

HARVARD JOURNAL *of* LAW & PUBLIC POLICY

VOLUME 46, ISSUE 3

FALL 2023

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The *Harvard Journal of Law & Public Policy* is published three times annually by the Harvard Society for Law & Public Policy, Inc., Harvard Law School, Cambridge, Massachusetts 02138. ISSN 0193-4872. Nonprofit postage prepaid at Lincoln, Nebraska and at additional mailing offices. POSTMASTER: Send address changes to the Harvard Journal of Law & Public Policy, Harvard Law School, Cambridge, Massachusetts 02138.

Yearly subscription rates: United States, \$55.00; foreign, \$75.00. Subscriptions are renewed automatically unless a request for discontinuance is received.

The *Journal* welcomes the submission of articles and book reviews. Each manuscript should be typed double-spaced, preferably in Times New Roman 12-point typeface. Authors submit manuscripts electronically to harvardjlpp@gmail.com, preferably prepared using Microsoft Word. Views expressed are those of the authors and do not necessarily reflect the views of the Society or of its officers, directors, editors, members, or staff. Unless otherwise indicated, all editors are students at the Harvard Law School.

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**THE “COMMON GOOD” IN HUNGARIAN JUDICIAL
INTERPRETATION:
FOOTNOTES FOR AMERICAN DEBATES ON COMMON
GOOD CONSTITUTIONALISM**

MÁRTON SÜLYOK*

Professor Adrian Vermeule of Harvard Law School has recently put forward the theory of Common Good Constitutionalism (CGC), arguing against originalism because it no longer serves its purpose and cannot address challenges in modern Constitutional interpretation or the conservative legal movement. Vermeule also argues that modern challenges of interpretation cannot be answered satisfactorily by the “living constitutionalism” methodology either. He first wrote about CGC in *The Atlantic*,¹ and “[i]t is fair to say the essay did not go unnoticed.”² Professor Vermeule’s book *Common Good Constitutionalism* explains his “original public meaning” of CGC,³ and it was widely debated, cited, and criticized for

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1. Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC, <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037> [perma.cc/X2Y7-83VZ].

2. Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL’Y 103, 106 (2022).

3. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

the better part of the past year.⁴ Given this momentum, the Harvard Journal of Law and Public Policy and the Harvard Chapter of the Federalist Society organized a CGC Symposium in October 2022, where I had the honor of moderating a panel on the Common Good comprising American, Irish, and Canadian legal scholars.⁵

The academic debate, the book, and the symposium all offer an opportunity to look at the common good in the context of the Fundamental Law of Hungary, as it contains a General and a Specific Interpretation Clause, the latter of which mandates the presumption of the service of the common good—as well as other factors—when interpreting the purpose of laws and the constitution. The relevant constitutional provisions were partially amended in 2018 and Hungarian scholarship disagrees on the extent of changes to the interpretive methodology.

Offering empirical and theoretical underpinning for these debates, two Presidents of the Supreme Court of Hungary (*Kúria, Curia*) have tasked two working groups over the past ten years to look at how the Specific Interpretation Clause of the Fundamental Law (cf. Part I., *infra*) has been applied in judicial practice, including constitutional case law. This second aspect is important as decisions of “ordinary jurisdictions” are subject to constitutional review before the Constitutional Court of Hungary (cf. *infra*) through “constitutional appeals” called complaints.⁶ During my assignment to one

4. See, e.g., William H. Pryor Jr., *Against Living Constitutional Goodism*, 23 FEDERALIST SOC'Y REV. 24 (2022); William Baude & Stephen E. Sachs, *The “Common Good” Manifesto*, 136 HARV. L. REV. 861 (2022) (reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022)).

5. I want to thank Prof. Lee Strang (University of Toledo College of Law) and Mario Fiandero (Editor-in-Chief of the Harvard Journal of Law and Public Policy) for this opportunity, and the Editorial Team for their valuable comments in the process of review.

6. Constitutional Court Act, § 26-27, No. CLI, Acts of Parliament, 2011 (Hungary), <https://hunconcourt.hu/act-on-the-cc> [perma.cc/G9NL-PYEZ]. The Supreme Court (*Kúria*) in Hungary oversees ordinary jurisdictions as the ultimate appeals forum, without any constitutional authority. It is separate from the constitutional jurisdiction (*Alkotmánybíróság, AB*), but responsible for the uniformity of the application of law and the consistency of judicial practice.

such working group in 2021, I prepared a comparative review of academic literature on judicial interpretation in light of the Specific Interpretation Clause.

In this article, I share insights from my work and add to other works that seem relevant to judicial interpretation in light of the common good, specifically focusing on constitutional case law.

Part I looks at the various approaches to constitutional interpretation clauses in Hungarian constitutional scholarship.⁷ These approaches reflect an intendedly “purposivist” approach, and the academic sources analyzed will describe what role the common good might have in the context of judicial interpretation.⁸

Part II contextualizes the common good by mapping out scholarly definitions of the concept, followed by examples from the post-2012 case law of the Hungarian Constitutional Court (AB).

Part III briefly summarizes why and how, in light of American debates on Common Good Constitutionalism, the Hungarian context for the incorporation of common good argumentation in constitutional interpretation—thereby creating a “common good jurisprudence”—could be characterized as a missed opportunity.

I. INTERPRETING INTERPRETATION—FOR WHAT PURPOSE?

For as long as courts have had the power to interpret constitutions, judicial interpretation and its constitutional scope and extent have been central to global debates. The birth of “constitutional justice” was a feat of interpretation carried out by the Supreme Court of the United States in *Marbury v. Madison*,⁹ which shaped future European regimes. The Hungarian Constitutional Court (*Alkotmánybíróság*, AB) was first established in 1989 and was molded in the Kelsenian (German-Austrian, centralized) tradition after the fall

7. HUNGARY CONST. art. R(3); art. 28 (amended by the Seventh Amendment to the Fundamental Law), 2018. For all references to the currently effective English text, see: <https://njt.hu/jogszabaly/en/2011-4301-02-00> [<https://perma.cc/2EVY-X259>].

8. HUNGARY CONST. art. 28.

9. 5 U.S. 137 (1803).

of communism.¹⁰ The AB received exclusive *erga omnes* interpretive powers through the adoption of the first democratic constitution and a preceding “constitutional convention” (National Roundtable, NEKA)¹¹ before the first freely elected democratic parliament voted on the constitutional text adopted by this “convention.”

After more than twenty years without them, specific provisions on interpretation were introduced with the National Assembly’s 2011 adoption of Hungary’s new constitution, the Fundamental Law.¹²

In my reading, the following preliminaries apply to these provisions:

- (i) The interpretation of the provisions of the constitution is expressly purposivist;
- (ii) Courts shall interpret the law in accordance with the constitution in this approach; and
- (iii) When interpreting the constitution or laws, the ordinary and constitutional jurisdictions shall presume that the constitution and the law serve moral and economical purposes, which are in accordance with common sense and the common good.

In exact constitutional terms:

- (A) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal [i.e., preamble] contained therein and the achievements of our historical constitution.¹³

10. Cf. Csaba Erdős & Fanni Tanács-Mandák, *Use of Foreign Law in the Practice of the Hungarian Constitutional Court—With Special Regard to the Period between 2012 and 2016*, in JUDICIAL COSMOPOLITANISM: THE USE OF FOREIGN LAW IN CONTEMPORARY CONSTITUTIONAL SYSTEMS 618 (Giuseppe Franco Ferrari ed., 2019).

11. László Trócsányi & Márton Sulyok, *The Birth and Early Life of the Basic Law of Hungary*, in THE BASIC (FUNDAMENTAL) LAW OF HUNGARY: A COMMENTARY OF THE NEW HUNGARIAN CONSTITUTION 4 (András Zs. Varga, András Patyi, Balázs Schanda, eds., 2nd ed. 2015).

12. As specified hereunder in points (A) and (B) with relevant citations provided there.

13. HUNGARY CONST. art. R(3) (General Interpretation Clause).

(B) Courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification [i.e., reasoning] of the [draft legislative] proposal or a proposal for amending the law. When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and [economical]¹⁴ purposes which are in accordance with common sense and the [common] good.¹⁵

Over time, the Interpretation Clauses have led scholars and practitioners to revisit fundamental questions of judicial interpretation.¹⁶ According to civil procedure scholar Krisztina Szigeti, for instance, the purpose of the Specific Interpretation Clause, particularly its sentence containing the reference to the common good, was to move the judiciary out of its comfort zone.¹⁷ Others, like law professor Péter Sólyom,¹⁸ think that “the contradictions and misunderstandings in the interpretation rule stem from the fact that it is not clear whether it is a fiction or a matter of content.”¹⁹ The analysis laid out herein takes it to be a matter of content and gives special focus to the common good.

14. The English version of the Constitution falls into a linguistic trap and uses economic where it should use economical. There are two words in Hungarian: ‘gazdaságos’ (economical) and ‘gazdasági’ (pertinent to the economy, i.e., economic). In the Constitution, the purpose (cél) in this clause is indicated as ‘gazdaságos’ (i.e., economical or sparing—obviously economic, but also other—resources).

15. HUNGARY CONST. art. 28 (Specific Interpretation Clause)

16. The introduction mentioned those Supreme Court working groups that have been specifically tasked with examining judicial interpretation in this context, but other scholars and practitioners have expressed themselves on this matter in the past two decades.

17. Szigeti Krisztina, *A Bírói Jogértelmezés és a Hetedik Alaptörvénymódosítás*, 4 ELJÁRÁSJOGI SZEMLE 15–16 [Procedure Law Review] (2019).

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19. Péter Sólyom, *Alapjogok Nyomában: A Magyar Alkotmánybíróság Esete a Gyűlekezési Szabadsággal*, MTA Law Working Papers 2018/9, 9 (Jan. 10, 2022), http://real.mtak.hu/121510/1/2018_09_Solyom.pdf [https://perma.cc/E7AT-JKSQ].

My conclusion explains why the Specific Interpretation Clause is special when it comes to interpreting Hungary's constitution (the Fundamental Law of Hungary). This "specialness" is relevant, as we will see from the synthesis of the many different arguments below, to the judicial role and to the different attaching "interpretive positions" that judges shall take when interpreting laws and the constitution, and more specifically their purpose in light of the public or common good, common sense, morality, and economical purposes as defined by the Specific Interpretation Clause.

To begin, based on our preexisting theoretical concepts, we can admit that the first sentence of the Specific Interpretation Clause requires teleological interpretation, but it remains to be seen "how the purpose of the legislation can be determined, [and] whether the Fundamental Law can be interpreted in light of objective, subjective or according to both purposes."²⁰

Rita Galántai²¹ points to a tension between the first and third sentences of the Specific Interpretation Clause, namely that it is not clear whether the four values in the third sentence (i) relate to the purpose of the legislation, (ii) are independent interpretative criteria, or (iii) serve as a "check" on the result of interpretation.²² The sitting President of the Supreme Court, law professor András Zs. Varga, sees the third sentence as a "verification rule."²³

At this point, I would like to point out that:

(A) It is debated in relevant literature whether the Specific Interpretation Clause implies an expectation that judges must also interpret the constitution (the Fundamental Law) in every case in which they interpret laws.²⁴

20. Galántai Rita Tünde, *Paradigmaváltások a Hazai Bírói Jogértelmezés Elméletében és Gyakorlatában*, Themis 2020/2, 60 (Jan. 10., 2022).

21. PhD student at ELTE Law School (Budapest) working on a dissertation on the freedom of limits of judicial interpretation.

22. Galántai, *supra* note 20, at 60.

23. Varga Zs. András, *Törvényjavaslatok Indokolása—az Alaptörvény Hetedik Módosításának 8. Cikkéről*, Pázmány Law Working Papers 2018/13 (Jan. 11, 2022, 11:00 PM).

24. Galántai, *supra* note 20, at 63.

(B) It is undisputed that the post-2018 Specific Interpretation Clause explicitly directs the judge into previously uncharted territory regarding the definition of the purpose, particularly through the general obligation to examine preambular provisions, legislative justifications (including explanatory memoranda) when engaging in the interpretation of law.²⁵

Regarding (A), Hungarian constitutional law professor and scholar Johanna Fröhlich²⁶ argues that the distinction between the interpretive standards for the constitution and those for ordinary laws exists only in the constitutional text. This is because the Specific Interpretation Clause expressed the subjective intention of the legislator before the 2018 amendment, and the change that year was merely a refinement of that original intent. “On the other hand, it could be argued that [. . .] the [2018] Seventh Amendment²⁷ has at most changed the interpretation of the ordinary courts [i.e., by clarifying the purpose of the legislation], but not the rules of interpretation of the Fundamental Law.”²⁸

Supreme Court President Varga approaches this argument similarly, stating that the Specific Interpretation Clause was not born “anew” with the Seventh Amendment:

- (i) “It does not define a new interpretative criterion, [but] merely elaborates on an existing one”;²⁹
- (ii) It does not change the existing canon of interpretation, since “the new provision does not override the previous rule that the

25. Cf. HUNGARY CONST. art. 28, *supra* note 15.

26. Assistant Professor at the Law School of Pontificia Universidad Catholica de Chile, a graduate and former colleague of the Law School of Péter Pázmány Catholic University in Budapest, with a PhD in constitutional law. She has an LLM from Notre Dame and has formerly served as an advisor at the Constitutional Court of Hungary.

27. The Seventh Amendment of the Fundamental Law was adopted on June 18, 2018, and entered into force on January 1, 2019. Besides ten other points, this was the amendment to introduce the current text of the Interpretation Clauses under Article 28 of the Fundamental Law, analyzed in detail throughout this paper.

28. Fröhlich Johanna, *Alkotmányértelmezés*, INTERNETES JOGTUDOMÁNYI ENCIKLOPÉDIA, para. 39 (Jan. 11, 2022), <http://ijoten.hu/szocikk/alkotmanyertelmezes> [perma.cc/PHV9-QYEB].

29. Varga, *supra* note 23, at 2.

interpretation must take into account not only the purpose of the legislation but also its conformity with the Fundamental Law.”³⁰

(iii) The Specific Interpretation Clause channels the General Interpretation Clause. In other words, in order to declare conformity with the constitution, the interpretation of the Fundamental Law will always be required,³¹ mindful of the requirements of both Clauses.

Regarding (B), Hungarian academic literature seems largely settled on the issue that purposivist (teleological) interpretation is to be determined from the text of the law to be interpreted and that the preamble of the law plays a decisive role.³² The “constitutional content” can then be determined by taking into account the social purpose of the law as revealed by the preamble, the title of the law, its (regulatory) scope, and the social function inherent in the text.³³ There are, however, contrasting conclusions arguing that, irrespective of the changes of the Seventh Amendment:

(i) it was and remains typical in practice to take into account narratives and commentary laid out in explanatory memoranda, and

(ii) judicial practice also applies a variety of findings in determining legislative intent, such as reference to the explanatory memorandum (justification), examination of the preamble, examination of the difference between the legislative proposal and the adopted legislative text, etc.³⁴

The Specific Interpretation Clause orients the interpreter with regard to the quality of the aim by an ex-post “verification rule”³⁵ with reference to the principles (values) of morality, economy, common sense, and common good. In this view, once all the questions

30. *Id.*

31. *Id.* at 3.

32. See Szigeti, *supra* note 17, at 8.

33. *Id.*

34. *Id.*

35. Varga, *supra* note 23, at 3.

of principle have been clarified, the interpretation must be weighed against the four values.³⁶ However, if we accept this “verification thesis,” then

- (i) the result of the interpretation must always be weighed against the criteria of the interpretation, and
- (ii) the interpretation opens up to metajuristic layers.³⁷

With all this in mind, we should not forget that the Hungarian Constitutional Court (AB) and Supreme Court (*Kúria*) may interpret the constitution in light of different justifications.³⁸ The AB may inquire into what justified the adoption of a piece of challenged legislation, as well as look at how the legislation implicates constitutional provisions. Moreover, the AB may assess whether the constitutional provisions implicated have been applied in harmony with the case law of the Constitutional Court in the course of judicial interpretation by ordinary courts. Ordinary courts (including the *Kúria*) may not engage in such a task beyond the point of examining the possible implications of legislation on constitutional provisions. They then must restrict themselves to applying the *erga omnes* interpretation given by the Constitutional Court when interpreting the law in the *inter partes* case before them.

Péter Sólyom considers the constitutional rules on interpretation a source of unnecessary uncertainty, seeing the Specific Interpretation Clause as a “futility of futilities” that sets in stone many uncertainties that pitted the interpretation of the ordinary courts against each other and the AB’s “interpretive authority” against the interpretation of ordinary courts.³⁹ In the context of fundamental rights, he argues that:

[Ordinary courts and judges h]ave a constitutional duty to interpret legislation in accordance with the Fundamental Law, but the Constitutional Court determines the constitutional limits of the scope of interpretation of a statute. Another important obligation of the courts is to

36. *Id.* at 5.

37. Galántai, *supra* note 20. In her example, through looking at “moral purpose.”

38. *See id.* at 374.

39. Sólyom, *supra* note 19, at 9.

be able to identify the fundamental rights implications of the case before them and to interpret the legislation in the light of the content of the fundamental right concerned. The Constitutional Court is empowered to review whether the courts give effect to the content of the fundamental right.⁴⁰

Arriving at the conclusions of Part I, I now present my reasoning for considering the Specific Interpretation Clause to be special. A judge's interpretative position is that of a "participant," but interpretation also creates an "observer" position that, according to Fröhlich, is not bound by the rules governing the situation, is neutral, and allows the judge to look at the legal problem "from an external perspective from which the facts of the situation observed can be objectively described."⁴¹

As regards the Specific Interpretation Clause, I would also add that, as a "participant," the judge is bound by the concrete, specific legal rules "governing the situation" and is "an active part of the interpretative decision," but—as an "observer"—he must also have an external (i.e., superior) point of view, not only determined (objectively) by the facts of the observed situation, but also by a "hermeneutic layer" above and beyond them. This layer is intrinsically linked to the constitution and its content, being in this sense objective. In addition, the above-mentioned "verification rule"⁴² specifies "teleological constraints" (public/common good, common sense, morality, economical purpose) in interpreting the Fundamental Law or laws.

The Specific Interpretation Clause defines the aim of judicial interpretation as the "reconstruction of the original thought behind the law" achieved through a chain of interpretative decisions and influenced by the complexity of legal language and the principles

40. *Id.* at 6. See generally Sándor Lénárd, *Fundamental Rights Adjudication in the Central European Region*, in *COMPARATIVE CONSTITUTIONALISM IN CENTRAL EUROPE: ANALYSIS ON CERTAIN CENTRAL AND EASTERN EUROPEAN COUNTRIES* 385–400 (Csink Lóránt & Trócsányi László eds., 2022).

41. Fröhlich, *supra* note 28, at 5.

42. See Galántai, *supra* note 20; Varga, *supra* note 23.

of rule of law and separation of powers.⁴³ This reference to the reconstruction of the original thought behind the law brings us to the interpretive method to deconstruct legislative intent. Regarding this, Supreme Court President Varga differentiates between a “textualist” (objective and “preamble-bound”) and an “originalist” (subjective and “justification-bound”) approach.⁴⁴

Finally, it could be argued in the context of this Hungarian “originalist” approach, that the objective, “textualist” concept prevailed until recently, and the novelty (or “specialness”) of the Specific Interpretation Clause is that it renders the “originalist” (subjective teleological) interpretation inescapable—though not exclusive.⁴⁵ If the interpretation intended by the legislator is not in line with the constitution, the AB may still declare the norm or the judgment based thereon unconstitutional.⁴⁶

II. INTERPRETING COMMON GOOD

A. *In Hungarian Legal and Constitutional Scholarship*

In this Part, I first present some approaches from Hungarian legal scholarship to the notion of the common good. The textualist approach to judicial interpretation provides a suitable segue into this. As it was very aptly put by legal theory scholar and professor of law Péter Szigeti,⁴⁷ “the mystery of public interest, public will, public or common good and of general interest has been a topic of discussion for more than 3000 years.”⁴⁸ In this sense, the second part of the preamble of the Fundamental Law⁴⁹ provides a vision of the

43. Sólyom, *supra* note 19, at 7.

44. Varga, *supra* note 23, at 3–4.

45. *Id.*

46. *Id.* at 4.

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48. Szigeti Péter, *A Minden Egyes Akaratától az Általános Akaratig Vezető Út*, in *KÖZ/ÉRDEK: ELMÉLETI ÉS GYAKORLATI MEGOLDÁSOK EGY KLASSZIKUS PROBLÉMÁRA* 20 (Lapsánszki András, Smuk Péter, Szigeti Péter eds., Gondolat 2017).

49. HUNGARY CONST. National Avowal.

Hungarian state and its communities that is anchored to natural law through the following narrative declarations:

- (i) “human existence is based on human dignity”⁵⁰
- (ii) “individual freedom can only be complete in cooperation with others”⁵¹
- (iii) “the family and the nation constitute the principal framework of our coexistence, and [...] our fundamental cohesive values are loyalty, faith and love”⁵²
- (iv) “the common goal of citizens and the State is to achieve the highest possible measure of well-being, safety, order, justice and liberty.”⁵³

I can agree that “the foundational idea of the ideal of the common good is that the association and cooperation of humans necessarily creates a unique group of goods, which in turn decisively affects the order of their relationships as well.”⁵⁴ Early notions of the common good are often related to principles of “commutative justice,” bearing on the mutual relationships of the members of the community by harmonizing (ordering) their activities with each other as well as by respecting and representing common and mutual interests.⁵⁵ According to Hungarian scholarship, due to the lapse of time and the appearance of modern capitalist structures and relations, the notion of the common good was replaced in Hungary by the dualistic structure of private vs. public interest.⁵⁶ (I suspect this to be a global trend, but the source cited remains silent on the issue.)

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Péter Takács, *A Közjó: a Közakarat és a Közérdek az Állam Kontextusában*, in *KÖZ/ÉRDEK*, *supra* note 48.

55. Samu Mihály, *Az Igazságosság—Az Alkotmányos Irányítás és a Társadalmi Elit Erkölcsi-jogi Felelőssége*, 9 *POLGÁRI SZEMLE* 184 [Civic Review] (2013); *see also* Casey & Vermeule, *supra* note 2, at 111.

56. Szigeti, *supra* note 48, at 23.

In this approach, the public or common good is a concept that strives to realize and protect the public interest.⁵⁷ Historically and in the context of different legal systems, it may have a rich variety of meanings.⁵⁸ In other words: “any eternal, timeless concept of the common good may only be a thin husk of an abstraction.”⁵⁹

In turn, those who think that the reference to the Holy Crown in the Fundamental Law⁶⁰ represents a recognition of the common good and that the common good necessitates that the state becomes more active in social matters are wrong according to renowned Hungarian state theory expert Prof. Péter Takács.⁶¹ He characterizes the abundant and exuberant references to the common good as the corollaries and consequences of “shallow relativism,” operating based on the assumption that the content of the common good changes with the age, culture, or community of reference and is therefore impossible to define.⁶²

Adrian Vermeule and Irish constitutional law and legal theory scholar Conor Casey⁶³ strike a similar tone reacting to claims that the common good

- (i) “is not simply [...] a placeholder for whatever subjective preferences any particular official might desire to impose”⁶⁴
- (ii) “is an undefined notion [...] both spatially and temporally.”⁶⁵

Considering these views extremely shortsighted, they conclude that the legal field cannot ignore its manifold representations in the

57. *Id.* at 21.

58. *Id.* at 20.

59. *Id.* at 21.

60. HUNGARY CONST. National Avowal; *id.* art. I).

61. Takács, *supra* note 54, at 52.

62. *Id.*

63. University of Surrey; LLB and PhD (Trinity College, Dublin), LLM (Yale Law School). Prof. Casey has also been a panelist on the Common Good Panel at the Symposium on Vermeule’s Common Good Constitutionalism that gave the *à propos* for this article and has been published earlier in JLPP as well, writing with Adrian Vermeule on this very topic.

64. Casey & Vermuele, *supra* note 2, at 109.

65. *Id.*

form of “cognates” such as “common good,” “social justice,” “general welfare,” “public interest,” “public good,” “peace, order, and good government.”⁶⁶ Péter Takács also addresses how and why “public will” (*közakarat*) and “public interest” (*közérdek*)—both terms related to the common good—started being used as substitutes for “public/common good.”⁶⁷ He also argues that the use of “public interest” is the continuation of the “common good” in modern times.⁶⁸ Others hold that all of these concepts are *prima facie* synonymous⁶⁹ and categorize expressions such as “national interest” (*nemzeti érdek*), “state interest” (*államérdek*), and “public interest” (*közérdek*) as the “political relatives” of the “public/common good” (*közjó*).⁷⁰

Péter Takács also reflects upon why common good became an issue. Did people foresee and therefore plan for the common good before their decision to associate and cooperate, or instead did they formulate their views of the common good in the process of their association for cooperation?⁷¹ We can agree with his argument that, once these goods have been created, they will authoritatively influence the most fundamental facets of the life of the community, and thus the notion of the common good is directly tied to the most all-encompassing association of humans, the most supreme community: the state. Thus, the common good is a concept that is highly relevant to states and to the law that is determinative in creating order in these states. In addition, this common good has a width, a depth, and an intensity that is relevant to many questions related to states.⁷² Also in my view, the Specific Interpretation Clause⁷³ is therefore relevant in this sense here as it creates a rule that defines

66. *Id.*

67. Takács, *supra* note 54, at 50.

68. *Id.*

69. Szigeti, *supra* note 48, at 20.

70. Kiss Barnabás, *Az Alapjogok Korlátozása és a Közérdek*, in *KÖZÉRDEK ÉS KÖZISZAGGATÁS* 169 (Szamel Katalin ed., MTA Jogtudományi Intézet 2008).

71. Takács, *supra* note 54, at 51.

72. *Id.*

73. HUNGARY CONST. art. 28.

how state institutions that apply the law should interpret it so as to maintain order in Hungary for the benefit of the community and the individual.

The common good is what justifies cooperation between members of a community (individuals) and is therefore conducive to certain conditions that support this cooperation. Peace may be one such condition, as the peace and order of a community is a common good to be upheld against both internal and external threats and attacks.⁷⁴ This, however, also translates into the safety and security of individual pursuits of “happiness” and individual goals (cf., “individual freedom can only be complete in cooperation with others,” *supra*). In other words, the members of the community share certain values (ideals), which direct their efforts to achieve certain specific goals.

A quote from *Jacobson v. Massachusetts*⁷⁵ seems fitting here:

In the constitution of Massachusetts adopted in 1780, it was laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for “the common good,” and that government is instituted “for the common good,” for the protection, safety, prosperity and happiness of the people, and not for the profit, honor or private interests of anyone man, family or class of men.⁷⁶

These values or ideals are aggregated under notions of justice, more specifically commutative justice, in the context of the common good, as mentioned above. The role of the state in securing the common good through harmonizing, “ordering” interests is very important, and here we can see that states have an at least two-fold task. It is not the state or state-issued law that creates common good. Rather, the state is a part of the common good, “merely

74. Takács, *supra* note 54, at 53.

75. 197 U.S. 11 (1905).

76. *Id.* at 27.

codifying” and safeguarding it.⁷⁷ It does so by securing for itself the right to use coercion to enforce the constitution and the laws.⁷⁸

On the other hand, the state has a mandate for active action as well, through “creating peace” (i.e., structuring relationships) in economic and financial terms and through the protection of the intellectual, moral, etc. products of community cooperation. These are not created by the state, but are to be sustained by it.⁷⁹ The constitutional protection afforded for the environment⁸⁰ or for sign language⁸¹ could serve as two good examples for such common good(s) in the Fundamental Law.

B. In Constitutional Case Law

In this Part, AB decisions contextualizing the common good will be presented based on two key resources:

- (i) The official digital AB case law database⁸²
- (ii) The most recent commentary of the 100 most influential decisions of the AB in the past thirty years (jointly published in 2021 by the AB and the Social Sciences Research Institute of the Hungarian Academy of Sciences).⁸³

A term search was run on “közjó” (Hungarian for public or “common good”) for the text of the Specific Interpretation Clause.⁸⁴ For many historical, cultural, and terminological reasons outlined above, explicit references to it do not appear—contrary to some

77. Takács, *supra* note 54, at 53.

78. As reflected by the Fundamental Law as well. *Cf.* HUNGARY CONST. art. C.

79. Takács, *supra* note 54, at 54.

80. HUNGARY CONST. art. P.

81. HUNGARY CONST. art. H.

82. Available at the AB website: <https://www.hunconcourt.hu> [<https://perma.cc/KG4G-U8ET>]. As many decisions of the AB are only available in Hungarian (or through translated summaries provided for the CODICES database operated by the Council of Europe), the cited texts are my own translations, except as otherwise indicated. As indicated below, a term search has been conducted in the AB database, and it took place January 2023.

83. ALKOTMÁNYBÍRÓSÁGI GYAKORLAT: AZ ALKOTMÁNYBÍRÓSÁG 100 ELVI JELENTŐSÉGŰ HATÁROZATA (Gárdos-Orosz Fruzsina, Zakariás Kinga eds., Társadalomtudományi Kutató, HVG-Orac 2021).

84. HUNGARY CONST. art. 28

initial expectations—as part of substantial and substantive argumentation in many majority decisions other than in the enumeration of the constitutional provisions that pertain to the dispute at hand.⁸⁵ Concurring and dissenting opinions as well as academic analyses of certain key decisions tend to rely on the common good to a greater extent.

Based on the listing of cases below, one may rightfully wonder at first reading about these decisions’ apparent lack of a pattern to follow or any other overarching characteristic or issue that might bind them together. The reason for this has become apparent through the research focused on the explicit and express mentions of the common good (as instructed by the Specific Interpretation Clause) in constitutional case law issued from the AB. It demonstrates that there are not in fact any guiding lines in the past ten years along which any (literal) “common good jurisprudence” could be constructed. The explicit references to the common good in the context of constitutional interpretation

- (i) are sporadic at best, turning up only once or twice every few years;
- (ii) might only appear in scholarly interpretations or analyses of certain decisions in an attempt to shed light on some of the considerations that the AB did not explicitly put to paper;
- (iii) surface in a variety of unconnected subject matters, ranging from freedom of information through consumer protection in the face of loan contracts to the acquisition of agricultural land and the right to property.

In light of this, I list those examples and short contexts⁸⁶ to which the roots of a “common good jurisprudence” might be traced in the future with the aim of pointing out junctures and points of convergence that may to some extent render certain patterns visible.

85. In AB decisions, this section generally follows the operative part and the description of the content of the petitioner’s arguments.

86. In this effort, I will adhere to the logic of the IRAC method as much as practicably possible due to the characteristics of Hungarian constitutional jurisprudence.

One 2013 decision [21/2013 (VII.19) AB⁸⁷] took up the issue of the lack of public availability and accessibility of data used to prepare decisions and addressed it under freedom of information (FOI) claims.⁸⁸ The National Opera House had been subjected by a ministerial commissioner assigned by the Ministry of National Resources to full-scale financial and economic screening regarding future decisions to be made due to a change in management.⁸⁹ Based on FOI legislation effective at the time, the petitioner filed an electronic disclosure request to the Ministry and asked them to provide the report prepared by the ministerial commissioner.⁹⁰ Arguing that the report was being used as data in preparation of decisions, the ministry refused to comply with the disclosure request, stating that no decision had yet been made regarding the Opera House.⁹¹ The petitioner challenged with administrative decision in court, requesting access to such public interest information.⁹² In first and second instances, the trial and appellate courts upheld the conclusions of the ministry, pointing out that the data requested was being used in preparing decisions, and therefore, refusing access to it was lawful.⁹³ The petitioner turned to the AB arguing a violation of the right to access public information.⁹⁴ Among the more relevant findings of the decision, the AB established a constitutional requirement⁹⁵ that in any litigation filed to gain access to public interest information, the trial courts need to examine both the legal grounds for refusing the provision of data and the justification of such

87. See Alkotmánybíróság Határozatai (Decisions of the Constitutional Court: Official Gazette of the Constitutional Court) [AK] Issue 16, 24 July 2013, 810–26.

88. *Id.* at 810–11, [1]–[8].

89. *Id.* at 810, [3].

90. *Id.*

91. *Id.*

92. *Id.*, at 810, [4]

93. *Id.*

94. HUNGARY CONST. art. VI.

95. Constitutional Court Act, § 46(3), No. CLI, Acts of Parliament, 2011 (Hungary).

refusal as to its content, and that refusal of such requests can only occur in the case of absolute necessity.⁹⁶

References to the Specific Interpretation Clause⁹⁷ can only be found in the joined dissenting opinions, but these do not go further than merely mentioning the common good. Commenting on the case, constitutional law expert and information rights advocate Zsuzsa Kerekes remarks that it is quite easy to find compelling arguments based on the sixty years of international and thirty years of domestic FOI practice that the broadest possible assurance of the accessibility of public interest data and the availability and accessibility of effective remedies against its infringement is the solution that corresponds with common sense and the common good.⁹⁸

In another case from this year [3175/2013 (IX.9.) AB⁹⁹], a trial court judge suspended the proceedings before they began and asked the AB (via a judicial initiative¹⁰⁰) to engage in the control of the conformity with the constitution of several provisions of the 1988 Act regulating Traffic on Public Roads¹⁰¹ and petitioned the AB to declare these provisions null and void. In the judge’s view, the challenged statutory provisions conflicted with constitutional provisions¹⁰² protecting the rights of consumers as well as with those protecting the right to remedy as part of fair trial rights.¹⁰³ The provisions of the Act regulated the payment of gradually increasing penalty supplements for illegal parking under specific circumstances and a relevant decision of the *Kúria* on the uniformity of law

96. *Id.* at 810. [1] – [2].

97. HUNGARY CONST. art. 28.

98. Kerekes Zsuzsa, 21/2013 (VII. 19) *AB Határozat—A Döntés-előkészítő Adatok Nyilvánossága in* ALKOTMÁNYBÍRÓSÁGI GYAKORLAT, *supra* note 83, at 229–31.

99. AK, Issue 18, 9 October 2013, 995–98.

100. Constitutional Court Act, § 25 (1), No. CLI, Acts of Parliament, 2011 (Hungary)

101. Public Roads Traffic Act, § 15/C (1)-2), 15/D (2), No. I., Acts of Parliament, 1988 (Hungary).

102. HUNGARY CONST. art. M(2) (“Hungary shall ensure the conditions for fair economic competition. Hungary shall act against any abuse of a dominant position, and shall protect the rights of consumers.”).

103. HUNGARY CONST. art. XXVIII

to be applied to these situations.¹⁰⁴ In the petitioner's view, this violates the rights of consumers.¹⁰⁵ The petitioner also maintained that the fact that the placement of the payment notification behind the windshield-wiper made it unsuitable to convey to the illegally-parking party that their payment obligation was due and because of this their right to remedy had also been infringed.¹⁰⁶

In assessing the arguments of the initiative, the AB did not refer to the Specific Interpretation Clause as relevant to the decision, but in the reasoning reflected on the "common good" element from a different angle. It refers back to the explanatory memoranda of the draft bill on the constitutional text of the Fundamental Law and cites it insofar as it mentions that Article M) was intended to incorporate a reference to competition and to limit said competition "as reasonably required by the common good."¹⁰⁷ This limitation is reflected in the "fair" indicator given to competition and to the references to consumer protection and the protection against abuse of dominance. This was done, however, without explicitly mentioning specific consumer rights. Considering these and other arguments (the detailing of which is omitted here), the AB finally refused the initiative by concluding that the violation of Article M) (2) cannot be determined solely based on the fact that the parking authority has a statutory power to impose gradually increasing penalty supplements and that the payment notification of these sanctions shall be placed on the windshield-wiper or on other clearly visible surfaces of the vehicle.¹⁰⁸

Based on these two cases from 2013, a partial conclusion can be drawn. The insignificance of the common good angle in shaping majority points of view of the AB is signaled by the fact that even at the beginning of the "reign" of the Specific Interpretation Clause, only two cases referred to it explicitly. I detect an allusion to the

104. AK, Issue 18, 9 October 2013, 995, [2].

105. *Id.*

106. *Id.* at 997, [15].

107. *See supra* note 99, at 996, [10].

108. *Id.* at 997, [14].

role of the state in the reference to serving the common good by assuring the broadest possible freedom of information in relation to the academic arguments presented on 21/2013 above.

Two years later, another two cases explicitly mentioned the common good.

In 2/2015 (II.2.) AB¹⁰⁹, another aspect of consumer protection came into the foreground in a majority decision regarding judicial initiatives petitioning the AB to declare the unconstitutionality of the 2014 Act on regulating certain questions in the *Kúria*'s decision on the uniformity of law regarding consumer (retail) loan contracts.¹¹⁰ The AB refused the initiatives and in the majority decision looked at when and how the state can be a litigant in cases in which it acts as a legal subject in private law.¹¹¹ The majority concluded that the public and private law faculties of the state cannot be sharply separated in this case because the state acts in the enforcement of clearly private law claims in a civil procedure that is based on the equality and heterarchy of the parties.¹¹² The state, moreover, carries this out as a public duty, in the interest of the common good, to protect the public interest.¹¹³ Furthermore, in this case, this task is carried out to protect the weaker parties in the hundreds of thousands of retail consumer loan contracts that lack any form of balance. Such an act on the part of the state clearly follows from Article M) (2) and on other acts of public power (i.e., laws that make this possible).¹¹⁴

109. AK, Issue 3, 9 Feb 2015, 132–60. An English summary of the decision is available from the CODICES database of the Venice Commission here: <http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2015-2-001> [<https://perma.cc/2S7K-6JLP>].

110. Regulating Issues Regarding Consumer Loan Contracts Act, § 4 (2)-(3), 6-15, No. XXXVIII., Acts of Parliament, 2014 (Hungary).

111. AK, Issue 3, 9 Feb 2015, at 133, [3].

112. See the various arguments summarized as above at *id.* at 138–140, [24]–[42].

113. *Id.* at 138, [31].

114. See *supra* note 109, at 138, [29]–[31].

In 17/2015 (VI.5.) AB,¹¹⁵ the issue concerned limitation of the right to property in the context of decision-making by the so-called (agricultural) land committees.¹¹⁶ Several judicial initiatives were unified in the AB proceedings, resulting in the determination that these committees shall always reason their decisions as a constitutional requirement.¹¹⁷ However, the fact that they have statutory powers to prevent the sale and purchase of agricultural land is not contrary to the Fundamental Law as it allows for the limitation of the acquisition of such lands in the form of organic laws (called cardinal in the Hungarian context), requiring a qualified (two-thirds) majority of the elected legislature (National Assembly).¹¹⁸

In the part of the majority decision in which a reference to the common good eventually surfaces, the legal issue is elaborated as follows. Under the legal framework (of the Act on the sale and purchase of land) examined in the majority decision, the provisions that have been alleged by petitioners to limit the right to property (and thus were eventually declared null and void by the AB) set forth the following: 1) that the sale of agricultural land needed to be approved by the competent agricultural administrative agency (authority) and 2) that the land committees had the option to exercise a tacit veto. Thus, by not declaring themselves on the request to approve, they hindered the administrative approval of the sale in question. This obviously brings about a nexus between the right to remedy against such decisions and judicial—and administrative—proceedings (or, more precisely, a lack thereof, as in the case of a tacit veto, in which there is no decision to appeal or challenge).¹¹⁹

115. AK, Issue 13, 9 Jun 2015, 773–803. An English summary of the decision is available from the CODICES database of the Venice Commission here: <http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2015-2-004> [<https://perma.cc/3CDT-A79V>].

116. AK, Issue 13, 9 Jun 2015, 773, [1].

117. On the unification of the complaints see *id.* at 778, [36], and on the constitutional requirement see *id.* at 773, [2].

118. *Id.* at 780, [48]–[50].

119. Remedy in administrative proceedings is assured by HUNGARY CONST. art. XXIV.

After detailing its vast case law on the right to remedy (herein omitted due to content limitations and irrelevance to the common good), the AB makes a general reference to the Specific Interpretation Clause,¹²⁰ but does not elaborate further on the common good aspect. The AB merely holds that in reaching its decision it had to take the Clause into account and thus presume that the laws serve the common good.¹²¹

Analyzing the decision, agricultural law expert István Olajos argues that because the tacit veto violates the right to remedy, administrative courts are in no position to exercise their rights originating in Law XXVI of 1896¹²² to review the facts of the case and to assess the acts of the proceeding authorities from the point of view of legality.¹²³ Here he adds that such a situation also prevents courts from assessing the discretion exercised by the administrative bodies in light of the common good and the other purposes specified in the Specific Interpretation Clause.¹²⁴

To draw another partial conclusion: 2015 seems to mark the year when considerations of the common good made it to the level of majority decisions. In reference to what I have outlined in Part II.A. regarding scholarly contexts of the common good, we can see that 2/2015 makes reference to the state carrying out a public duty “in the interest of the common good, to protect the public interest.”¹²⁵ This formulation (i.e., the state protects the public interest in the interest of the common good) seems to be in somewhat of a contradiction with earlier scholarly determinations that the “common good” and the “public interest” are synonymous (elaborated in Part

120. HUNGARY CONST. art. 28.

121. *See supra* note 115, at 787, [88].

122. As such, in other contexts of Hungarian constitutional interpretation under HUNGARY CONST. art. R(3), this could be considered an achievement of the historical constitution, if recognized as such by the AB.

123. Olajos István: 17/2015 (VI.5) AB Határozat—Földforgalmi Törvény, *in* ALKOTMÁNYBÍRÓSÁGI GYAKORLAT, *supra* note 83, at 579.

124. *Id.*

125. *See supra* note 109.

II.A. above) by clearly separating them and stating that protecting the public interest is necessary to realize the common good.

The same decision mentions the role of the state, an angle that is picked up again in a 2016 decision in which a concurring opinion by Justice Ágnes Czine makes reference to the common good [3091/2016 (V.12.) AB¹²⁶]. Czine points to an approach in relation to the state's *Schutzpflicht* (obligation to protect) of fundamental rights and its scope taken by the BVerfG, the German Federal Constitutional Court:

The decisions, representations, acts of the different levels of state decision-making brought in the name of citizens, fall under the obligation to protect fundamental rights, extending this obligation to all acts of state bodies and organizations, because this realizes the carrying out of such mandatory (public) duties that are intended to serve the common good. [...] [T]he state takes charge of tasks entrusted to it for the benefit of individuals and is accountable to them.¹²⁷

Another two years pass and the common good becomes relevant once again in scholarly commentary, tied to a very controversial issue of constitutional law, namely the standing and the right of public (state) organs to file constitutional complaints when their fundamental rights are violated.¹²⁸ The fact that in the case subject to scholarly commentary (introduced below) a public organ filed a constitutional complaint raised many dogmatic problems in constitutional law, especially because

(i) A constitutional complaint is an instrument specifically designed to offer protections for individuals and their organizations against state violations of their fundamental rights protected by the constitution; and

126. AK, Issue 11, 12 May 2016, 588–601.

127. *Id.* at 598, [72].

128. Constitutional Court Act, § 27 (2)-(3), No. CLI, Acts of Parliament, 2011 (Hungary), <https://hunconcourt.hu/act-on-the-cc> [<https://perma.cc/PMF7-5FWV>].

(ii) The complaint filed by the state organ in the case at hand was admitted for review and the AB annulled the challenged judicial decision of the *Kúria*.

In this case [23/2018 (XII.28.) AB¹²⁹] the Hungarian National Bank (MNB) filed a constitutional complaint against two judicial decisions brought by a trial court and the *Kúria*.¹³⁰

To briefly summarize the facts: MNB conducted ex officio review proceedings (through the Financial Stability Council, PST) against an investment company monitoring the compliance of their operation.¹³¹ During this review, among other sanctions imposed, the license of the company was revoked and its liquidation initiated. A member of the company’s board of directors has been compelled to pay a review fine for a material breach of fiduciary duties and responsibility of the members of the directorial bodies of such enterprises.¹³² When the decision was served, it had the signature of the Deputy Governor of MNB, indicating that the power to make the ruling was transferred to him under the 2013 Act on the MNB.¹³³ Challenging this decision, the board member affected by the sanctions asked the court to render the PST’s administrative decision ineffective given that the power of the PST was taken away by the Deputy Governor, who thus brought his decision in his own discretion. The court complied.¹³⁴

Upon appeal by the petitioner (MNB), the *Kúria* upheld the lower court’s decision and remanded the proceedings back to MNB, ordering it to be done anew and specifying that the Deputy Governor could not have brought the decision in his own discretion because it was specified on the document in question that his powers would only have allowed for the signature of the decision as a mere formality.¹³⁵ The *Kúria* also specified that it did not feel the necessity

129. AK, Issue 1, 7 Jan 2019, 2–19.

130. *Id.* at 2, [1].

131. *Id.*, [2].

132. *Id.*

133. *Id.* at 2, [3].

134. *Id.* at 2, [4]–[5].

135. *Id.* at 2, [7]–[8].

to apply the Specific Interpretation Clause¹³⁶ to the issues at hand for reasons of the clarity of the underlying administrative rules. In petitioner's view, however, the *Kúria's* challenged decision violated both the right to a fair trial¹³⁷ and the Interpretation Clauses,¹³⁸ along with other constitutional provisions (hereby omitted).

Petitioner's (MNB's) argument was that, pursuant to the General Interpretation Clause, the constitutional provisions protecting the right to remedy and a fair trial may in practice only be assured if the courts apply the law in harmony with the Specific Interpretation Clause. Then, if the proceeding courts (within their own discretion) are to decide to discard the Specific Interpretation Clause—and therefore do not apply the laws in accordance with their purpose to realize the common good—it is to the detriment of rule of law, separation of powers, and fair trial, resulting in a violation of fundamental rights, such as the right to remedy.¹³⁹

The relevance of the common good to the interpretation of the law at hand is also touched upon in scholarly commentary dissecting the meaning of the Specific Interpretation Clause in a similar vein that was presented *supra* in Part I (regarding its implications on judicial decision-making). As a reminder: in interpreting certain terms and the intent of the legislator, the Specific Interpretation Clause requires judges to presume (while interpreting a law or the constitution) that they have a purpose that corresponds with common sense and the common good and are both moral and economical.

136. HUNGARY CONST. art. 28.

137. HUNGARY CONST. art. XXVIII.

138. HUNGARY CONST. art. R(2); art. 28.

139. As summarized by Nóra Chronowski and Attila Vincze. Chronowski Nóra, Vincze Attila, *23/2018 (XII.28.) AB—Közhatalmi Szerv Alkotmányjogi Panasza*, in ALKOTMÁNYBÍRÓSÁGI GYAKORLAT, *supra* note 83, at 893–94.

The way in which leading Hungarian constitutional law scholars Nóra Chronowski¹⁴⁰ and Attila Vincze¹⁴¹ interpret the Specific Interpretation Clause also reflects on the common good, by providing the following alternative approaches:

(i) the law is unambiguous and is in harmony with both the Fundamental Law and the common good and thus shall be applied,

(ii) the law is ambiguous but clear as per the intent of the legislator and is in harmony with both the Fundamental Law and the common good and thus shall be applied;

(iii) the law is ambiguous, including in light of the legislator’s intent (necessitating the choice of an interpretation that is in harmony with the Fundamental Law and thus with the common good), and shall be applied;

(iv) the law is ambiguous but clear as per the legislator’s intent, but its interpretation is not in harmony with the Fundamental Law and the common good and therefore an interpretive choice which brings it in accordance with these becomes necessary; and finally,

(v) the law is ambiguous and cannot be clarified as per the legislator’s intent and there is no interpretation of it which would be in harmony with the Fundamental Law and thus common good. In this case, as well as in the case in which the law is ambiguous and not in harmony with the Fundamental Law, its review of conformity with the constitution (norm control) should be initiated.¹⁴²

To close the constitutional case law sample, one last case needs to be mentioned from 2022 [3083/2022 (II.25) AB¹⁴³], where the issue of admissibility¹⁴⁴ of a constitutional complaint petition was at hand.

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142. *Id.* at 895.

143. AK, Issue 6, 25 Feb 2022, 516–20.

144. Examining if a set of conditions are met before a case is taken for review, similar to the systems applied by the BVerfG or the European Court of Human Rights.

A petitioner (a private individual) asked the AB whether it was constitutional to disregard any income previously earned in the United Kingdom as the baseline for monthly wages when calculating the financial basis for disability benefits due to the petitioner.¹⁴⁵

In reviewing the application, the AB explained that such a calculation is not necessary in Hungary to award benefits, and the constitutional rules on social security rights¹⁴⁶ merely set forth that the state is obliged to provide access to the healthcare system by operating it. The AB repeated an already settled notion that creating the balance between individual rights and the common good is typically “not a question of constitutional law” and therefore subject to adjudication by the AB, but is rather an issue of lawmaking to be handled by the legislature (in this case the National Assembly).¹⁴⁷ As the petitioner failed to substantiate the doubt of unconstitutionality that would have influenced the judicial decision challenged on its merits, the AB rejected the complaint and did not review the issue any further.¹⁴⁸

This last case again contextualizes the role of the state in serving the common good, with apparent judicial deference to legislative action instead of engaging in constitutional interpretation. This is the thread that leads me to look at whether in terms of establishing a “common good jurisprudence” Hungary may be considered the land of missed opportunities.

III. CONCLUSIONS: HUNGARY, THE LAND OF (MISSED) OPPORTUNITIES?

From the very few explicit and substantial references to the common good in AB case law as presented above (especially in the context of the Specific Interpretation Clause¹⁴⁹) one may deduce that Hungarian constitutional jurisprudence does not provide fertile

145. AK, *supra* note 143, at 516, [1]; 517, [6].

146. HUNGARY CONST. art. XIX.

147. AK, *supra* note 143, at 518, [15].

148. *Id.*

149. HUNGARY CONST. art. 28.

grounds for establishing a “common good jurisprudence.” But why is this?

In general, we can find much more references to other elements of the Specific Interpretation Clause in AB case law, such as “common sense” and “moral purposes,” but the “common good” frame of reference is scarce, sporadic, and seemingly unsystematic as has been represented by the five examples found in ten years of extensive case law. Thus, if CGC is at any point to be considered in Hungary to create a “common good jurisprudence” of constitutional interpretation, it might not at all become as influential as one might think despite a specific constitutional reference to the common good, which orients judicial interpretation of the law and of the constitution. *Prima facie*, this might seem like a missed opportunity.

In our sample presented above, we can find only one case from 2022 which clearly and explicitly explains why it is most unlikely that the AB is going to take it upon itself to interpret the constitutional contexts of common good in protecting fundamental rights. As an institution designed to protect the constitution and if necessary engage in its interpretation under standards defined by the General and Specific Interpretation Clauses, the AB may only engage in interpretation without prejudice to the constitutionally reserved legislative powers, i.e., the AB may not engage in what US constitutional scholarship phrases as “legislating from the bench” (with reference to the judicial activism of the Supreme Court), a tendency that—according to some—upsets the balance and separation of powers.

Consequently, this seems to be a good point to react to what Conor Casey and Adrian Vermeule talk about in terms of an “executive-led separation of powers above other ways of allocating authority,”¹⁵⁰ which they consider advantageous from the point of view of CGC.

In Europe, in those countries that have adopted a parliamentary form of government, an “executive-infused” (if not -led) separation

150. Casey & Vermeule, *supra* note 3, at 135.

of powers became predominant over time (termed as “fusion of powers”), in which actual executive and legislative functions are blended and bound to each other in many respects.¹⁵¹ Hungary is such a country, and this means that the fusion of powers might eventually leave a bit of legroom for the government (headed by the Prime Minister) to influence parliamentary lawmaking (legislature) in the service of the common good.

For instance, this could happen through governmental instructions to the ministries (the equivalents of U.S. departments) on what core values to focus on when preparing regulatory concepts for such laws to be adopted by the National Assembly which might help the government realize its working program and legislative agenda. However, the draft legislative proposals (for Acts of Parliament to be adopted by the National Assembly) – after having been prepared by the executive—still have to go through the bodies of the elected legislature and be deliberated on more than once before being put to a closing vote in the plenary session. The elaboration of these procedural issues, however, is not pertinent to the subject matter of the article on some Hungarian aspects of the American CGC debates.

In the two Parts above, I examined many issues related to the relevance of the common good in the Hungarian context of judicial interpretation of the constitution. In this effort, I first introduced the Interpretation Clauses of the Fundamental Law of Hungary and the terms in which they relate and refer to the presumption of serving the common good in the context of purposive (teleological) interpretation.

In Part I, I discussed many different scholarly points of view regarding judicial interpretation and discussed the terms in which the Specific Interpretation Clause of the Fundamental Law becomes a “verification rule” of judicial interpretation, introducing

151. See generally Matthew Søberg Shugart, *Comparative Executive–Legislative Relations*, in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 344 (Sarah A. Binder et al., ed., 2008); Richard Albert, *The Fusion of Presidentialism and Parliamentarianism*, 57 AM. J. COMPAR. L. 531, (2009).

“teleological constraints” for the judge, only one of which is the common good.

In Part II, I have introduced the theoretical footing of the common good concept in Hungarian legal theory and constitutional scholarship.

(i) In Part II.A. I reflected on the nature of the role of the state in “codifying” certain aspects of the common good, recognizing its role in social ordering.

(ii) In Part II.B. I introduced Hungarian constitutional case law (2012-2022) issued from the state institution in charge of *erga omnes* constitutional interpretation, i.e., the Constitutional Court of Hungary (AB). Herein, I focused on those decisions in which the common good was mentioned as a point of reference that impacted the decisions of the Court to some degree.

In closing, I posit that due to the appearance of the dualism of public and private interests after the transition to democracy, the broad notion of the common good was generally deemed inappropriate and was replaced by references to the “public interest” and its “cognates” or “political relatives,”¹⁵² which is probably the reason why there is only a very low number of instances to date in which the “common good” explicitly appears in constitutional case law.

Consequently, one may argue that the lack of a clear focus on the common good as well as the lack of actual grounding in the common good of the AB’s very few relevant decisions signals that the momentum of Common Good Constitutionalism in the American mold is not present in Hungarian constitutional interpretation and may thus be characterized as a missed opportunity.

However, it might as well be that it is merely still too early to tell if the Specific Interpretation Clause has fulfilled its originally intended role and function in the very short ten years of its existence within the grand scheme of Hungarian constitutional case law.

152. For the positions of Péter Szigeti, *see supra* note 48.