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## **CHANGES TO THE CONCEPT OF SOVEREIGNTY IN POST-1989 HUNGARY**

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*The concept of sovereignty is a discourse element encompassing many disciplines, and is also a subject of public debate. In order to better understand the processes of Hungarian public life, the present study examines the changes in the content of discourse concerning the concept of sovereignty in Hungary between 1990 and 2021. It focuses on two fields of law, namely international law (and the theory of international relations) and constitutional law. While in the 1990s and 2000s professional and public dialogue were characterised by a discourse which followed Western patterns in seeking to transcend traditional notions of sovereignty, the early 2020s have so far been characterised by a return to the classical concept, and a diversification of positions can likewise be observed in the academic discourse on sovereignty in Hungary.*

**KEYWORDS:**

sovereignty, realism, idealism, regime change, federalism, regionalism, constitutional law, European Union

The concept of sovereignty is, to a greater or lesser extent, perpetually present in virtually all countries and in different spheres of public debate. The term itself has a pronounced scholarly relevance, so that in parallel there exists an in-depth discourse on the concept within several disciplines. Among these disciplines, jurisprudence in particular stands out. Among the legal disciplines, the concept of sovereignty is regarded as a key research topic in both international law and constitutional theory. However, these scholarly debates typically do not remain confined within the realm of science, but also shape public thinking by entering public discourse. Therefore, if we take the changes in the concept of sovereignty in the post-1989 period as the object of our analysis, we must reflect on both scholarly and public discourses. However, as the concept of sovereignty is extremely broad, it may be methodologically desirable to subject the contents of the term “sovereignty” to conceptual analysis; that is, the following paper investigates the interpretative range within which the term lies in Hungary and how it changed historically. The reason why this is important is that, among the varying perceptions, the dilemmas and aspirations of a given age and social order often return in some form.<sup>1</sup> In the light of this knowledge, we can understand how and according to what logic the concept of sovereignty has changed in Hungarian public discourse since 1989.

## 1. RANGES OF INTERPRETATION OF THE CONCEPT OF SOVEREIGNTY, WITH REGARD TO POLITICAL DEBATES IN POST-1989 HUNGARY

The concept of sovereignty is, on the one hand, very difficult to define, yet on the other hand it is an unavoidable element of scholarly and public debate. The conceptual difficulties are further nuanced by the fact that the social organisation, power relations and political debates of a given age can always be discovered within individual conceptions of sovereignty, which logically change from age to age, and thus, the interpretations of sovereignty likewise change. Therefore, in order to understand the debates of the turbulent period which immediately preceded and followed the events of 1989 in Hungary, it is necessary to give an account of the possibilities of interpreting the concept of sovereignty within the framework of a short overview.

### *1.1. The concept of sovereignty in a historical context*

The origins of the concept of sovereignty can be traced to the Middle Ages, when it was understood as the right of a medieval monarch to rule (with divine legitimacy) over his

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<sup>1</sup> Nóra Chronowski and József Petrétei, ‘Szuverenitás’ [Sovereignty], in *Internetes Jogtudományi Enciklopédia* [Internet Law Encyclopedia], ed. by András Jakab, Miklós Könczöl, Attila Menyhárd and Gábor Sulyok (2020).

subjects.<sup>2</sup> Compared to this conception of sovereignty, which was founded upon certain Roman legal institutions which survived into the Middle Ages, the 16<sup>th</sup> century works of the Italian political thinker Niccolò Machiavelli and the French lawyer Jean Bodin marked a new departure. It was Machiavelli who first delineated the concept of the “state” (*stato*) in its present sense, while Bodin defined the substantive criteria of sovereignty (the creation of laws, the granting of mercy, the power to declare war and make peace, and judicial rights, but also the right to mint coins and set the units of measurement.<sup>3</sup>) Another important step in the evolution of sovereignty as a concept came with the age of bourgeois revolutions. The work of the theorists of that era (classically John Locke, Thomas Hobbes and Jean-Jacques Rousseau) was primarily aimed at separating the person of the ruler from the concept of sovereignty.<sup>4</sup> Another important development was the international system arising from the Peace of Westphalia, which in a certain sense marked the transposition of legal and philosophical developments into the system of international law and international relations.<sup>5</sup> The logic of the nation state-based international system remained essentially intact until the second half of the twentieth century. At the same time, within legal theory and political philosophy, the concept of sovereignty crystallised into an understanding of the state as a polity exercising exclusive power over a given population.<sup>6</sup> This quick and broad-brush historical overview also shows how many different interpretations of the concept of sovereignty can exist, regardless of era and social organisation. But before turning to the specific Hungarian discourse, it is definitely worth reviewing how emphases can differ from the perspective of certain disciplines.

## 1.2. Disciplinary interpretations of sovereignty

The brief historical summary above also serves to illustrate how many differently focused and methodological approaches can be used to interpret the concept of sovereignty. If we look up, for instance, the scholarly handbooks published by the Oxford University, the so-called Oxford Handbooks, we find 35 different publications listed under the catalogue entry “Sovereignty”. Some of these are textbooks covering a broad disciplinary field, while others are more narrowly focused (examining, for example, the political system of a given

<sup>2</sup> The word is derived from French translations of the Latin term *superanus* as *soverain*, and thus, in its abstract, conceptual form, *soveraineté*. The emergence of the concept also signalled a crisis for medieval universalism, in that it did not presuppose any greater authority over the ruler of a given state beyond divine power. (Helmut Quaritsch, ‘Souveränität. Entstehung und Entwicklung des Begriffs in Frankreich und in Deutschland vom 13. Jahrhundert bis 1806’, *Schriften zur Verfassungsgeschichte* 38 [Sovereignty. Origin and Development of the Term in France and Germany from the 13th Century to 1806, Writings on the History of the Constitution 38] (Berlin: Duncker und Humblot, 1986), 12–15.

<sup>3</sup> See Jean Bodin, *Les six livres de la République* [The Six Books of the Republic] (Paris: Jacques du Puys, 1576).

<sup>4</sup> See Andrzej Rapaczynski, *Nature and Politics: Liberalism in the Philosophies of Hobbes, Locke, and Rousseau* (Ithaca: Cornell University Press, 1989).

<sup>5</sup> Hugo Grotius, *On the Law of War and Peace* (Cambridge: Cambridge University Press, 2012).

<sup>6</sup> Georg Jellinek, *Allgemeine Staatslehre*, 3<sup>rd</sup> edition (Berlin: O. Häring, 1914), 396.

country), but the mere fact that such a catalogue entry exists already indicates the diversity of interpretive frameworks. The article on sovereignty written by Johan D van der Vyver, published in *The Oxford Handbook of International Human Rights Law*, and which also covers interdisciplinary divergences in interpretation, can help us systematise these myriad conceptions of sovereignty.<sup>7</sup> According to van der Vyver, from the point of view of international law, the concept of sovereignty is interesting in terms of its external content, such as state independence and exclusive control over state affairs, while from the point of view of a constitution, the concept of sovereignty forms the main source of political authority. In the following, we briefly present the dilemmas in these areas, and later we will discuss the Hungarian discourse in the light of the problems outlined here.

### 1.3. *International law and international relations*

The system of international relations we are familiar with today was created by the Peace of Westphalia, which established an international environment within which states mutually recognised one another's sovereignty. Under the peace system, the internal sovereignty of states became inviolable, so that states could not interfere in the internal affairs of each other. But international law and international relations essentially examine the question of sovereignty in its external dimensions. One of the most important principles of international law is that states are equal as actors in the international system. However, there can be huge *de facto* differences in resources, territory, population and influence between *de jure* equal and mutually recognisant states, differences which fundamentally undermine the theoretical equality between these entities.<sup>8</sup> Thus, some form of legal system regulating the relations between sovereign states may be necessary, and even – according to some interpretations – a body with the power to enforce these rules.<sup>9</sup> There may already be methodological differences between schools of thought whether states are assumed to be essentially cooperative or competing entities. As for the question of whether it would be possible to establish a body with genuine power over states, which would help settle interstate disputes and, if necessary, arbitrate between them, opinions differ.<sup>10</sup>

<sup>7</sup> Johan D van der Vyver, 'Sovereignty', in *The Oxford Handbook of International Human Rights Law*, ed. by Dinah Shelton (Oxford: Oxford University Press, 2013), 1–2.

<sup>8</sup> The topic is thoroughly presented in an article by Ákos Szalai: Ákos Szalai, 'Miért korlátozzák az országok a szuverenitásukat? Joggazdaságtani és közösségi döntések elméletén nyugvó magyarázatok' [Why Do Countries Limit Their Sovereignty? Explanations Based on Theories of Legal Economics and Community Decisions], *MTA Law Working Papers*, 54 (2014).

<sup>9</sup> Gábor Kardos, 'Sovereign Equality of States', in *Internetes Jogtudományi Enciklopédia* [Internet Law Encyclopedia], ed. by András Jakab and Balázs Fekete, 2020, 18–24.

<sup>10</sup> For more on this debate see Robert M A Crawford, *Idealism and Realism in International Relations* (Routledge, 2005); Vítor Ramon Fernandes, 'Idealism and realism in international relations: an ontological debate', *Janus. NET, e-journal of International Relations* 7, no 2 (2016), 14–25; Hans J Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, fifth revised edition (New York: Alfred A Knopf Inc, 1978); Kenneth N Waltz, *Theory of International Politics* (Waveland Press, 2010); Kenneth Waltz, *Man, the State and War:*

In the twentieth century, a number of international organisations were set up to regulate interstate relations. The question that arises with regard to these organisations, then, is how their rights and competencies relate to the nation states that created them.<sup>11</sup> One influential position holds that the sovereignty of nation states is always paramount, while others argue in favour of the sovereignty of supranational organisations.<sup>12</sup> Further debates concern the roles of various multinational and intergovernmental bodies and international NGOs.<sup>13</sup> According to some interpretations, the latter actors have drawn level with traditional states in terms of both competence and actual capacity for action, and therefore the model of governance and the exercise of sovereignty no longer operates according to the classical hierarchical model, but more closely resembles the networked model.<sup>14</sup> Indeed, some even argue that sovereignty has now lost its essential meaning, and is thus best avoided as an explanatory concept.<sup>15</sup> The picture is further nuanced by the increasing frequency of humanitarian interventions since the second half of the twentieth century, which, as the term suggests, represent direct interference in the affairs of another state (although it is increasingly accepted that a state committing crimes against humanity against its own

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*A Theoretical Analysis* (New York: Columbia University Press, 1954); David J Singer, 'The Level-of-Analysis Problem in International Relations', *World Politics* 14, no 1 (1961), 77–92; Klaus Eugen Knorr and Sidney Verba, *The International System: Theoretical Essays* (Princeton University Press, 1961), 77–92.

<sup>11</sup> For more see Robert Keohane, 'Sovereignty, Interdependence, and International Institutions', in *Ideas and Ideals: Essays on Politics in Honor of Stanley Hoffmann*, ed. by Linda B Miller and Michael Smith (Routledge, 1993); Kal Raustiala, 'Rethinking the sovereignty debate in international economic law', *Journal of International Economic Law* 6, no 4 (2003), 841–878; Robert O Keohane and Joseph S Nye, Jr, 'Power and interdependence in the information age', *Foreign Affairs* 77, no 5 (1998), 81.

<sup>12</sup> For more see Ernst B Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950–1957* (Paris: University of Notre Dame Press, 1958); Ernst B Haas, *Beyond the Nation-State: Functionalism and International Organization* (Stanford University Press, 1964); Wayne Sandholtz and Alec Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford: Oxford University Press, 1998).

<sup>13</sup> Marie Törnquist-Chesnier, 'NGOs and international law', *Journal of Human Rights* 3, no 2 (2004), 253–263; Andrea Bianchi (ed.), *Non-State Actors and International Law* (Routledge, 2017); Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge: Cambridge University Press, 2005); Steve Charnovitz, 'Nongovernmental Organizations and International Law', *The American Journal of International Law* 100, no 2 (2006), 348–372; Stephen D Krasner, 'Sovereignty', *Foreign Policy* 122 (2001), 20–29.

<sup>14</sup> That is, so-called global governance does not have a fixed institutional structure, but can more accurately be described as a network-like interaction between many different actors at different levels and within different parameters. (See Alex Pongrácz, 'A szuverenitásfogalom változásának 21. századi fejleményei' [The Development of the Concept of the Nation States' Sovereignty in the 21<sup>st</sup> Century], *Pro Publico Bono – Magyar Közigazgatás* 6, no 2 [2018], 128–153.) At the same time, however, it is worth noting that the cornerstone of the debate on the European Union – as Béla Pokol points out – is whether the organisation is a federation or a federal state. In the former case, the sovereignty of the Member States precedes their obligations under EU law, while in the latter case it does not. (Béla Pokol, 'Globális uralmi rend és állami szuverenitás' [Global Order and State Sovereignty], *MTA Law Working Papers* 1, no 13 [2014], 8.)

<sup>15</sup> See, for example, Mihály Bihari's theorem: "My starting theorem is that the classical content and explanation of sovereignty is incompatible with the concept and content of modern-day sovereignty." (Mihály Bihari, 'Theoretical Foundations of Modern Sovereignty: An Attempt to Develop the Foundations of a Functionalist Systems-Based Sovereignty Theory', *MTA Law Working Papers* 1, no 51 [2014], 1–2.)

people cannot be considered sovereign).<sup>16</sup> At the same time, this latter axiom takes us into the realm of constitutional theory.

#### 1.4. Constitutional theory

The interpretive framework of classical constitutional theory focuses primarily on the internal dimension of sovereignty. The different paradigms of interpretation are primarily concerned with who or what can be considered sovereign in a given state, and to what extent. Today's modern democracies typically derive sovereignty from the nation or people, and it is exercised by the political community through representation.<sup>17</sup> At the same time, it is debatable whether the political community is able to establish the constitutional framework (legality) that gives legitimacy to the exercise of sovereignty.<sup>18</sup> Some go so far as to state that the framework for legality in practice is never created by the political community but by the true sovereign.<sup>19</sup> A similar line of argument posits that democracies are based on systems of values that cannot re-create themselves.<sup>20</sup> In addition, the question of who forms the political community in a given state may give rise to further debates. According to one interpretation, a community is made up of the citizens of a given state, which collectively make up the political nation.<sup>21</sup> At the same time, the notion of a cultural nation simultaneously broadens and, in a sense, narrows the circle of those who make up a political community, because according to this interpretation, community members are a community of the same cultural identity, independent of state borders or citizenship. The relationship between citizens as a sovereign political community and the state can also be interpreted as a dilemma of constitutional interpretation, which in turn leads into the realm of political philosophy.

<sup>16</sup> Such is the position of, for instance, Francis Deng, a UN humanitarian adviser. (Francis Deng, 'From Sovereignty as Responsibility to the Responsibility to Protect', *Global Responsibility to Protect* 2, no 4 [2010], 353–370.)

<sup>17</sup> Chronowski and Petrétei, 'Szuverenitás', 1–34.

<sup>18</sup> Gábor György Wisnovszky, 'A szuverenitás valódi forrásának feltérképezése a nyugati államfejlődésen és a magyar rendszerváltáson keresztül' [Mapping the True Source of Sovereignty through Western State Development and the Hungarian Regime Change], *Polgári Szemle* 14, no 1–3 (2018), 44–56.

<sup>19</sup> Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (Trans. by George Schwab, Chicago: University of Chicago Press, 2005).

<sup>20</sup> Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit* [State, Society, Freedom] (Frankfurt am Main: Suhrkamp Verlag, 1976), 66–67.

<sup>21</sup> Gergely Egedy, 'Gondolatok a nemzetről. A politikai és a kulturális megközelítés' [Thoughts on the Nation. A Political and Cultural Approach], in *Nemzetfogalmak és etnopolitikai modellek Kelet-Közép-Európában* [Nation Concepts and Ethnopolitical Models in Central and Eastern Europe], ed. by László Szarka, Balázs Vizi, Balázs Majtényi and Zoltán Kántor (Budapest: Gondolat, 2007), 70–80.

## 2. INTERPRETATIONS OF SOVEREIGNTY IN POST-1989 HUNGARY

In the following we shall examine, in light of the concepts outlined above, the post-1989 discourse in Hungary concerning the concept of sovereignty, broken down into the research topics of the two fields of scholarly enquiry, with differing focuses. At the same time, this bifurcation – that is, a division between international law and constitutional law – is fundamentally theoretical in the sense that a statement or speaker does not necessarily have a background in that field, even if the topic belongs to the scholarly discipline in question.

### *2.1. International law and international relations*

As outlined in the theoretical part of this study, international law and international relations are primarily concerned with the external dimension of sovereignty, that is, they seek the answer to the question of who the subjects of international law are. The classical answer to this question is that the subjects of international law are, of course, states.<sup>22</sup> At the same time, with the end of the Cold War, this foundation of international relations and international law also dissolved. This process can be seen both in Western states and, as a receptor of the Western model, in Hungary, though supplemented with a number of local peculiarities. The domestic reception of the reinterpreted concept of sovereignty can be examined along three fundamental lines, all of which touch on international law and the theory of international relations: 1. transitology as political science; 2. an examination of NGOs, with special regard to their state-restricting role; and 3. the political issues raised by the duality of federalism and regionalism. These areas are examined below.

#### *2.1.1. Transitology*

“The ceremony of sovereignty seems to continue,  
despite the fact that the gods have long since left the field.”<sup>23</sup>

Transitology flourished as a trend in Western political science discourse in the 1980s and 1990s. The primary field of study within this discipline was the question of how to

<sup>22</sup> See Jellinek, *Allgemeine Staatslehre*; Grotius, *On the Law of War and Peace*; Henry Kissinger, *World Order* (London: Penguin Books, 2014). At the same time, of course, contemporary scholarship distinguishes five levels of subjectivity: 1. states; 2. international organisations; 3. natural persons; 4. legal persons; 5. peoples. (János Bruhács, *International Law* [Budapest: Dialóg Campus, 1998], 6–7; Péter Kovács, *Public International Law* [Budapest: Osiris, 2011], 93–190.)

<sup>23</sup> Márton Eörsi, ‘Alkotmány és szuverenitás az Európai Unióban’ [Constitution and Sovereignty in the European Union], *2000* 15, no 3 (2003), 18.

democratise a country through the implementation of a Western institutional system. Initially, the former colonial nations of Africa and Latin America were the subjects of analysis, but after the fall of the Iron Curtain in 1989, the implementation of the findings of this academic discipline greatly influenced the Central and Eastern European region as well.<sup>24</sup> In its essence, transitology is not merely a descriptive discipline, but rather serves as a guide for countries wishing to democratise.<sup>25</sup> The guidance given is that building a stable and functioning democracy is only possible through the swift adoption of Western institutions.<sup>26</sup> However, after the Cold War, the theory of international relations was also determined by the school of transitology, that is the vision of the era meant a unipolar world order realised with the aid of supranational organisations forming a global network of governance.<sup>27</sup> For this reason, the adoption of the Western institutional system generally entailed the most rapid possible incorporation into these Western international institutions. This, in turn, implied that traditional notions of state sovereignty were superseded.<sup>28</sup> The scientific and intellectual discourse in Hungary tended to accept this narrative, if only because, in a sense, thinkers on the reform Left saw in transitology a corrective trend to socialist modernisation efforts.<sup>29</sup> Paradoxically, however, the Hungarian elite of the era saw in the takeover of institutions and integration into the international order a potential safeguard against socialist reorganisation.<sup>30</sup> Therefore, the main thrust of contemporary Hungarian discourse chiefly portrayed integration into the institutions of the Western international system as a desirable development. There was also a retort from within this discourse to the fact that this meant sovereignty, at least as it had traditionally been

<sup>24</sup> The key literature on this trend includes the following: Dankwart A Rustow, 'Transitions to Democracy: Toward a Dynamic Model', *Comparative Politics* 2, no 3 (1970), 337–363; Stephan Haggard and Robert R Kaufman, 'The Political Economy of Democratic Transitions', *Comparative Politics* 29, no 3 (1997), 263–283; Lucian W Pye and Sidney Verba, *Political Culture and Political Development* (Princeton: Princeton University Press, 1965); Clive Staples Lewis, *The Abolition of Man* (Oxford: Oxford University Press, 1943); Seymour Martin Lipset, 'Some Social Requisites of Democracy: Economic Development and Political Legitimacy', *American Political Science Review* 53, no 1 (1959), 69–105; Phillips Cutright, 'National Political Development: Measurement and Analysis', *American Sociological Review* 28, no 2 (1963), 253–264; Myron Weiner, 'Political Integration and Political Development', *The Annals of the American Academy of Political and Social Science* 358, no 1 (1965), 52–64.

<sup>25</sup> Ervin Csizmadia, *A magyar politikai fejlődés logikája* [The Logic of Hungarian Political Development] (Budapest: Gondolat, 2017), 52–62.

<sup>26</sup> John Haskell and Boris N Mamlyuk, 'Capitalism, Communism and Colonialism? Revisiting "Transitology" as the Ideology of Informal Empire', *Global Jurist* 9, no 2 (2009), 1–35.

<sup>27</sup> Charles Krauthammer, 'Universal dominion: Toward a unipolar world', *The National Interest* 18 (1989), 46–49.

<sup>28</sup> Rudolf Tőkés, "'Transitology': Global Dreams and Postcommunist Realities", *Books – Budapest Review of Books – English Edition* 9, no 1 (1999), 16–23.

<sup>29</sup> Jordan Gans-Morse, 'Searching for Transitologists: Contemporary Theories of Post-Communist Transitions and the Myth of a Dominant Paradigm', *Post-Soviet Affairs* 20, no 4 (2004), 320–349.

<sup>30</sup> "In the end, only a successful modernization strategy can maintain a balance of power in Europe. A frustrated and destabilizing Central and Eastern Europe could have a disruptive effect on Western Europe." (András Inotai, 'A Nyugat és a közép- és kelet-európai átalakulás' [The West and the Transition of Central and Eastern Europe], *Közgazdasági Szemle* 40, no 11 [1993], 937.)



conceived, would be curtailed in several respects. Thus, a number of authors argued that the traditional notion of sovereignty had become obsolete and incomprehensible.<sup>31</sup>

If we examine the Hungarian discourse surrounding sovereignty in 2020, a completely different picture emerges. The debate has clearly become bipolar. Moreover, articles arguing that sovereignty as a concept has been transcended seem to have lost their persuasive power, while articles preaching the virtues of the traditional concept of sovereignty and advocating adherence to it – thus implicitly criticising international organisations – have gained influence. In essence, the latter position can be seen as the opposite of the globalist consensus of the 1990s, with the classical concept of sovereignty serving in their argumentative framework as a form of protection against the harmful effects of globalisation (economic instability, migration-induced tensions).<sup>32</sup>

<sup>31</sup> László Valki, 'Az Európai Unióhoz csatlakozó Magyarország szuverenitása' [The Sovereignty of Hungary Joining the European Union], *Magyar Tudomány* 44, no 8 (1999), 1006; Béláné Havasi, 'Nemzeti érdekek – szuverenitás – integráció (Magyarország és az Európai Közösségek)' [National Interests – Sovereignty – Integration (Hungary and the European Communities)], *Külgazdaság* 35, no 10 (1991), 58; Sándor Kurtán, 'Az Európai Közösség – Egy előadás-sorozat áttekintése' [The European Community – An Overview of a Lecture Series], *Mozgó Világ* 17, no 8 (1991), 36; Ernő Fábrián, 'A „mi” és a „mások” identitása' [The Identity of 'We' and 'Others'], in *Az értelem keresése* [In Search for Reason], ed. by János Gyurgyák, Csaba Lőrincz, Zsolt Németh, Zoltán Lépesfalvi and Andrea Horváth (Budapest: Századvég Kiadó, 1994); Mihály Samu, 'Plurális demokrácia – kisebbségi politika: kollektív jogok és a kisebbségek államalkotó minősége' [Plural Democracy – Minority Politics: Collective Rights and the State-Building Quality of Minorities], *Valóság* 35, no 4 (1992), 53; László Kiss J, 'A szuverenitás változó normái a nemzetközi kapcsolatokban: területiség és funkcionalitás, állam és nemzet' [Changing Norms of Sovereignty in International Relations: Territoriality and Functionality, State and Nation], *Valóság* 38, no 3 (1995), 3; Kálmán Kulcsár, 'A magyar modernizáció politikai összefüggései' [Political Contexts of Hungarian Modernization], *Valóság* 38, no 11 (1995), 22; Kálmán Kulcsár, 'Az európai integráció és Magyarország' [European Integration and Hungary], *Magyar Tudomány* 40, no 10 (1995), 1147; Kiss J, 'A szuverenitás változó normái', 15; Kálmán Kulcsár, 'A kulturális jogok és a demokratikus biztonság Európában' [Cultural Rights and Democratic Security in Europe], *Magyar Tudomány* 41, no 3 (1996), 270; Veronika Kőrö, 'Az állami szuverenitás egyes kérdései az európai integráció tükrében' [Some Issues of State Sovereignty in the Light of European Integration], *Magyar Közigazgatás* 54, no 1 (2004).

<sup>32</sup> See János Hoós, 'Globalizáció, nemzeti szuverenitás és demokrácia: Magyarország helyzete a globális világban' [Globalization, National Sovereignty and Democracy: Hungary's Position in the Global World], *Közgazdaság – Review of Economic Theory and Policy* 7, no 1 (2012), 37–66; Alex Pongrácz, 'A globalizált világ aktuális kérdései: államelhalás vagy államépítés?' [Current Issues in a Globalized World: State Death or State Building?], *MTA Law Working Papers* 1, no 18 (2014); Alex Pongrácz, 'Nemzetállamok és új szabályozó hatalmak a globális erőtérben' [Nation States and New Regulatory Powers in the Global Power Space], PhD thesis; András Zs Varga, 'Állami szuverenitás versus intézményi autoritás' [National State Sovereignty Versus Institutional Authority], *Pro Publico Bono – Magyar Közigazgatás* 4, no 4 (2016), 24–30; Tibor Navracsics, 'Nemzeti érdek és Európa' [National Interest and Europe], *Pro Publico Bono – Magyar Közigazgatás* 2, no 4 (2014), 100–104; László Trócsányi, 'Közösségi intézmények és nemzeti érdek' [Community Institutions and National Interest], *De iurisprudentia et iure publico* 2, no 1 (2008).

### 2.1.2. Multinational corporations and non-governmental actors (iNGOs)

“Nevertheless, it would be a mistake to ignore the particular Janus-faced character of NGOs: sometimes as a ‘government’, sometimes as self-nominated organizations, they oppose democratically elected governments.”<sup>33</sup>

Various civic initiatives played a key role in the process of the post-1989 regime change in Hungary. Hungary’s current governing party, Fidesz, started as a civic initiative (the Bibó István College for Advanced Studies), but even the Hungarian Democratic Forum or MDF, which would go on to form Hungary’s first post-1989 government, began as a civil initiative (the *Lakiteleki találkozó* or Lakitelek meeting). Likewise, the liberal Alliance of Free Democrats (SZDSZ) was first launched as a civic initiative (*Szabad Kezdeményezések Hálózata* or Network of Free Initiatives). These groups took part in the work of the Opposition Round Table, also coordinated by a non-governmental organisation, the Independent Legal Forum, and from this platform grew the National Round Table which negotiated with the state socialist party. As early as the eighties, a number of civic initiatives were being launched, solidifying the political transition. Among these, it is worth noting the Danube Circle, which prevented the construction of the Bős–Nagymaros dam, and in doing so fundamentally challenged the power of the state party. What is more, these groups had a theoretical as well as a practical importance. The current prime minister of Hungary, Viktor Orbán, wrote his dissertation – in 1986! – on the political role of non-governmental organisations, but the topic was also researched in remarkable detail by future ombudsman Máté Szabó, who was likewise part of the process of regime change at that time.<sup>34</sup> This NGO-focused thinking was also seen in the discourse on sovereignty, which was only reinforced by the marked influence of the school of transitology discussed earlier. In the globalisation-focused, network-based international system of the time, focused as it was on abolishing nation state hierarchies, various national (NGO) and international

<sup>33</sup> László Kiss J, ‘A „külpolitika vége?“, avagy a kül- és biztonságpolitika új modellje’ [The “End of Foreign Policy?”, or the New Model of Foreign and Security Policy], *Külgügyi Szemle* 1, no 1 (2002), 18.

<sup>34</sup> See Viktor Orbán, *Társadalmi önszerveződés és mozgalom a politikai rendszerben (A lengyel példa)* [Social Self-Organisation and Movement in the Political System (The Polish Example)], dissertation, 1986; Máté Szabó, ‘Katasztrófa vagy társadalmi változás? Az Ökológiai Mozgalom Elméleti Modelljei’ [Disaster or Social Change? Theoretical Models of the Ecological Movement], *Világosság* 25, no 6 (1984), 376–384; Máté Szabó, ‘Társadalmi mozgalom, politikai rendszer, modernizáció’ [Social Movement, Political System, Modernisation], in *Magyar Politikatudományi Társaság Évkönyve*, 1986, 95–120; Máté Szabó, ‘A társadalmi mozgalmak és új típusaik elméleti elemzéséhez’ [Towards a Theoretical Analysis of Social Movements and Their New Types], *Társadalomkutatás* 4, no 3–4 (1986), 114–122; Máté Szabó, ‘Spontán szerveződő ifjúsági csoportok a nyolcvanas években Magyarországon’ [Spontaneously Organised Youth Groups in Hungary in the 1980s], *Ifjúsági Szemle: Az Ifjúkommunista Kiadványa* 9, no 3 (1989), 9–19. Other related literature: András Arató, ‘Civil társadalom Lengyelországban és Magyarországon’ [Civil Society in Poland and Hungary], *Politikatudományi Szemle* 1, no 2 (1992), 53–80; Gábor Halmai, *Az egyesülés szabadsága* [Freedom of Association] (Budapest: Atlantisz, 1990).

(iNGO) non-governmental actors and multinational corporations were assumed to take over the role of nation states as subjects of the international system and thus also in a new interpretation of sovereignty.<sup>35</sup> This model of thinking was essentially dominant in Hungarian discourse around sovereignty in the years immediately after 1989.<sup>36</sup>

By 2020, this discourse had also undergone significant changes. Although many non-governmental organisations operate and flourish in Hungary, as in other countries, there is increasing criticism in Hungary of NGOs and international NGOs that do not fit into the paradigm defined by the traditional notion of nation state sovereignty.<sup>37</sup> An important

<sup>35</sup> Relevant international literature: Christopher Kilby, *Sovereignty and NGOs*, 1998; Krasner, 'Sovereignty'; Iain Atack, 'Four Criteria of Development NGO Legitimacy', *World Development* 27, no 5 (1999), 855–864; Daniel C Thomas, 'International NGOs, State Sovereignty, and Democratic Values', *Chicago Journal of International Law* 2, no 2 (2001), 389; Thomas J Biersteker, 'State, Sovereignty and Territory', in *Handbook of International Relations*, ed. by Walter Carlsnaes, Thomas Risse and Beth A Simmons (London: Sage Publications, 2002), 157–176; Shamima Ahmed and David M Potter, *NGOs in International Politics* (Kumarian Press, 2006); John Boli and George M Thomas (eds), *Constructing World Culture: International Nongovernmental Organizations since 1875* (Stanford, California: Stanford University Press, 1999); Martha Finnemore, *National Interests in International Society* (Ithaca, N.Y.: Cornell University Press, 1996); Margaret E Keck and Kathryn Sikkink (eds), *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, N.Y.: Cornell University Press, 1998); Paul Wapner and Lester Edwin J Ruiz (eds), *Principled World Politics: The Challenge of Normative International Relations* (Lanham: Rowman and Littlefield, 2000); Alexander Cooley, 'Imperial Wreckage: Property Rights, Sovereignty, and Security in the Post-Soviet Space', *International Security* 25, no 3 (2000), 100–127; Hendrik Spruyt, *The Sovereign State and Its Competitors* (Princeton, N. J.: Princeton University Press, 1994).

<sup>36</sup> The Hungarian reception of the above: Ferenc Kondorosi, *Civil társadalom Magyarországon* [Civil Society in Hungary] (Budapest: Politika és Kultúra Alapítvány, 1998); Gyula Ocskay, 'A lokális diskurzusok és a globális hatalom. Egy hálózatépítési modellprogramról' [Local Discourses and Global Power. On a Model Network-Building Programme], *Tér és Társadalom* 16, no 1 (2002), 17–40; Károly Grüber, 'Magyarország és az európai alkotmányozási folyamat: az Európai Konvent' [Hungary and the European Constitutional Process: The European Convention], *Tér és Társadalom* 19, no 1 (2005), 155–161; Eszter Bakonyi, 'A globalizáció kiáltványának kritikai olvasata' [A Critical Reading of the Manifesto of Globalisation], *Információs Társadalom* 5 (2005), 95–104; Ádám Kéglér, 'Lobbizás az Európai Unióban' [Lobbying in the European Union], *Politikatudományi Szemle* 13, no 1–2 (2004); Péter Somlai, 'Globalizáció és világpolgári szolidaritás. Töprengés Jürgen Habermas új munkáiról' [Globalisation and Global Civic Solidarity. Reflecting on the New Works of Jürgen Habermas], in *Írások Huszár Tibor 70. születésnapjára* [Writings for Tibor Huszár's 70th Birthday], ed. by Erika Iványi and Zsuzsa Solymosi (Budapest: ELTE Szociológiai és Szociálpolitikai Intézet, 2000), 398–405; Gábor G Szabó, 'A decentralizált világrend eszméje és a globális irányítás realitása' [The Idea of a Decentralised World Order and the Realities of Global Governance], *Politikatudományi Szemle* 13, no 3 (2004), 41–58; Máté Szabó, 'Civil társadalom–globalizáció–regionalizmus' [Civil Society–Globalisation–Regionalism], *Magyar Kisebbség* 8, no 2–3 (2003); Attila Fábián, 'Demokrácia a globalizáció korában' [Democracy in the Age of Globalisation], in *Magyarország jövője*, ed. by Lajos Juhász (Sopron: Nyugat-magyarországi Egyetem Közgazdaságtudományi Kar, 2005); Ferenc Miszlivetz, 'Remények, célok, realitások 1989 előtt és után' [Hopes, Goals, Realities before and after 1989], *Kritika* 29, no 2 (2000), 11.

<sup>37</sup> Critical Hungarian literature: Gábor Máthé, 'A posztmodern jogállam' [Post-Modern Rule of Law], *Polgári Szemle* 15, no 1–3 (2019), 193–203; Hortenzia Hosszú, 'A kormányzás állam-központú elméleteinek reneszánsza' [A Renaissance of State-centered Theories of Governance], *Új Magyar Közigazgatás* 11 (2018), 1–8; Századvég Alapítvány, *Az NGO-k mint politikai szereplők* [NGOs as Political Actors], 2016; Csaba Varga, 'A Joguralom és Színeváltozásai idealizáció és ideokratikus nyomásgyakorlás között' [The Rule of Law and Its Shifts between Idealisation and Ideocratic Pressure], *Pázmány Law Working Papers* 12 (2006); János Frivaldszky, 'Az állami szuverenitás problematikájának érvénytelenítése: (Good) Governance avagy mi a jó kormányzás és a helyes hatalomgyakorlás?' [Overriding the Issue of State Sovereignty: (Good) Governance

element of this was the law imposing obligations on NGOs that receive significant support from abroad.<sup>38</sup> If only because this Hungarian legislation protecting sovereignty has attracted the attention of various international organisations (European Commission, Court of Justice of the European Union, the Venice Commission), which have made this legislation an object of thorough scrutiny.<sup>39</sup> This fact also represents a serious reversal in the nature of Hungarian discourse, because unlike during the period immediately after 1989, when Hungarian thinking was characterised by the adoption of Western trends, the so-called ‘NGO Law’ turned this phenomena on its head, making a Hungarian law a subject of international contention. At the same time, the case is not that simple, because due to the ruling of the Court of Justice of the European Union (CJEU), the law in question has been repealed, and a new NGO supervisory regime was introduced which assigns the task to the Hungarian State Audit Office.

### 2.1.3. Federalisation and regionalisation

“The federalist political organization is suited  
To ensuring national and even minority  
self-identity and freedom of action.”<sup>40</sup>

The Hungarian public discourse of the 1990s on federalisation and regionalisation also fitted in with the spirit of the age. In the post-Cold War discourse, there was a strong belief that the international system based on nation states should be replaced over time by supranational federations that would range from sub-nation state regions to continents.<sup>41</sup>

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or What is Good Governance and Good Power?], in *Az állam szuverenitása – Eszmény és/vagy valóság. Interdiszciplináris megközelítések*, ed. by Péter Takács (Budapest–Győr: Gondolat, 2015). Pro-NGO Hungarian texts: Gergely Bárándy, ‘Civilek és az állam. Törvényalkotási kronológia 2014–2018’ [NGO-s and the State. Chronology of Legislation 2014–2018], *Jura* 24, no 2 (2018), 300; László Kákai, ‘Kettős szorításban a magyar civil szervezetek’ [Hungarian NGOs under Double Pressure], *Pólusok* 1, no 2 (2020), 1–30; Bálint Magyar, *Post-Communist Mafia State. The Case of Hungary* (Budapest: Central European University Press, 2016).

<sup>38</sup> Act LXXVI of 2017 on the transparency of organisations that receive financial support from abroad.

<sup>39</sup> For more on this topic see Venice Commission Opinion No. 919/2018 OSCE/ODIHR Opinion No. Opinion-Nr. NGO-HUN/326/2018; European Commission for Democracy through Law (Venice Commission) Compilation of Venice Commission Opinions Concerning Freedom of Association (revised in December 2019); Judgment in Case C-78/18 Commission v Hungary; Krisztina Szabó, Balázs Szent-Iványi and András Tétényi, ‘While the Cat’s Away, Will the Mice Play? Government–NGO Relations and the Politics of Aid in Hungary, in *Aid Power and Politics*, ed. by Iliana Olivié and Aitor Pérez (London: Routledge, 2019).

<sup>40</sup> Péter Balázs, ‘Az európai föderalizmus’ [European Federalism], *Mozgó Világ* 17, no 8 (1991), 34.

<sup>41</sup> Relevant international literature: John Loughlin, ‘Federalism, Regionalism and the European Union’, *Politics* 13, no 1 (1993), 9–16; Tanja A Börzel, ‘From competitive regionalism to cooperative federalism: The Europeanization of the Spanish state of autonomies’, *Publius: The Journal of Federalism* 30, no 2 (2000), 17–42; Kathryn Stoner-Weiss, ‘Federalism and Regionalism’, in *Developments in Russian Politics* 4, ed. by Stephen White, Alex Pravda and Zvi Gjelman (London: Palgrave, 1997), 229–250; Joyce Quin, *Regionalism in the European Union* (Intellect Books, 1999).

Hungarian public discourse also adapted to this idea.<sup>42</sup> At this point, it is worth mentioning that in the former Eastern Bloc, national borders frequently do not coincide with national boundaries, a problem to which regionalisation and federalisation – also connected to sovereignty in a political philosophical sense – were offered as potential solutions. Moreover, due to the events of the Balkan wars, participants in the Hungarian discourse were already sympathetic to the federal concept from the outset, fearing that ethnic conflicts between nation states could spread to the entire region.

The federalism debate in 2020 is a defining element of the Hungarian discourse concerning sovereignty, and perhaps the issue that has become the most polarising. While the protection of nation state sovereignty is one of the main priorities of the Hungarian Government, the plan for the establishment of a United States of Europe has been formulated by the Hungarian opposition.<sup>43</sup> In this sense, the professional and intellectual Hungarian discourse has become essentially reactive, as both studies and writings on the topic criticising and supporting federalism have been published.

## 2.2. Constitutional theory

In post-1989 Hungary, the debate on the internal dimension took on a particular aspect. Accession to the Western institutional system, and especially to the European Union, presupposed a certain degree of legal harmonisation, which also entailed the necessity

<sup>42</sup> Relevant Hungarian literature: Zoltán Józsa, 'Regionalizmus és önkormányzatok' [Regionalism and Local Governments], *Magyar Közigazgatás* 50, no 4 (2000), 209; Balázs, 'Az európai föderalizmus', 34; Gusztáv Molnár, 'Miért kell a konföderáció?' (Why Do We Need a Confederation?), *Beszélő* 4, no 18 (1993); Krisztina Vida, *A föderalizmus hatása az európai integráció fejlődésére és szerepe az alkotmányozási folyamatban* [The Impact of Federalism on the Development of European Integration and Its Role in the Constitutional Process], PhD thesis (Budapesti Corvinus Egyetem, 2004); György Beke, 'Fatális lét? Beszélgetés Balázs Sándor kolozsvári filozófussal' [Fatal Existence? Conversation with Sándor Balázs, a Philosopher from Kolozsvár/Cluj-Napoca], *Kritika* 20, no 12 (1991), 18; Kálmán Kulcsár, 'A jogállam dimenziói' [Dimensions of the Rule of Law], *Társadalmi Szemle* 4, no 7 (1994); János Kis, *Túl a nemzetállamon. Az állam semlegessége* [Beyond the Nation State. Neutrality of the State] (Budapest: Atlantisz, 1997).

<sup>43</sup> A selection of texts espousing the nation state position: Attila Marján, 'A föderalizmus fogalmának európai kontextusban való értelmezhetőségéről és néhány ezzel kapcsolatos intézményi kérdéstről' [On the Interpretability of the Concept of Federalism in the European Context and Certain Related Institutional Matters], *Pro Publico Bono – Magyar Közigazgatás* 1, no 3 (2013), 23–41; Attila Marján, 'Az európai föderalizmus kérdésének néhány gazdasági és politikai aspektusa' [Some Economic and Political Aspects Regarding the Issue of European Federalism], *Külgügyi Szemle* 12, no 2 (2013); András Zs Varga, 'Magyarország szuverenitása', in *A magyar közjog alapintézményei*, ed. by Lóránt Csink, Balázs Schanda and András Zs Varga (Budapest: Pázmány Press, 2020). József Dúró, *Ellenzők, kritikusok, kétkedők* (Budapest: Századvég Kiadó, 2017); Béla Pokol, *Globális uralmi rend. 2. kötet* [Global Order. 2<sup>nd</sup> Volume] (Budapest: Kairosz, 2008). Béla Pokol, 'Egy politológusi Európa-tanulmányi megközelítés kritikája', *Jogelméleti Szemle* no 2 (2019), 75–81. Selection of texts mostly promoting the idea of European Federalism: Endre Varga, 'Szuverenitás és europaizálódás' [Sovereignty and Europeanisation], *Jogi Tanulmányok* 14, no 2 (2010), 135–146; Éva Bóka, 'Búcsú a Föderalizmustól?', in *Az EU: problémák és alternatívák*, ed. by Éva Bóka (Grotius Könyvtár, 2013). Bihari, 'Theoretical Foundations of Modern Sovereignty'.

of clarifying the relationship between EU law and the laws of Hungary. To put it more simply, in order to complete Hungary's accession to the European Union, it was necessary to open the way, in a constitutional sense, for EU law within the Hungarian legal system. As the applicability of EU law essentially entailed a transfer of sovereignty, the primacy of EU law had to be declared at the constitutional level.

The constitutional amendment authorising EU law has been referred to as the 'accession clause' by the relevant scientific literature since the beginning of the debate. The thinking on what formal and substantive solutions this clause might employ began in earnest after the Hungarian Parliament declared its intention to join the European Community.<sup>44</sup> (It was the first state in the region to do so.) An amendment to the Constitution, that is the integration of the accession clause into the Constitution, was ultimately necessary because, although the Constitution in force at the time stated only in general terms that Hungary's legal system accepted, respected and upheld the provisions of international law, it did not provide specific guidance for situations in which EU legal provisions and those of the Hungarian legal system conflicted. However, there was little consensus on the wording or content of the accession clause at the turn of the 1990s and 2000s. That this matter could be the subject of further discussion has already been shown by two relevant decisions of the Constitutional Court, which sought in advance to clarify the relationship between EU law and the Hungarian Constitution. Barna Berke, who was a judge at the Court of Justice of the European Union, has lodged several petitions with the Constitutional Court, arguing that the provisions of the Constitutional Court Act (Act XXXII of 1989) are unconstitutional, as they vouchsafe the Constitutional Court only a preliminary, normative review when it comes to international treaties. According to the petitioner, the constitutional rights of citizens are violated if they cannot be enforced *ex post* within the framework of normative control of international treaties.<sup>45</sup>

In response to this petition, the Constitutional Court issued a resolution in Decree 4/1997 (I.22.), in which it explained that the possibility of *ex post* normative control fully extends to the laws promulgating international treaties. Only Imre Vörös, a constitutional judge, attached a dissenting opinion to the decision, arguing that the possibility of preliminary normative control can arise only from the text of the norms of the constitution in force at that time. Also following the motion of Barna Berke, the Constitutional Court ruled in favour of 30/1998 (VI.25.), which went even further, if that were possible, than the previous decision, essentially declaring that national law took precedence over EU law, basing this decision on the basis of sovereignty. A quote from the decision in question:

<sup>44</sup> Act I of 1994 on the promulgation of the Europe Agreement establishing an association between the Republic of Hungary and the European Communities and their Member States, signed in Brussels on 16 December 1991.

<sup>45</sup> Barna Berke's proposal and the motion itself are analysed in detail in László Kecskés, 'Magyarország EU-csatlakozásának alkotmányossági problémái és a szükségessé vált alkotmánymódosítás folyamata (I. rész)' [Constitutional Problems of Hungary's Accession to the EU and the Process of Constitutional Amendment (Part I)], *European Law* no 1 (2003), 21–30.

According to the Constitution, the aspect of democratic legitimacy based on popular sovereignty and democratic rule of law imposes a requirement regarding the legal norms applicable in the Republic of Hungary that their creation be traceable to the ultimate source of public authority. [...] The European Union is an independent system of public authority separate from the Republic of Hungary, with its own autonomous legal order and legal personality under international law.

These two decisions of the then-Constitutional Court prompted reflection on the domestic reception of EU law. As László Kecskés formulated in his question, the Constitutional Court essentially ‘created dogma’.<sup>46</sup> At the same time, the constitutional discourse of the time typically did not welcome the two Constitutional Court resolutions, as they saw in them a barrier to EU accession.<sup>47</sup> It is also worth noting that the former Constitutional Court based its position on the fact that Hungary was not a member of the European Community at the time the decisions were made. The two decisions thus made it clear that the issue of accession should be settled at a constitutional level. The manner of this, and even more so its content, were far from clear. Hungarian constitutional discourse was aware of the international literature concerning the relationship between EU law and national constitutions.<sup>48</sup> In this context, the Hungarian literature essentially argued for the direct

<sup>46</sup> Kecskés, ‘Magyarország EU-csatlakozásának alkotmányossági problémái’, 27.

<sup>47</sup> Some relevant Hungarian literature: László Sólyom, ‘A jogállami forradalomtól az EU-csatlakozásig. Az alkotmányfejlődés keretei’ [From the Revolution of the Rule of Law to EU Accession. Frameworks for Constitutional Development], in *És mi lesz az alkotmánnyal?* [And What of the Constitution?], ed. by László Majtényi and Zoltán Miklósi (Budapest: Eötvös Károly Közpolitikai Intézet, 2004), 9–24; András Sajó, ‘Az EU-csatlakozás alkotmányosságra gyakorolt hatása az új tagállamokban’ [The Impact of EU Accession on Constitutionality in the New Member States], trans. by Gyöngyi Borsody, *Fundamentum* 7, no 2 (2003), 14–26; Péter Paczolay, ‘A magyar alkotmány jövője és az uniós csatlakozás’ [The Future of the Hungarian Constitution and EU Accession], *Politikatudományi Szemle* 13, 1–2 (2004), 31–48; László Blutman, ‘A magyar Lisszabon-határozat: befejezetlen szimfónia luxemburgi hangnemben’ [The Hungarian Lisbon Decision: An Unfinished Symphony in a Luxembourgish Key], *Alkotmánybírói Szemle* 1, no 2 (2010), 90–99; Pál Vastagh, ‘A magyar alkotmányfejlődés jellemző vonásai, különös tekintettel az európai uniós integrációra’ [Characteristic Features of the Development of the Hungarian Constitution, with Particular Regard to European Union Accession], *Európa* 2002 2, no 4 (2001), 48; Imre Vörös, ‘Az EU-csatlakozás alkotmányjogi, jogdogmatikai és jogpolitikai aspektusai’ [Constitutional, Legal and Political Aspects of EU Accession], in *Jogalkotás, jogalkalmazás hazánk EU-csatlakozása küszöbén*, ed. by Jenő Czuczai (Budapest: Complex Kiadó, 2003), 60; Jenő Czuczai, ‘Magyarország EU-csatlakozásának közjogi feltételei’ [Public Law Conditions for Hungary’s Accession to the EU], in *Jogalkotás, jogalkalmazás hazánk EU-csatlakozása küszöbén*, ed. by Jenő Czuczai (Budapest: Complex Kiadó, 2003), 22.

<sup>48</sup> Relevant international literature: Dominik Lasok and John William Bridge, *Introduction to the Law and Institutions of the European Communities* (London: Butterworths, 1987); Neil Walker, ‘Sovereignty and Differentiated Integration in the European Union’, *European Law Journal* 4, no 4 (1998), 355; Theodor Schilling, ‘The Autonomy of the Community Legal Order: An Analysis of Possible Foundations’, *Harvard International Law Journal* 37, no 2 (1996), 389; Joseph Weiler, *The Constitution of Europe: ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999); Federico G Mancini, ‘Europe: The Case for Statehood’, *European Law Journal* 4, no 1 (1998), 29.

applicability of EU law, and also expected its implementation from the accession clause which was still to be written.<sup>49</sup> The clause ultimately became Article 2/A of the Constitution.

There are a number of constitutional and interpretative debates behind the normative text that was finally adopted. The contemporary literature agreed that the European Union could not be understood as a traditional state actor or an international actor in the classical sense, but should be interpreted as a specific international subject, a *sui generis* formation, which could not be placed in either category. The dynamic and evolving nature of European integration distinguishes the EU from classical international organisations. This evolving nature also raises further questions, in particular whether the accession clause creates the possibility of a later federal European Union. Most analyses in the literature were of the opinion that the logical consequence of the ever-closer cooperation of Member States could ultimately be a European federation, the constitutional foundations of which were opened on the 'Hungarian side' by the accession clause. Barna Berke alone argued that:

However specific this form may be, with its supranational nature, the so-called normative supranationalism of its legal system and enforcement system, it is fundamentally about states forming the EU as individual political, constitutional-legal constructs. Thus, there can be no federation under this accession clause.<sup>50</sup>

Another important issue with the accession clause is the extent to which it enables a transfer of authority (sovereignty transfer). The normative text of the clause in this respect states that powers are transferred by the Hungarian state to the European Union 'to the extent necessary'. This provision of the accession clause essentially empowers the European Union to exercise constitutional legitimacy through the delegated powers. At the same time, it is a constraint upon the organisation. This wording allows for a broad range of possible understandings, and thus many interpretations have been made with regard to it. According to László Kecskés, already quoted, the clause creates a sharp, yet unnecessary boundary line, which worsens the positions of the Hungarian legislation in the case of parallel legislation.<sup>51</sup> Still, when the clause was adopted, the matter of which principles Hungary expected to adhere to with regard to the powers delegated to the European Union

<sup>49</sup> Vörös, 'Az EU-csatlakozás'; Vastagh, 'A magyar alkotmányfejlődés'; András Bragyova, 'Igazságtétel és nemzetközi jog. Glossza az Alkotmánybíróság határozatához' [Justice and International Law. Note on the Decision of the Constitutional Court], *Allam- és Jogtudomány* 3, no 1 (1993), 217–218; István Kukorelli and Imre Papp, 'A magyar alkotmány EU-konformitása' [EU Conformity of the Hungarian Constitution], *Európai Jog* 2, no 6 (2002), 3–9; Zsuzsa Cserhalmi, 'Kié a végső szó' [Who Has the Last Word], *Európa* 2002 3, no 1 (2002); Jenő Czuczai, 'Utószó' [Afterword], in *Jogalkotás, jogalkalmazás hazánk EU-csatlakozása küszöbén*, ed. by Jenő Czuczai (Budapest: Complex Kiadó, 2003), 137.

<sup>50</sup> Barna Berke, 'Az európai közösségi jogrend strukturális elveiről' [On the Structural Principles of the Common European Legal Structure], in *Ius privatum ius commune Europae. Liber Amicorum Studia Ferenc Mádl Dedicata*, ed. by Miklós Király (Budapest: ELTE ÁJK Nemzetközi Magánjogi Tanszék, 2001), 52.

<sup>51</sup> Kecskés, 'Magyarország EU-csatlakozásának alkotmányossági problémái', 28.



did not even arise.<sup>52</sup> Moreover, the contemporary literature considered the imposition of such conditions to be fundamentally unnecessary; indeed contemporary thinking considered the imposition of conditions that deepened the degree of integration desirable. The formulation of restrictive expectations, as we will see, only emerged as a real alternative in the 2010s.

In summary, then, the discourse on the internal content of sovereignty in the post-1989 period was essentially aimed at the harmonisation of law and the transfer of powers in connection with accession to the European Union. Although difficulties regarding the transfer of competences concerning sovereignty were already arising at that time, the basic direction of the discourse was primarily about opening up the Hungarian legal system; in other words, how to ‘let EU law in’ to the Hungarian legal system. In contrast, as we shall see, for the 2020s, the discourse focused precisely on the limits of the transfer of sovereignty.

The discourse that began in the second half of 2010 was most influenced by what was at once a legislative and an international political event. The legislative event was of course the constitutional process of 2011 which resulted in the new constitution of Hungary, the Fundamental Law which entered into force on 1 January 2012. Based on the normative text adopted in 2011, the Fundamental Law essentially transferred the provisions of the accession clause of the previous Constitution to Article E of the Fundamental Law, so its content also essentially focused on four areas: paragraph (1) assumes integration as a state goal to the extent necessary, and paragraph (2), as in the previous constitution, empowers the European Union to exercise, to the extent necessary, constitutional sovereignty jointly with other Member States through its institutions. Paragraph (3) recognises that European Union law may, within the framework of paragraph (2), lay down a generally binding rule of conduct. The authorisation granted under paragraph (4) to recognise the binding effect of an international treaty as defined in paragraph (2) shall require a two-thirds majority vote in parliament.<sup>53</sup>

However, Article E paragraph (2) of the Fundamental Law in force today contains a number of new clauses. The seventh amendment to the Fundamental Law of Hungary changed the text of this paragraph, which is supplemented in its current form by the following sentences:

The exercise of the powers listed under this paragraph shall be in conformity with the fundamental rights and freedoms set forth in the Fundamental Law and shall not restrict Hungary’s inalienable right of disposition over its territorial unity, population, form of government and state system.

<sup>52</sup> Adél Sasvári, ‘Magyarország a XXI. századi európaiság kapujában’ [Hungary on the Threshold of 21st-century Europeanness], *Magyar Közigazgatás* 54, no 8 (2004), 492.

<sup>53</sup> Márta Dezső and Attila Vincze, *Magyar alkotmányosság az európai integrációban* [Hungarian Constitutionality in European Integration] (Budapest: HVG-ORAC, 2012), 21–22.

What may lie behind this additional content is easy to see. The seventh amendment to the Fundamental Law was adopted by the Hungarian Parliament in the summer of 2018, three years after the migration crisis, when the ‘mandatory resettlement quota’ was planned to be introduced by the EU Commission. The idea was opposed by Hungary. The seventh amendment limits the applicability of EU law with reference to concepts related to classical sovereignty, such as population and territorial integrity. In this respect, it is also worth looking at the legislative justification for the relevant part of the seventh constitutional amendment:

It is therefore appropriate that the political community of a State, through the Constituent Assembly, enshrine in the Constitution certain elements of the national identity of the State.<sup>54</sup>

It is clear that the amendment and the justification introduced a hitherto little-emphasised concept, the concept of identity, into the discourse, placing it on a constitutional level and reintroducing constitutional identity as a concept limiting EU law. This concept is likewise recognised in the international literature.<sup>55</sup> At the same time, the concept of constitutional identity can be interpreted with reference to Hungarian peculiarities as well. The Hungarian Fundamental Law declares that it respects the achievements of the Hungarian historical constitution based on customary law and the identity arising therefrom. The content of this is described in detail by former Constitutional Judge András Zs Varga in a relevant Constitutional Court decision examining the applicability of EU law:

Constitutional self-identity is not a universal legal value, it is a feature of specific States and of their communities, of the nation, that does not apply (the same way) to other nations.<sup>56</sup>

<sup>54</sup> T/332. The seventh amendment to the Fundamental Law of Hungary. (The author’s translation.)

<sup>55</sup> Liav Orgad, ‘Cultural Defence’ of Nations: Cultural Citizenship in France, Germany and the Netherlands’, *European Law Journal* 15, no 6 (2009), 719–737; Gary J Jacobsohn, *Constitutional Identity* (Cambridge, Mass.: Harvard University Press, 2010); Michel Rosenfeld, ‘Constitutional Identity’, in *The Oxford Handbook of Comparative Constitutional Law*, ed. by Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 756, 757; Leonard FM Besselink, ‘National and constitutional identity before and after Lisbon’, *Utrecht Law Review* 6, no 3 (2010), 36; Pietro Faraguna, ‘Constitutional Identity in the EU – A Shield or a Sword?’, *German Law Journal* 18, no 7 (2017), 1617–1640; Elke Cloots, ‘National Identity, Constitutional Identity, and Sovereignty in the EU’, *Netherlands Journal of Legal Philosophy* 45, no 2 (2016), 82; Monica Claes and Jan-Herman Reestman, ‘The protection of national constitutional identity and the limits of European integration at the occasion of the Gauweiler case’, *German Law Journal* 16, no 4 (2015), 917–970.

<sup>56</sup> 2/2019 (III.5.) Constitutional Court ruling [70], or originally Constitutional Court Ruling: 22/2016 (XII.5.), Reasoning [110]. The following study provides a substantive analysis of the decision in question, namely Decision 22/2016: Veronika Kéri and Zoltán Pozsár-Szentmiklósy, ‘Az Alkotmánybíróság határozata az Alaptörvény E) cikkének értelmezéséről’ [Decision of the Constitutional Court on the Interpretation of Article E of the Basic Law], *Jogesetek Magyarázata* 8, no 1–2 (2017).

The Constitutional Court decision in question was issued at the request of the Hungarian Government, and was intended to decide whether Hungary was obliged under EU law to grant asylum to third-country nationals and, if so, in the case of a fundamental conflict between the granting of asylum and the obligation to preserve constitutional identity, whether a panel other than the Constitutional Court had the right to an authentic interpretation of the Hungarian Fundamental Law. The Constitutional Court held that only it was entitled to an authentic interpretation, and that the obligation to protect constitutional identity took precedence over the application of EU law, in this case the obligation to grant asylum, since its application was also a condition of constitutional authorisation. It is worth noting that this is not the only Constitutional Court decision that has reached a similar conclusion with regard to EU law and national law, but the concept of constitutional identity related to the refugee issue is a characteristic element of the sovereignty discourse.<sup>57</sup>

The discourse described above can essentially be characterised as a dialogue between the legislator, that is the Hungarian Parliament, and the judiciary, the Constitutional Court, in which the Parliament, which possesses fundamental legislative power, together with the Hungarian Constitutional Court, the only body which can supply an authentic interpretation of the Fundamental Law, laid down the theoretical framework within which the concepts of constitutional identity and sovereignty could be interpreted in Hungary by 2020. Nor has the profession of constitutional law remained outside the debate, meaning that the discourse surrounding this topic has taken on a multi-polar character. Some scholars have explicitly welcomed the emergence of the concept of constitutional identity in the discourse on sovereignty. At the same time, many authors have pointed out that the content of the concept is so subtle that the obligations created by the concept can also be used to achieve direct policy goals. A number of long-term analyses have also been produced, shedding light on the substantive correlations in several refractions. This also shows how generative this topic has been within the discourse on domestic sovereignty.

Summarising what has been described so far, we can see that both in the 1990s and at the end of the 2010s, the Hungarian Constitutional Court took a fundamentally more sovereigntist position, proclaiming the primacy of domestic law over EU law. However, on the first occasion the Constitutional Court was not supported by either the political establishment or the profession of constitutional law, as the primary concern of the latter was the opening of domestic law to EU law. By 2020, however, the situation seemed to have changed, with post-2010 governments typically supporting the sovereign aspirations of the Constitutional Court and professional opinions being more divided, rather than unanimously proclaiming the primacy of EU law, as had been the case in the early 2000s. The reversal of this trend is partly due to the new Fundamental Law and partly

<sup>57</sup> Constitutional Court decisions with content tending in a similar direction: 9/2018 (VII.9.) Constitutional Court decision; 17/2013 (VI.26.) Constitutional Court decision; 22/2012 (V.11.) Constitutional Court decision; 3/2019 (III. 7.) Constitutional Court decision; 22/2016 (XII.5.) Constitutional Court decision.

to geopolitical events such as migration, to which both the legislation and the domestic constitutional discourse have responded.

### 3. CONCLUSIONS

Based on the above, it is clear in what direction the professional and public discourse surrounding the concept of sovereignty has moved in the thirty years following the change of regime. While the events of 1989 held out the promise of regaining independence and sovereignty, contemporary public opinion – partly as a failsafe against a return to the past – essentially chose the deepest and most rapid possible integration into Western institutional structures as a national strategic goal. The legal professional discourse fits this goal insofar as it adapted Western professional discourse to Hungarian circumstances. From the point of view of international law, the transcendence of the traditional concept of sovereignty became the dominant paradigm, while constitutional discourse was characterised by an early, constitution-based opening of domestic public law to EU law, showing the importance and urgency which characterised the process of sovereignty transfer.

Entering the 2020s, we see a completely different picture. The relevant professional discourse has become much more diverse, and numerous professional texts and arguments have been published which are open to the traditional understanding of sovereignty and represent the concept in public life. This process is closely related to the international and geopolitical events of the 2010s, which have had a significant impact on Hungary precisely due to the previous, partial abandonment of the traditional concept of sovereignty.

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