any challenge to the legal constitutionalist imagination has been identified as a danger to the democracy itself. Legal constitutionalism (identified with the concept of democracy) became the only game in the town.[14]

Given the controversial character of the Hungarian constitutional history and historical references to the past, along with the normative bias of the dominant perception of constitutionalism and the HCC's explicit adherence to the Dworkinian type of constitutional adjudication, no surprise that historical rhetoric and historical references were completely absent from Hungarian constitutionalism after 1990. But history (along with heavy controversies on how to interpret the Hungarian constitutional history and historical constitution) came back after the landslide victory of the Fidesz party in 2010. Viktor Orbán indicated during the election campaign in 2010 that if his party obtained a landslide victory it would enact a new constitution. This constitution would, he asserted, complete the unfinished task of the regime change which had begun in 1989 and help solve the economic and social problems that afflicted the country.[15] During the election campaign, however, no drafts of a new constitution were circulated, and the constitution-making process did not produce a new constitutional text until 2011, when it was adopted by the two-thirds right-wing majority of the parliament. The legitimacy of the new constitution was, however, challenged by the opposition parties which refused to participate in the drafting process and encouraged popular demonstrations against the new Fundamental Law.[16] One of the major objections of the left-wing and liberal parties against the Fundamental Law concerned the references to the historical constitution of Hungary, which was denounced as an anachronistic

[13] Kálmán Pócza, 'Democratic Theory and Constitutional Adjudication' (2015) 56 *Acta Juridica Hungarica* 199.

[14] Paul Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge, 2014), 45–79.

[15] Viktor Orbán, '*Nem lesz árnyékkormány!, Beszéd a Magyar Polgári Együttműködés Egyesület Új államépítés, új irány, új feladatok című konferenciáján Kecskeméten*' 2009. november 8-án (There Won't be Shadow Cabinet! Speech at the Conference *New State-building, New Direction, New Tasks* organized by the Hungarian Civil Cooperation Association on 8 November 2009), http://2010-2015.miniszterelnok.hu/beszed/nem_lesz_arnyekkormany; furthermore: Viktor Orbán, Újjá kell építeni Magyarországot, évértékelő beszéd, 2010. február 5. (We Should Rebuild Hungary! Speech on State of Hungary on 5 February 2010), http://2010-2015.miniszterelnok.hu/beszed/ujja_kell_epiteni_magyarorszagot.

[16] The secession of two left-wing parties from the constitution-making process was implicated by the amendments of the 'old' 1989 constitution by the right-wing constitutional majority in the summer of 2010. This amendment cut the competences of the Constitutional Court. To the process, see Pál Sonnevend, Andras Jakab and Lóránt Csink, 'The Constitution as an Instrument of Everyday Politics: The Basic Law of Hungary', in Armin von Bogdany and Pál Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Bloomsbury Publishing, 2015), 44.

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reference to an ancient undemocratic tradition and which had legitimized and empowered a semi-authoritarian regime in the interwar period and paved the way for the horrors which afflicted Hungary in WWII.[17]

9.4 THE HISTORICAL TURN AND THE FUNDAMENTAL LAW AFTER 2010

Although the concept of the historical constitution was heavily criticized in the public sphere at the time of the adoption of the Fundamental Law, legal scholarship has shown rather moderate interest in it. Among those few studies engaging with the phenomenon of the historical constitution, one might equally find highly critical comments, analyses completely neglecting the references to the historical constitution and some endorsing the revival of the historical constitution.[18] Debates in the

[17] See, for example, the opinion of the Hungarian Socialist Party on the draft constitution from 21 March 2011, http://mszp.hu/nyomtatas/312.

[18] As for highly critical comments, see: Imre Vörös, 'A történeti alkotmány az Alkotmánybíróság gyakorlatában' (2016) 9 *Közjogi Szemle* 44; Zoltán Szente, 'A 2011. évi Alaptörvény és a történeti alkotmány összekapcsolásának mítosza' (2019) 12 *Közjogi Szemle* 1; Zoltán Szente, 'A historizáló alkotmányozás problémái – a történeti alkotmány és a Szent Korona az új Alaptörvényben' (2011) 3 *Közjogi Szemle* 1; Ivett Császár and Balázs Majtényi, 'Hungary: The Historic Constitution as the Place of Memory', in Markku Suksi, Kalliope Agapiou-Josephides, Jean-Paul Lehners and Manfred Nowak (eds.), *First Fundamental Rights Documents in Europe* (Cambridge University Press, 2015); Zoltán Szente, 'How Not to Use History in Constitutional Interpretation: The Aborted Resurrection of the Historical Constitution in Hungary', in Francesco Biagi, Justin O. Frosini and Jason Mazzone (eds.), *Comparative Constitutional History: Uses of History in Constitutional Adjudication* (Brill, 2022). Studies endorsing the revival of the historical constitution: Ádám Rixer, *A vívmány-teszt* (Ludovika University Press, 2018); Ádám Rixer, 'A történeti alkotmány lehetséges jelentéstartalmai' (2011) 3 *Jogelméleti Szemle* 1; Szakály Zsuzsa, 'A történeti alkotmány és az alkotmányos identitás az Alaptörvény tükrében' (2015) 3 *Pro Publico Bono* 24; Lóránt Csink and Johanna Fröhlich, 'Történeti alkotmány és kontinuitás az új Alaptörvényben' (2012) 5 *Közjogi Szemle* 9; Attila Horváth, 'A magyar történeti alkotmány tradíciói' (2011) *Alkotmánybírósági Szemle* 23; Attila Horváth, 'Tiszteletben tartjuk történeti alkotmányunk vívmányait és a Szent Koronát, amely megtestesíti Magyarország alkotmányos állami folytonosságát és a nemzet egységét', in András Patyi (ed.), *Rendhagyó kommentár egy rendhagyó preambulumról* (Dialóg Campus, 2019); Attila Horváth, 'A történeti alkotmány, a Szent Korona-tan mint a szuverenitás biztosítéka', in András Karácsony (ed.), *Szuverenitáskérdések. Elméletek* (Gondolat Kiadó, 2020); István Szabó, 'Az ősi alkotmány: Történeti előzmények', in Lóránt Csink, Balázs Schanda and András Varga Zs (eds.), *A magyar közjog alapintézményei* (Pázmány Press, 2020); Anna Gera, 'Történeti alkotmányunk vívmányai az Alaptörvény speciális alkotmányos rendszerében' (2021) *MTA Law Working Papers* 6, 1–32; József Szalma and Cservák Csaba, 'A történelmi/történeti alkotmány és értelmezési kérdései az új Magyar Alaptörvény fényében' (2017) 2 *Létünk* 47, 9–33; Jenő Szmodis, 'Az alkotmányos történelmi vívmányok szerepéről a normakontrollban: Széljegyzetek Vörös Imre akadémiai székfoglaló előadásához' (2016) 4 *Jogelméleti Szemle* 176; András Milánkovich and Boldizsár Szentgáli-Tóth, 'Díszítő elem, vagy új értelmezési távlatok? A magyar közjog történeti dimenziói az Alaptörvény tükrében' (2014) 1 *Közjogi Szemle* 7, 65–74; Zsolt Zétényi (ed.), *A történeti alkotmány: Magyarország ősi alkotmánya* (Magyarországért Kulturális Egyesület, 2010); András Varga Zs, 'Történeti alkotmányunk vívmányai az Alaptörvény kógens rendelkezésében' (2016) 12 *Iustum Aequum Salutare* 83. Rather pragmatic

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legal scholarship focused mainly on questions of formal and material indeterminacy of the term 'historical constitution' or, alternatively, on the practical impossibility of the revival of the historical constitution with a legally binding force (due to incompatibility with modern society's circumstances or disruption of the constitutional traditions). In contrast to these studies, this essay does not reflect on the feasibility of reviving the historical constitution from a legal-dogmatic point of view but rather from the perspective of the humanities and social sciences by focusing on the *utility* and *desirability* of the references to the historical constitution in the community building process.

The term 'historical constitution' appears four times in the Fundamental Law: three times in the preamble (National Avowal), and once in the core text of the constitution:

> We honour the achievements of our *historic constitution* and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation. (National Avowal)
>
> We hold that the protection of our identity rooted in our *historic constitution* is a fundamental obligation of the State. (National Avowal)[19]
>
> We do not recognise the suspension of our *historic constitution* due to foreign occupations. We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship. (National Avowal)
>
> The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our *historic constitution*. (Article R, para 3)

In the legal scholarship, these references have been heavily criticized and/or considered as irrelevant for constitutional interpretation. Several renowned legal scholars have proposed that they should be simply ignored and that the focus should be solely on the written text of the Fundamental Law.[20] By contrast, a significantly

approaches: Jakab András: Az új Alaptörvény keletkezése és gyakorlati következményei. Budapest, HVG-ORAC, 'Wiener György: Jogfolytonosság és megszakítottság a történeti alkotmányosság rendjében' (2017) 10 *Közjogi Szemle* 22; István Stipta, *A magyar történeti alkotmány és a hazai közjogi-közigazgatási jogvédelem* (Gondolat Kiadó, 2020); Ferenc Hörcher Balázs Fekete, 'Péter László öröksége: a történeti alkotmány rekonstrukciója' (2015) 8 *Közjogi Szemle* 11.

[19] This was added to the National Avowal by the seventh amendment to the Constitution (28 June 2018).

[20] Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution' (2012) 23 *Journal of Democracy* 138; Sándor Radnóti, 'A Sacred Symbol in a Secular Country: The Holy Crown', in Gábor Attila Tóth, *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law* (CEU Press, 2012); Kim Lane Scheppele, 'The Unconstitutional Constitution' *The New York Times*, 2 January 2012; Gábor Halmai, 'The Hungarian Constitutional Court and Constitutional Identity', *Verfassungsblog*, 10 January

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smaller group of scholars evaluated these references more positively.[21] Since there is no general agreement on the question which parliamentary acts and/or unwritten constitutional norms should be considered as part of the historical constitution, the majority of legal scholars rejected the idea of the revival of the historical constitution.

Nevertheless, these references exhibit their utmost relevance not from the perspective of their legalistic-dogmatic interpretation, but rather as part of a certainly vague and undetermined historical narrative. Surely, Article R, paragraph 3 gives an unambiguous command for the Hungarian Constitutional Court on how to interpret the Fundamental Law, and it has a legally binding force concerning constitutional interpretation. Nevertheless, the practice of constitutional adjudication of the HCC shows that this command has been neglected most of the time.[22] Apart from this instruction, which, at the end of the day, has been almost systematically disregarded by the HCC, all other references are included into the preamble of the constitution, which has typically extra-legal, non-binding or declarative character, thus it usually serves the aim to put the constitution into context and create a master narrative of the political community.[23] Besides the location of these references in the preamble, the wording of the text is also telling: terms like we 'honour', 'hold' or 'recognize' indicate the disposition of the community towards the historical constitution however it may be defined. Such dispositional expressions are intended to create a sense of attachment to the constitutional past of the political community and imply that the symbolic-integrative function of these references prevail over their legal character. Given that references to the historical constitution functions as a leeway for community building, the question arises as to whether it is a useful and desirable tool for promoting social integration.

2017, In Hungarian: Zoltán Szente, 'A historizáló alkotmányozás problémái'; Zoltán Szente, 'Az Alaptörvény és az alkotmányos változások szakmai és tudományos reflexiói 2010 után' (2015) 19 *Fundamentum* 62; Imre Vörös, 'A történeti alkotmány az Alkotmánybíróság gyakorlatában'.

[21] Ferenc Hörcher, 'The National Avowal', in Lóránt Csink, Balázs Schanda and András Zs. Varga (eds.), *The Basic Law of Hungary: A First Commentary* (Clarus Press – National Institute of Public Administration, 2012); Ferenc Hörcher, 'Communal Values in the New Hungarian Fundamental Law: The Habermas-Ratzinger Debate and the Use of the Humanities in Constitutional Interpretation', in Ellen Bos and Kálmán Pócza (eds.), *Verfassunggebung in konsolidierten Demokratien: Neubeginn oder Verfall eines politischen Systems?* (Nomos, 2014), 346–365; Ádám Rixer, *A történeti alkotmány helye mai jogunkban* (KRE ÁJK, 2012); Péter Smuk, 'Nemzetfogalom és történeti narratíva az Alaptörvényben', in Kecskés Gábor (ed.), *Doktori Műhelytanulmányok. Győr* (Széchenyi University Press, 2013).

[22] Anna Gera, 'Történeti alkotmányunk vívmányai az Alaptörvény speciális alkotmányos rendszerében', *MTA Law Working Papers* (2021), 6.1–32.

[23] Balázs Fekete, 'The National Avowal: More than a Conventional Preamble to a Constitution', in Zoltán Szente, Fanni Mandák and Zsuzsanna Fejes (eds.), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development* (L'Harmattan, 2015), 11–24; Liav Orgad, 'The Preamble in Constitutional Interpretation' (2010) 8 *International Journal of Constitutional Law* 714.

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9.5 COMMUNITY BUILDING BY REFERENCES TO THE HISTORICAL CONSTITUTION

Setting aside the question of whether the 'historical' narrative will prevail or simply disappear from the Hungarian political arena, one might be interested in to what extent such a project would be *useful* for both the Hungarian and the European political community. Furthermore, even if the project seems to be *useful*, it is less than obvious why such a project would be *desirable*. Therefore, we must consider the *normative* arguments which underpin or delegitimize the desirability of the community building by references to the Hungarian historical constitution.

The dominant view in the legal scholarship is that the most important functions of a constitution are to constitute, legitimate and limit state power, defend the rights of the citizens and secure the rule of law (including legal certainty and calculability).[24] Nevertheless, this dominant view has been challenged by several scholars. Other functions, like expressing fundamental values of the political community or being a symbolic focal point of debates on divergent visions of political and social order, might also be crucial functions. Constitutions might reflect the power struggle and power relations of the daily politics during the constitution-making process. In more fortunate cases they can also express the fundamental values of the political community. But they are even more than that since they also possess a symbolic dimension. They serve as a focal point for various social and political practices, interpretations, constitutional myths, memorial days and political debates over the correct form of social order.[25]

Thus, they are *symbolic* expressions of divergent visions of political and social order. They can serve as symbolic tools for *social integration*, as the example of the US constitution or the constitution of the German Federal Republic after WWII demonstrate.[26] Constitutions may acquire a totemic or symbolic importance and therefore contribute to social cohesion. It should be admitted that this integrative function might be performed by different means. In France, for example, it is not the constitution which serves as a dew point of the integration process but the idea of the nation. In Germany, for many years following the Bismarck-era, it was the

[24] Denis J. Galligan and Mila Versteeg, 'Theoretical Perspectives on the Social and Political Foundations of Constitutions', in D. J. Galligan and M. Versteeg (eds.), *Social and Political Foundations of Constitutions* (Cambridge University Pressm 2013), 3–50.

[25] Dieter Grimm, *Constitutionalism. Past, Present, and Future* (Oxford University Press, 2016), 131; András Jakab, 'The Two Functions of a Constitution', in Ellen Bos and Kálmán Pócza (eds.), *Verfassunggebung in konsolidierten Demokratien Neubeginn oder Verfall eines politischen Systems?* (Nomos Verlag, 2014), 78–104.

[26] For the thesis that constitutions have a highly important symbolic dimension and have, consequently, an integrative function, see: Hans Vorländer, 'Constitutions as Symbolic Orders', in Paul Blokker and Chris Thornhill (eds.), *Sociological Constitutionalism* (Cambridge University Press, 2017), 209–240; Dieter Grimm, 'Integration by Constitution', in Dieter Grimm (ed.), *Constitutionalism: Past, Present, and Future* (Oxford University Press, 2016).

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abstract concept of the state which served as a focal point of social integration.[27] With some reservations, we could also argue that, in Hungary, the idea of the historical constitution and the ever changing *idea* of the Holy Crown were the central *loci* of this imaginative process.[28]

A constitutional practice based on this extended meaning of the term '*constitution*' generates emotional ties that promote the process of social integration, even if the concepts of political order symbolized by constitutions vary heavily over time and/or within one and the same political community in a given period.[29] Constitutions necessarily contain highly general and often stylistically elevated abstract terms and phrases, and, as a consequence, they cannot help but to induce different interpretations or visions of political order.[30] Surely, silence or explicit unanimity on constitutional issues produces social cohesion, but social cohesion will rarely be created by judicial interpretation. Social cohesion and community building need more emotion and less rigid logic and rationality.[31] Here politics is once again at the forefront: a political community cannot be governed in the long run without constructing a sense of community that appeals to the *emotional* dispositions of its members. And, for this reason, the most important functions of the constitutions do not exhaust in constituting or constraining political power and maintaining legal certainty. It seems inevitable that modern constitutions stand at the focal point of *social integration* processes that presuppose some kind of *emotional* engagement. Whether constitutions can fulfil this function in an appropriate manner might be evaluated on an individual basis, and, unfortunately, only retrospectively. Whether the new Fundamental Law of Hungary and its references to the historical constitution will achieve these goals at any time in the future remains an open question to be answered in the decades to come. But it is undeniable that constitutions, including the Fundamental Law of Hungary, play a highly important role in social integration that extends well beyond the formal functions of the constitutions.

Given the fact that fostering social integration seems to be a crucial function of constitutions, the question emerges how can constitutions best serve this purpose? How can they establish social integration? Here constitutional imagination might

[27] Hans Vorländer, 'Integration durch Verfassung? Die symbolische Bedeutung der Verfassung im politischen Integrationsprozess', in Hans Vorländer (ed.), *Integration durch Verfassung* (Wiesbaden, 2002), 24.

[28] Certainly, the idea and the meanings of the term 'Holy Crown' have changed over time, nevertheless, with varying and frequently contested connotations, the Holy Crown has served for several hundred years as the focal point of Hungarian political discourse. For the various meanings of the concept of the Holy Crown in Hungary see: László Péter, 'The Holy Crown of Hungary, Visible and Invisible', in László Péter (ed.), *Hungary's Long Nineteenth Century: Constitutional and Democratic Traditions in a European Perspective* (Brill, 2012), 15–113.

[29] André Brodocz, *Die symbolische Dimension der Verfassung* (Wiesbaden, 2003), 228.

[30] Loughlin, 'The Constitutional Imagination', 13.

[31] Chris Thornhill, *A Sociology of Constitutions* (Cambridge University Press, 2011), 1–20.

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have a decisive role. As Martin Loughlin argues, constitutional imagination is an important element of the collective self-representation of a political community created by a fruitful tension between ideology and utopia. While ideology is a technique of social integration which conceals the gap in legitimacy claims, utopian thought exposes this gap. Both have positive and negative attributes.

> The positive role of ideology is to achieve social and *political integration* through constitutional ordering, while for utopian thought the positive role seeks to elaborate and promote ideals that are implicit within a constitutional text. But on the negative side, ideology can operate primarily to mask the various forms of domination within constitutional arrangements, and, in striving for constitutional perfection, utopianism might simply amount to a flight from political reality.[32]

Furthermore, constitutional imagination can 'harness the power of narrative, symbol, ritual and myth to project an account of political existence in ways that shape – and re-shape – political reality. The phrase draws our attention to the capacity of constitutions to offer alternative perceptions of reality, revealing new ways of conceiving the boundaries of practical political action.'[33] Komárek adds that constitutional imaginaries are 'necessary fictions' of nationhood, common identity or shared history which integrate individual subjects and their beliefs into a common whole.[34]

By accepting these assessments and putting aside the question of utopian thinking for another study, we are focusing here deliberately on the ideological side of constitutional imaginaries and argue that constitutions are capable to produce social cohesion by *historical references*. Historical master narratives and open-ended historical references excite emotional reactions which can be transformed into a powerful tool of building social cohesion. Common narrative and shared history are certainly the most important elements of community building. They can create emotional commitments. Most recently even legal scholars begun to argue that emotions could not be neglected in constitutionalism, community building and establishing social integration. Contemporary constitutional systems are typically presented as if they were operating according to rationality. It is believed that this is achieved by successfully exiling emotions. But, in Sajó's view, 'emotions are the heroes of constitutional institution building'.[35] To be sure, these studies argue that enthusiastic commitment to human rights has its origin in a desperate resistance against the tyrants in seventeenth century Britain, late eighteenth century American colonies and in France. Emotional engagement for liberating the individuals from the

[32] Loughlin, 'The Constitutional Imagination', 13 (emphasis added).

[33] Ibid.

[34] Jan Komárek, 'European Constitutional Imaginaries: Utopias, Ideologies, and the Other' in Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press, 2023), 1–17, 3.

[35] András Sajó, 'Emotions in Constitutional Design' (2010) 8 *International Journal of Constitutional Law* 354, 357.

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tyranny should be considered as a crucial factor in the success story of human rights regimes as we know them today.[36]

The lesson we can learn from these studies is that emotional ties shaped by constitutional references to crucial historical moments are necessary factors of successful community building processes. Thus, we can rightly argue that historical master narratives and open-ended historical references on the constitutional level may strengthen the emotional ties among the members of the political community. Nevertheless, it should be admitted that they can also have the opposite effect. Historical narratives might divide society, strengthen polarization and, consequently, impede social integration. In the Hungarian context, László Péter argued that:

> The Holy Crown tradition is conducive to social and national cohesion. It undoubtedly has been for many people; at the same time, however, it has been culturally divisive, too. As we have seen, the doctrine creates social conflict as well as healing it.[37]

To be more concrete and give an example of how historical narratives and historical references might divide but, at the end of the day, even strengthen the emotional ties among the members of the political community, let's briefly summarize the story of the Holy Crown after the democratic transformation process of 1989/1990. After a highly adventurous journey from Budapest to Mattsee, the Holy Crown has been seized by the US Army in 1945 and the US government has preserved it at Fort Knox for two decades. As part of his new foreign policy of appeasement, Jimmy Carter decided that the masterpiece should be transferred back to Hungary. In 1978 the Holy Crown returned to Hungary and it has been exhibited as an artefact and as a historical object in the National Museum in Budapest. Nevertheless, the return of the Holy Crown generated wider public resonance and inspired even authors of the highly popular rock-opera *Stephen, the King* (*István, a király*) which became part of the cultural DNA of all Hungarians as early as in the early 1980s (i.e., well before the fall of Communism).[38]

The Holy Crown got once again into the forefront of political debates directly after the democratic transformation process of 1989/1990. Lengthy and passionate parliamentary and public debates on whether the Holy Crown should be included into the coat of arms of the new democratic state showed that the Holy Crown could still stimulate political emotions. Left-wing and liberal MPs and public intellectuals argued that the Hungarian coat of arms should not depict the Holy Crown because it

[36] András Sajó, *Constitutional Sentiments* (Yale University Press, 2011).

[37] László Péter, 'The Holy Crown of Hungary, Visible and Invisible', in L. Péter (ed.), *Hungary's Long Nineteenth Century: Constitutional and Democratic Traditions in a European Perspective* (Brill, 2012), 109.

[38] László Péter, 'The Holy Crown of Hungary, Visible and Invisible' (2003) 81 *The Slavonic and East European Review* 421.

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belonged to the feudal era of the Hungarian history – they opted rather for the so-called *Kossuth-címer*, a coat with clear allusions to the short-lived republican past of Hungary. Nevertheless, the right-wing parliamentary majority decided to adopt a law which made the coat of arms with the Holy Crown official. Even though the left-wing and liberal parties won the next parliamentary elections in 1994 with a two-thirds (constitutional) majority, they haven't changed the official coat of arms of Hungary. The issue was settled, and the new government did not open the file again.[39]

The next episode of the story started in 2000 as the first Orbán-government decided to transfer the Holy Crown from the National Museum to the Parliament as a symbolic event of the thousand years old foundation of the Hungarian state by King Saint Stephen in 1000 AD. Once again, heavy debates dominated the political life because left-wing and liberal parties opposed the idea to move the Holy Crown, a symbol of feudal monarchy in their view, to the Parliament which, in turn, has been generally considered as the temple of the republican idea. Nevertheless, the right-wing government transferred the Holy Crown to the Parliament in 2001 even though the issue seemed to increase political polarization. But, once again, after the left-wing and liberal parties came into power in 2002 there was no initiative to transfer the Holy Crown back to the National Museum, which has been regarded by the left-wing and liberal politicians and intellectuals as the most appropriate place for preserving a historically important but currently irrelevant artefact.[40] Nowadays, thousands of Hungarians are visiting the Holy Crown by guided tours all year round and especially on 20 August, the day when the Parliament opens its door during the national holiday commemorating the state foundation of Hungary in 1000 AD.

Once highly divisive and polarizing, the Holy Crown now attracts thousands of visitors in the Parliament and there is no debate or initiative to transfer it back to the National Museum. In that sense, the story of the Holy Crown might be an instructive example as far as the central question of this chapter is concerned: whether it is useful to rely on constitutional memory and historical references in the constitution while trying to promote social integration of the political community. Surely, the Holy Crown is only one example and there might be several differences between the Holy Crown and the references to the historical constitution in the Fundamental Law. Nevertheless, it shows that it is not *unconceivable* that historical narratives really promote social cohesion even if they were once highly divisive issues.

[39] József Zoltán Tóth, *Magyar közjogi hagyományok és nemzeti öntudat a 19. Század végétől napjainkig. Adalékok a Szent Korona-eszme történetéhez* (Szent István Társulat, 2008), 166.

[40] László Péter, 'The Holy Crown of Hungary, Visible and Invisible' in L. László Péter (ed.), *Hungary's Long Nineteenth Century: Constitutional and Democratic Traditions in a European Perspective* (Brill, 2012), 105.

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9.6 CONCLUSIONS

This chapter considered the dilemmas of whether it is useful and desirable to reach back to the idea of the historical constitution and national emotions to create a sense of community. It approached the question from a non-legalistic point of view and contended that it might be useful and desirable *but* only under certain circumstances. It also stressed that whether these conditions prevail can only be established *retrospectively*. Since 2010, several right-wing voters have supported the historicization of politics and politically less committed voters have become aware of the importance of the history of the political community, but several opponents of the government have considered (and are still considering) the references to the historical constitution as an anachronistic effort which turns the attention towards the (less glorious) past instead of the future.

Thus, historical reminiscences, including the references to the historical constitution, might serve the cause of peaceful community building – but they can easily be focal points of intensive social conflicts as well. Counter-narratives which challenge the historical narrative of the new Fundamental Law or the usefulness of any historical narratives on a constitutional level in community building are flourishing in Hungary.[41] Consequently, as for now, we can't estimate whether community building by historical narratives and by references to the historical constitution will be a successful attempt. Even if social integration based on historical references has been launched on a rocky way, its polarizing effect might be chilled and transformed into an integrative power. Time will tell us whether constitutional references to the historical constitution will be successful in promoting social cohesion or it will fail due to the insurmountable gap existing between the two camps of the political community.

[41] Gabor Halmai, 'The Hungarian Constitutional Court and Constitutional Identity', *Verfassungsblog*, 20 January 2017, http://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/; Zoltán Szente, 'A historizáló alkotmányozás problémái' (2011), 1–13; Zoltán Szente, 'A 2011. évi Alaptörvény és a történeti alkotmány összekapcsolásának mítosza', *Közjogi Szemle*, 12 January 2019, 1–8.

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