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National(ist) constitutional identity?
Hungary's road to abuse constitutional pluralism

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**NATIONAL(IST) CONSTITUTIONAL IDENTITY?
HUNGARY'S ROAD TO ABUSE CONSTITUTIONAL PLURALISM**

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Abstract

This paper discusses a decision of the Hungarian Constitutional Court issued in December 2016, in which the judges refer to the country's constitutional identity to justify the government's refusal to apply the EU's refugee relocation scheme in Hungary. The misuse of constitutional identity, the paper argues cannot be derived from the previous jurisprudence of the Court. Right before and after the EU accession of the country the Court followed a mild approach of limited EU law primacy approach, which did not change immediately after Viktor Orbán's government introduced an illiberal constitutional system and packed the Constitutional Court after 2010. The reason for change has been the government's anti-migration policy, and the Court was instrumental to justify the government's desire to exclude refugees from Hungary and to evade its obligations under European law. The paper concludes that this abuse of constitutional identity for merely nationalistic political purposes discredits every genuine and legitimate reference to national constitutional identity claims, and strengthens the calls for an end of constitutional pluralism in the EU altogether.

Keywords

constitutional identity, Constitutional Court of Hungary, anti-migration legislation

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Table of contents

INTRODUCTION..... 1

EU ACCESSION: MILDLY LIMITED PRIMACY APPROACH 1

EU-LAW-FRIENDLINESS UPHELD EVEN AFTER THE ILLIBERAL CONSTITUTIONAL CHANGE..... 3

 The Hungarian Lisbon judgment..... 3

 Jurisprudence after the fundamental law 5

 The Court holds after the fourth amendment 6

THE ANTI-MIGRATION POLICY AS A MATTER OF CONSTITUTIONAL IDENTITY? 8

 Psychological preparations..... 8

 Anti-rule-of-law immigration laws 8

 Invalid anti-migrant referendum 10

 Failed constitutional amendment..... 11

 The constitutional court rubberstamps the constitutional identity defense 12

WHAT’S WRONG WITH HUNGARY’S NEW CONSTITUTIONAL IDENTITY?..... 14

CONCLUSION 16

Introduction

Before and right after the EU accession, the Hungarian Constitutional Court, a powerful and still independent institution developed a consistent jurisprudence regarding the primacy of EU law. It was a moderate version of a German-type limited primacy approach. During the pre-accession constitutional amendment of 2002 it was supported by then-opposition leader Viktor Orbán, who was reluctant to entrench EU primacy into the text of the constitution, but together with the Constitutional Court justices, was ready to acknowledge the role of shared European constitutional principles in Hungary's that time still liberal democratic constitutional system. But since the 2010 parliamentary elections Hungary has set off on a journey to become an 'illiberal' member state of the EU, which does not comply with the shared values of rule of law and democracy, the 'basic structure' of Europe. The new government of Viktor Orbán from the very beginning has justified non-compliance by referring to national sovereignty¹, and lately - as an immediate reaction to the EU's efforts to solve the migration crisis - to the country's constitutional identity guaranteed in Article 4 (2) TEU. This paper argues that these references have nothing to do with Hungary's constitution, or constitutional identity, but rather serve to legitimize the government's intention not to take part in EU's joint solutions of the refugee crisis. With this misuse of Article 4(2) the Hungarian government clearly violates the principle of sincere cooperation laid down in Article 4(3) as well as human dignity and human rights as principles of Article 2 TEU. Hence this abuse of constitutional identity cannot be recognized as a sign of horizontal plurality of national constitutional orders worth of defence within the European constitutional whole.

EU accession: mildly limited primacy approach

Before discussing this new national constitutional identity, I would like to demonstrate that it represents a deviation from the previous, 1989 Constitution's approach on the primacy of EU law, as amended right before accession. During the drafting of the 2002 December amendment to the Hungarian Constitution of 1989, which made Hungary's accession to the Union possible, the Socialist-liberal

¹ The first reaction of the Hungarian government to the 'Tavares report' of 3 July 2013 report of the European Parliament on the Hungarian constitutional situation (<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN>) was not a sign of willingness to comply with the recommendations of the report, but rather a harsh rejection. Two days after the European Parliament adopted the report at its plenary session, the Hungarian Parliament adopted Resolution 69/2013 on "the equal treatment due to Hungary". The document is written in first person plural as an anti-European manifesto on behalf of all Hungarians: "We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain." The resolution argues that the European Parliament exceeded its jurisdiction by passing the report, and creating institutions that violate Hungary's sovereignty as guaranteed in the Treaty on the European Union. The Hungarian text also points out that behind this abuse of power there are business interests, which were violated by the Hungarian government by reducing the costs of energy paid by families, which could undermine the interest of many European companies which for years have gained extra profits from their monopoly in Hungary. In its conclusion, the Hungarian Parliament calls on the Hungarian government "not to cede to the pressure of the European Union, not to let the nation's rights guaranteed in the fundamental treaty be violated, and to continue the politics of improving life for Hungarian families". These words very much reflect the Orbán-government's view of 'national freedom', the liberty of the state (or the nation) to determine its own laws: "This is why we are writing our own constitution... And we don't want any unsolicited help from strangers who are keen to guide us... Hungary must turn on its own axis". (For the original, Hungarian-language text of Orbán's speech, entitled *Nem leszünk gyarmat!* [We won't be a colony anymore!] see e.g. http://www.miniszterelnok.hu/beszed/nem_leszunk_gyarmat_. The English-language translation of excerpts from Orbán's speech was made available by Hungarian officials, see e.g. Financial Times: Brussels Blog, 16 March 2012, at: <http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFtC>).

government and the conservative opposition, led by former Prime Minister Viktor Orbán² reached a compromise that reflected numerous elements of the German position concerning the protection of sovereignty. The final text of the amendment (Article 2/A (1)) read as follows: “By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as ‘European Union’); these powers may be exercised independently and by way of the institutions of the European Union.”

This text rather emphatically delimited the transfer of powers. The reservations for national sovereignty, made at the behest of the then-opposition parties, were primarily expressed in the requirement that powers may only be transferred “to the extent necessary in connection with the rights and obligations conferred by the treaties.” Some authors even argued that these limitations constituted an ongoing hindrance to the effectiveness of Union law in Hungary.³ It was also a reflection of this understanding of national sovereignty that the reference to the primacy of EU law, which was present in the government’s initial draft of the amendment, due to the request of the opposition was not included in the final text. Referring to the German Constitutional Court’s Maastricht decision, former (and since 2010 current) Prime Minister Orbán has argued in several speeches that not only the otherwise not unusual omission of a mention, but also the implementation of the primacy of Community law would undermine the impact and importance of the Hungarian Constitution.

The first test of these constitutional provisions by the Constitutional Court occurred within the first month of Hungary’s EU accession. In its decision 17/2004. (V. 25.), the Court had to decide on the constitutionality of an act that the National Assembly had adopted on 5 April 2004, immediately before accession, regarding the implementation of two EU regulations on the commercial surplus stock of agricultural products. The President of the Republic asked the Constitutional Court for a preliminary constitutional review on the grounds that he believed the act to have retroactive effect. The President argued that although the law was to enter into effect on 25 May, the obligations specified therein applied already from 1 May – and hence it was unconstitutional. The Constitutional Court affirmed the President’s concerns and correspondingly the act could not be promulgated. Practically, the decision allows for two interpretations. The first suggests - as the Court itself argues in its opinion - that the judicial body did not really address Community law since the issue fell entirely within the realm of Hungarian law. In effect, therefore, the Court - in cooperation with the President of the Republic - did nothing but convey to the Hungarian Parliament that from that point onward it must be mindful of the country’s Union membership when it drafts and adopts legislation.⁴ The other interpretation, however, posits that it was not Parliament in fact but the Constitutional Court itself that refused to partake in the European learning process.⁵

² Viktor Orbán’s center-right Fidesz party led a coalition government between 1998-2002.

³ See: P. Sonnevend, ‘Alapvető jogaink a csatlakozás után’ [Our fundamental rights after accession], *Fundamentum* 2. 2009. 33.

⁴ Pál Sonnevend, who at the time was working on the staff of the Office of the President of the Republic, argued for this position. See: P. Sonnevend, ‘Offene Staatlichkeit: Ungarn’, in A. von Bogdandy & P. C. Villalón & P. M. Huber, *Handbuch Ius Publicum Europaeum*, Band II. C.F. Müller Verlag, Heidelberg, 2008, pp. 379–402.

⁵ For an expression of this critique see: A. Sajó, ‘Miért nehéz tantárgy az együttműködő alkotmányosság?’ [Why is cooperative constitutionalism a difficult academic subject?], *Fundamentum*, 3, 2004, pp. 89–96. It is undeniable that in several subsequent decisions the Constitutional Court did take European Union law into consideration: Constitutional Court decision No. 1304/B/2007. AB on waitlists, No. 94/B/2000. AB on damages caused by lawmaking, No. 942/B/2001. AB pertaining to the induction of lawyers into the bar association, No. 84/B/2001 on defining the concept of economic activity, No. 74/2006 (XII. 15.) AB. on the requirements concerning the grant to leave, No. 37/2000. (X. 31.) AB and 23/2010. (III. 4.) AB on advertisements as services and advertising media as goods, respectively, were all mindful of Union freedoms in their given contexts.

EU-law-friendliness upheld even after the illiberal constitutional change

In the spring of 2010, Fidesz, with its tiny Christian democratic coalition partner won two-third of the seats in the 2010 Parliamentary elections. As noticed by the Venice Commission⁶, the European Court of Justice⁷ and the European Court of Human Rights⁸, the Hungarian Constitutional Court and the ordinary courts lost their independence under the constitutional regime of the Orbán government. Indeed, one of the new government's first actions was to modify the nomination rules for Constitutional Court justices aiming at packing the Court.⁹ Instead of the previous consensual procedure, the new rules made it possible for the governing parties to nominate, and with its two-third majority in the plenary of the Parliament elect, judges without the consent of opposition parties. In July, 2010, the government made use of the new rules, and elected two new judges to the bench, who did not even fulfil the legal requirements set for justices. Later that year the government also expanded the number of justices on the Court from 11 to 15 to give themselves four more seats to fill with non-consensual candidates. Even though as of early 2013 the judges loyal to the government were in majority¹⁰, the Court continued its rather Europe-friendly jurisprudence.

The Hungarian Lisbon judgment

One of the first judgments issued after the 2010 parliamentary elections was decision 143/2010. (VII. 14.) AB on the constitutionality of the Act of promulgation of the Lisbon Treaty. Here the Court rejected the petition submitted by a private person aimed at establishing the unconstitutionality of the Act of promulgation of the Lisbon Treaty. (Act CLXVIII of 2007) The petition emphasized that the new rules and mechanisms of the Lisbon Treaty jeopardized the existence of the Republic of Hungary as an independent, sovereign State, governed by the rule of law.

The Constitutional Court pointed out that the reasoning and the examples in the petition were more or less similar to those examined by other European constitutional courts in the framework of the *a priori* constitutional review of the Lisbon Treaty, accomplished on the demand of national governments, MPs, etc. Under Article 36.1 of the Act on the Constitutional Court, before ratifying an international treaty, the President of the Republic and the Government may request the examination of the constitutionality

⁶ Opinion 663/2012 CDL-AD(2012)001 of the Venice Commission on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organization and administration of courts of Hungary, adopted by its 90th Plenary Session (Venice, 16-17 March 2012);

⁷ The retirement age for Hungarian judges was reduced from seventy years to sixty-two years, starting on the day the new constitution entered into force on 1 January 2012. This change forced around one tenth of the Hungarian judges into early retirement. ECJ, 6 November 2012, Case C-288/12, *Commission v. Hungary*. About the case see G. Halmi, *The Early Retirement Age of the Hungarian Judges*, in *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, Cambridge University Press, 2017.

⁸ On 1 January 2012, the Fundamental Law terminated the term of office of András Baka, President of the Supreme Court, three and a half years before its normal expiry date. Mr. Baka turned to the European Court of Human Rights (ECtHR) complaining that he was dismissed in connection with his views and public position expressed in his capacity as President of the Supreme Court on issues of fundamental importance for the judiciary. On 23 June 2016, the Grand Chamber of the ECtHR, similar to the prior second chamber judgment of 27 May 2014 stated that Hungary had infringed upon Mr. Baka's rights, because his removal may have been related to his criticism of the transformation of the organization of the courts. *Baka v. Hungary*, Judgment of 23 June 2016. Application no. 20261/12.

⁹ Instead of the previous consensual procedure, the new rules made it possible for the governing parties to nominate, and with its two-third majority in the plenary of the Parliament elect, judges without the consent of opposition parties. In July, 2010, the government made use of the new rules, and elected two new judges to the bench, who did not even fulfil the legal requirements set for justices. Later that year the government also expanded the number of justices on the Court from 11 to 15 to give themselves four more seats to fill with non-consensual candidates.

¹⁰ In February 2013, an eighth justice out of the 15 members of the Constitutional Court was added and in April 2013 a ninth Fidesz justice joined the bench with the exclusive votes of the governing parties without any consultation with opposition parties, civil or professional organizations. This way the justices elected by consensus became a minority. By now all the members of the Court are loyal to the government.

of an international treaty or of its provisions thought to be of concern. However, this institution of an *a priori* constitutional review of international treaties was not applied in 2007 concerning the Act of promulgation of the Lisbon Treaty.

Firstly, the Constitutional Court checked its competence concerning the Act of promulgation and came to the conclusion that even if the Treaty of Lisbon modifying the Treaty on European Union and the Treaty establishing the European Community (the latter renamed as the Treaty on the Functioning of the European Union) entered into force, this did not mean that the Act of promulgation had to be treated in a different way as compared to the review of ordinary acts and other legal norms which might be challenged according to the *actio popularis* system, guaranteed by the Act on the Constitutional Court. The Constitutional Court pointed out that in the framework of the *a posteriori* review of norms, due attention should be paid to the fact that Hungary is a member state of the European Union. That is why even a decision declaring – let's assume - unconstitutionality cannot threaten the execution of all the commitments deriving from EU-membership. In this case, the legislator should find a solution in which the EU commitments are executed without violating the Constitution. The Constitutional Court also emphasized that, in case of treaties of such high importance, the competent authorities should always ask in due time the *a priori* constitutional review, thus the deliberation of the present petition is closely linked to the fact, that the *a priori* constitutional review was not demanded.

The Constitutional Court also recognized that the authentic interpretation of the EU treaties and other EU-norms falls under the competence of the European Court of Justice. The Court used the theory of *acte clair* and did not need to refer the case to the European Court of Justice, because it was evident that the petitioner's arguments were a result of an imperfect, inadequate reading and understanding of the Lisbon Treaty when he contested the constitutionality of the Act of promulgation. Consequently, a verbatim, full quotation of Article 49/A (currently Article 50) of the Treaty on the European Union was sufficient to see that contrary to petitioner's allegation, no state could be obliged to uphold its membership if it did not want to do so.

Following the doctrine of *acte clair*, the Constitutional Court considered that in order to rebut the petitioner's arguments, it was enough to refer to rule changes after the Lisbon Treaty which could be regarded as facts of common knowledge: e.g. the attribution of a legally binding nature to the Charter of Fundamental Rights, the enlargement of the role of competences of national parliaments according to Protocol No. 2 on subsidiarity and proportionality etc. All these showed that the petitioner's arguments for the alleged dangers of the Lisbon Treaty were unfounded.

The Constitutional Court also interpreted the relevant articles of the 1989 Constitution on sovereignty, democracy, rule of law and European cooperation. According to the Court, the so-called European clause (Article 2/A) could not be interpreted in a way that would deprive the clauses on sovereignty and rule of law of their substance. The Court referred however to its former jurisprudence on the free limitation of the exercise of attributes of sovereignty by the holder of the sovereignty, i.e. in fact by the legislator. The Constitutional Court emphasized that material and procedural rules were duly observed during the adoption of the Act of promulgation and that the Parliament gave its consent to the content of the Lisbon Treaty of its free will. To summarize, the Constitutional Court came to the conclusion that even if the reforms of the Lisbon Treaty were of paramount importance, they did not change the situation that Hungary maintained and enjoyed her independence, her rule of law character and her sovereignty. Consequently, the application was rejected in all its elements.

As we can see, this decision, without explicit references to the *Lissabon-Urteil* of the German Federal Constitutional Court, resembles the judgment of their German colleagues, as the Hungarian justices also affirmed that the Parliament has an obligation to reconcile the commitments derived from Hungary's membership in the EU.¹¹

¹¹ See a similar assessment in P. Faraguna, 'Taking Constitutional Identities Away from the Courts', Brook. J. Int'l L. Vol. 41:2. 2016. 491, at 505.

Partly this happened also when the not yet fully packed Constitutional Court issued its decision 165/2011. (XII. 20.) AB at end of 2011, which annulled some less important parts of the highly controversial, and by international actors also harshly criticised media laws,¹² even though the Court never addressed the most debated issues (e.g. the overwhelming majority of the representatives of the government appointees in the media regulatory and oversight bodies).¹³

Jurisprudence after the fundamental law

With the two-third majority gained in the 2010 elections, the governing parties were able to initiate and enact a new Constitution without the votes of the weak opposition parties. But this constitutionalist exercise aimed at an illiberal constitutional sort¹⁴. This new constitution, entitled the Fundamental Law of Hungary was passed by the Parliament on 18 April 2011 without any elementary political, professional, scientific or social debates¹⁵. Although Article E) of the new constitutional text states that Hungary contributes to the creation of European unity, in many respects it does not comply with the standards of democratic constitutionalism and the basic principles set forth in Article 2 of the Treaty on the European Union.

After Fidesz' mentioned opposition towards a primacy clause in the constitution during the accession amendment, it comes as no great surprise that the Fundamental Law does not contain such a provision. Instead, its Europe clause [Article E], which provides a basis for Union co-operation is substantially

¹² Opinion no. 798 / 2015 CDL-AD(2015)015 of the Venice Commission on the media legislation (Act CLXXXV of 2010 on media services and on the mass media, Act CIV of 2010 on the freedom of the press, and the legislation on taxation of advertisement revenues of mass media) adopted by its 103rd Plenary Session (Venice, 19-20 June 2015)

¹³ It was precisely the Hungarian constitution-making of 2011 and the resultant cardinal acts - foremost the media law that substantially limited press freedom - adopted in the course of that process, which prompted a revolutionary proposal that sought to transform the European Union's fundamental rights protection system and was the subject of intense academic debates. The so-called 'reverse Solange' proposal aimed at the protection of European press freedom - and of course the substance of the other fundamental rights enshrined in the European Charter of the same name - by national courts, following the pertinent, emerging jurisprudence of the European Court of Justice on Union citizenship. See A. von Bogdandy, & M. Kottmann & C. Antpöhler & J. Dickschen & S. Hentrei & M. Smrkolj, 'Reverse Solange. Protecting European Media Freedom Against EU Member States', *Common Market Law Review*, Volume 49, 2012.

¹⁴ In an interview on Hungarian public radio on July 5, 2013 Prime Minister Viktor Orbán responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim to produce a liberal constitution. He said: "In Europe the trend is for every constitution to be liberal, this is not one. Liberal constitutions are based on the freedom of the individual and subdue welfare and the interest of the community to this goal. When we created the constitution, we posed questions to the people. The first question was the following: what would you like; should the constitution regulate the rights of the individual and create other rules in accordance with this principle or should it create a balance between the rights and duties of the individual. According to my recollection more than 80% of the people responded by saying that they wanted to live in a world, where freedom existed, but where welfare and the interest of the community could not be neglected and that these need to be balanced in the constitution. I received an order and mandate for this. For this reason, the Hungarian constitution is a constitution of balance, and not a side-leaning constitution, which is the fashion in Europe, as there are plenty of problems there". See A Tavares jelentés egy baloldali akció (The Tavares report is a leftist action), Interview with PM Viktor Orbán, July 5, 2013. Kossuth Rádió. <http://www.kormany.hu/hu/miniszterelnokseg/miniszterelnok/beszedek-publikaciok-interjuk/a-tavares-jelentes-egy-baloldali-akcio>

¹⁵ In its opinion approved at its plenary session of 17-18 June 2011, the Council of Europe's Venice Commission also expressed its concerns related to the document, which was drawn up in a process that excluded the political opposition and professional and other civil organisations. See: [http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)016-E.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)016-E.pdf). Fidesz's counter-argument was that the other Parliamentary parties excluded themselves from the decision-making process with their boycott, with the exception of the extreme-right Jobbik, which voted against the document.

similar to that contained in the previous Constitution. In other words, it does not realize any advances, but at least it does not constitute a step back, either.¹⁶

The Fundamental Law also expresses a commitment to the international community and to international law. Unlike the respective provision of the previous Constitution, however, Article Q (1), which addresses this issue, does not contain the principles of rejecting war - which is part of international *ius cogens* - and of the prohibition on violence - based on the UN Charter Article 2 (4). Instead, it unites the aforementioned prohibitions and posits peace, security and sustainable development in international cooperation with the peoples and countries of the world, as objectives. Article Q (2) and (3) makes provisions regarding the relationship between international and Hungarian law; it does so respecting the requirement of compatibility and upholding the monist-adoptional system in the context of the recognized rules of international law, and the dualist-transformational system in the case of other sources of international law (international agreements and decisions rendered by certain international judicial forums). The dualist-transformational system becomes unequivocal - as compared to the effective Constitution - through the requirement of promulgation in law. In effect, therefore, the interpretive frameworks developed through the Constitutional Court's jurisprudence do not change.

The not-yet fully packed Constitutional Court continued this practice even after the entry into force of Fidesz's new constitution, the Fundamental Law. In a decision on the constitutional review of certain constitutional amendments the justices stated that according to their consistent jurisprudence the unalterable core of the Hungarian constitution may be derived from *ius cogens*¹⁷ and general principles of international law expressed in such multilateral treaties as the ICCPR, the European Convention of Human Rights, and those fundamental rights and constitutional principles which are part of the shared European constitutional tradition and are reflected in the documents of the EU and the Council of Europe.

In another decision (32/2012. (VII. 4.) AB), the Court held that the Act on National Higher Education granted the government unconstitutional authority to regulate by decree the substance of student contracts concluded with students who receive publicly funded scholarships. According to the majority opinion, the student who upon the conclusion of his/her higher education studies chooses to take a job in another EU member state rather than Hungary, exercises his/her freedom to choose an occupation. And in addition to Hungary's Fundamental Law, this freedom is also recognized by the European Union's basic treaty (Article 45 (1) and (2) of the Treaty on the Functioning of the European Union), and is also protected by secondary Union law as part of the freedom of movement.¹⁸

The Court holds after the fourth amendment

On 11 March the Hungarian Parliament added the Fourth Amendment to the country's 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court, and rebuffing requests by the European Union, the Council of Europe and the US government that urged the government to seek the opinion of the Venice Commission before bringing the amendment into force. The Fourth Amendment also added new restrictions on the Constitutional Court, inserted

¹⁶For more details, see: N. Chronowski, 'Az alaptörvény európai mérlegen' [The Fundamental Laws in European balance], *Fundamentum* 2, 2011.

¹⁷The previous Constitutional Court's practice had made clear that domestic law is void if it contravenes international *ius cogens*. Cf. for example Constitutional Court decision No. 53/1993. (X. 13.). Some construe this decision as stating that the Constitutional Court believes international *ius cogens* enjoys primacy over the constitution. On this, see P. Sonnevend, 'Verjährung und völkerrechtliche Verbrechen in der Rechtsprechung des ungarischen Verfassungsgerichts', *ZaöRV* 57, 1997. 211.

¹⁸Nevertheless, neither the fact that it violated the Fundamental Law, nor the breach of Union law has stopped the government from enacting into law a provision that would require students to pay tuition fees after their studies if they choose to work abroad, including the countries of the European Union.

provisions that limited the application of constitutional rights and raises questions about whether concessions that Hungary made to European bodies in 2012 in order to comply with European law are themselves now unconstitutional. These moves reopened serious doubts about the state of liberal constitutionalism in Hungary and Hungary's compliance with its international commitments under the Treaties of the European Union and under the European Convention on Human Rights.

The Venice Commission in its opinion issued after the amendment already came into force, came to the conclusion that the Fourth Amendment seriously undermined the possibility of constitutional review in Hungary and endangered the constitutional system of checks and balances. Together with the *en bloc* use of cardinal laws to perpetuate choices made by the present majority, the Fourth Amendment, the Commission argued, "is the result of an instrumental view of the Constitution as a political means of the governmental majority and is a sign of the abolition of the essential difference between constitution-making and ordinary politics".¹⁹

Even in its decision upholding the constitutionality of the Fourth Amendment of the Fundamental Law, the already fully packed Constitutional Court, the majority of which had already been elected by the governing parties exclusively without the consent of the opposition, promised that it would define limits on constitution-making and legislative powers in light of Articles Q and E of the Fundamental Law, with reference to the obligations stemming from Hungary's EU membership. According to the Constitutional Court these sources gave effect to a coherent system of constitutional values which could not be disregarded by the constitution-maker or legislative powers.²⁰ In its decision on the constitutionality of the assignment of trial judges by the head of the National Judicial Office, the Constitutional Court said that national and European constitutional developments necessarily influenced the interpretation of the Fundamental Law.²¹ This willingness of the Constitutional Court justices, loyal to the government, to define the unalterable core of the constitution with reference to international and European obligations, which can only be explained with a minimum commitment to their legal profession, does not mean that the Court is willing to protect this core from government invasion.

With its EU-friendly approach followed till the refugee crisis the Constitutional Court kept Hungary in the group of countries that subscribed to a notion of limited Union supremacy²². This means that they reserved for themselves the right to review, if necessary, Union statutes in light of the fundamental rights standards set out in their own constitutions, but on the other hand until the Hungarian government itself did not raise the issue of constitutional identity in relationship with its own inhumane dealing with the refugee and migration crisis the Court never argued for the non-application of any EU legal norm. In other words, this limited primacy approach of the judges was decisively distinct from the December 2016 anti-EU constitutional identity concept of the Court imposed by the government.

¹⁹ See 720/2013 opinion of the Venice Commission adopted at its plenary session on 14-15 June on the Fourth Amendment to the Fundamental Law of Hungary [http://www.venice.coe.int/WebForms/documents/?pdf=CDL-AD\(2013\)012-e](http://www.venice.coe.int/WebForms/documents/?pdf=CDL-AD(2013)012-e)

²⁰ Decision 12/2013. (V. 24.) AB

²¹ Decision 36/2013 (XII. 15) AB

²² For this reason, I do not agree with Monica Claes' classification, which puts Hungary – together with Austria, Cyprus, Luxemburg and the Netherlands - into the group of member states, where the primacy of EU law goes more or less uncontested, and courts have not suggested that they could review EU law and declare it inapplicable. See M Claes, 'The Validity and Primacy of EU Law and the "Cooperative Relationship" between National Constitutional Courts and the Court of Justice of the European Union', 25 *Maastricht Journal*, 1, Special Issue, 2016. 157. A rather share Christoph Grabenwarter's categorization, according to which Hungary, together with Italy, Germany, Denmark, Belgium, Spain, Sweden Ireland, and Great-Britain, as well as the Czech Republic, Slovakia, Romania, and Lithuania, among the more recent entrants to the EU, fall into the category of limited primacy. See in Ch. Grabenwarter, 'Staatliches Unionsverfassungsrecht', in A. von Bogdandy & J. Bast (Eds.), *Europäisches Verfassungsrecht*, Springer, Heidelberg – New York, 2009, pp. 121–175. On the constitutional law solutions employed by the new member states see A. Sajó, 'Az EU-csatlakozás alkotmányosságra gyakorolt hatása az új tagállamokban' [The impact of EU accession on constitutionalism in the new member states], *Fundamentum* 2, 2003. pp. 14–26.

The anti-migration policy as a matter of constitutional identity?

Psychological preparations

As early as May 2015, a few days after many hundreds of refugees had drowned in the Mediterranean Sea, Viktor Orbán announced that ‘We need no refugees’, arguing that Europe does not need immigrants at all, and that the European Union should be sealed and defended against intruders by the army, and should not overreach in its immigration and refugee policies. Rather, the member states should formulate their own policies and deal with their unwanted immigrants as they best see fit. In the summer of 2015, the Hungarian government left thousands of refugees to languish on fields and in the streets, forcibly herded others into squalid detention camps, and fired water cannons and teargas at refugees gathered against the razor fence it had erected, first on its border with Serbia, and later with Croatia, another EU Member State. Viktor Orbán, styling himself as the defender of Europe’s ‘Christian civilization’ against an Islamic invasion managed to encourage other eastern European governments to follow his example.

In order to legitimate this policy against Hungary’s unwanted immigrants the government announced it would hold a ‘national consultation’. (A similar consultation was held in 2011, shortly before the enactment of the new Fundamental Law, the results of which have never been made public.) The government sent out eight million questionnaires to the voting-age population, in the expectation that one million would be filed and returned. Because there was no legal requirement to make the responses public, they were seen again exclusively by government officials.²³ To see the demagoguery and populism behind the ‘consultation’, it is worth quoting some of the questions without comments: “How important is the spread of terrorism as far as your own life is concerned? Do you agree that mistaken immigration policies contribute to the spread of terrorism? Do you agree with the opinion that economic immigrants endanger the jobs and livelihoods of the Hungarian people? In your opinion did Brussels' policies on immigration and terrorism fail? Would you support a new regulation that would allow the government to place immigrants who illegally entered the country into internment camps? Do you agree with the government that instead of allocating funds to immigration we should support Hungarian families and those children yet to be born?”

Anti-rule-of-law immigration laws

After this psychological preparation, the government also tried to convince the public that the only way to enforce EU law and protect both the Hungarian and the Schengen border of Europe was to build a 175-km long razor-wire fence along the entire border with Serbia, and later along the 377-km long border with Croatia. In July 2015, the Parliament amended the asylum law, and adopted a National List of Safe Countries, considering Serbia as a safe third country for asylum-seekers (in contradiction with the clear position of the European Court of Human Rights and the Hungarian Supreme Court). These changes, which entered into force on 1 August, accelerated the asylum proceedings, rendering an ineffective one-instance judicial review with unreasonably short deadlines into a quasi-automatic rejection at first glance of over 99% of asylum claims (as 99% of asylum-seekers entered Hungary from Serbia).

Another piece of legislation, which came into effect on 15 September - by the time Hungary registered over 170.000 asylum claims – allowed for the construction of so-called transit zones, where immigration and asylum procedures are conducted. On 15 September 2015, when the border to Serbia was closed, two transit zones started to operate: one in Röszke and another in Tompa. The one in Röszke is a

²³ The official reasoning of the Parliamentary resolution on the message to the leaders of the European Union without referring to any source claims that during the consultation 1 million people expressed their opinion that the permissive immigration policy of the EU has been failed. In a speech held in the Hungarian Parliament on 21 September 2015, PM Orbán, referring to the unpublished outcome of the national consultation, claimed that more than 80% of those responded agreed that the migration policy of the EU has failed and Hungary must be protected. <http://www.kormany.hu/en/the-prime-minister/news/it-is-hungary-s-historic-and-moral-obligation-to-protect-europe>

compound of approximately 50 smaller containers, which are integrated into the border fence. The introduced border procedure is a specific type of admissibility procedure, which can only be initiated if the applicant submitted the asylum claim in the transit zone. The inadmissibility decisions are delivered partly by judges appointed for a fixed term or by court clerks within less than an hour (!), and they immediately expel the rejected asylum seeker and order a ban on entry and stay for one or two years. In parallel with this regulation the law also amended the Criminal Code, creating new crimes, including illegally entering the country and damaging state property, such as the fence. Under basic definition these criminal acts are punishable by up to three years' imprisonment, but in aggravated cases sentences can increase up to 20 years to life imprisonment.

The same amendments also entitled the government to declare a 'state of migration emergency', if more than 500 migrants seek asylum per day for a month, or if 2000 migrants are in transit camps for a week, or if migrants riot anywhere in the country. The emergency situation entitles the government to send soldiers to guard the borders, fully armed, to use dogs, rubber bullets, and teargas in addition to the police, which is normally authorized to do that. An amendment to the Law on the Police provides that the police is authorized to enter any house in Hungary without a warrant, searching for illegal migrants.

The fence and the new laws not only violate international treaties, especially Article 31 of the Geneva Convention of 1951 signed by Hungary, and different EU laws²⁴, but also Fidesz's own Fundamental Law, which did not regulate this emergency situation, and did not allow the army to be deployed within the country except in emergency situations prescribed in the constitution. This was the reason that on 7 June 2016, National Assembly representatives from the Fidesz-KDNP governing alliance and the radical-nationalist opposition party Jobbik approved the Sixth Amendment to the Fundamental Law. This amendment authorizes the National Assembly to declare, at the initiative of the government, a "terrorism state of emergency" (*terrorveszélyhelyzet*) in the event of a terrorist attack or a "significant and direct danger of a terrorist attack" (*terrortámadás jelentős és közvetlen veszélye*). The amendment furnishes the government with the right to suspend existing laws and to take other 'extraordinary measures' that depart from existing laws during a declared terrorism state of emergency. The amendment stipulates that the declaration of a terrorism state of emergency and possible extension of such a state of emergency require the approval of a two-thirds majority of National Assembly representatives. The Sixth Amendment to the Fundamental Law permits the government to issue resolutions affecting state administration, law-enforcement and national-security organizations and the military for a period of up to 15 days after initiating the declaration of a terrorism state of emergency, even if the National Assembly has not approved such a state of emergency.

On March 7 2017 the Hungarian Parliament passed an amendment to the Asylum Act that forces all asylum seekers into guarded detention camps.²⁵ While their cases are being decided, asylum seekers, including women and children over the age of 14, will be herded into shipping containers surrounded by a high razor-fence on the Hungarian side of the border.²⁶

On March 14 2017 the European Court of Human Rights found that the detention of two Bangladeshi asylum-seekers for more than three weeks in a guarded compound without any formal, reasoned decision

²⁴ The Hungarian legislations seemed to violate at least three different EU laws: a) the 2006 EU regulation requires "[b]order checks should be carried out in such a way as to fully respect human dignity"; b) the 2013 EU Asylum Directive requires "standards for the reception of applicants that will suffice to ensure them a dignified standard of living"; and c) under the EU's Dublin III Rules, "Member States shall not hold a person in detention for the sole reason that he or she is an applicant [for asylum]."

²⁵ http://www.upi.com/Top_News/World-News/2017/03/07/UN-Hungary-plan-for-refugee-camps-illegal-harmful-to-children/4631488910166/

²⁶ On the very same day that the Parliament voted for the bill, Viktor Orbán delivered a speech at the swearing-in-ceremony of 462 new 'border hunters'. In the speech Orbán described 'migration as a Trojan horse of terrorism', and he also dismissed criticism of the new law as 'charming human rights nonsense'. See Éva S. Balogh, The Hungarian government's shameful treatment of asylum seekers, The Hungarian Spectrum, March 10, 2017. <http://hungarianspectrum.org/2017/03/09/the-hungarian-governments-shameful-treatment-of-asylum-seekers/>

and without appropriate judicial review had amounted to a de facto deprivation of their liberty (Article 5 of the Convention) and right to effective remedy (Article 13). The Court also found a violation of Article 3 on account of the applicants' expulsion to Serbia insofar as they had not had the benefit of effective guarantees to protect them from exposure to a real risk of being subjected to inhuman and degrading treatment.²⁷ We should take into account that this unlawful detention of the applicants in the transit zone was based on less restrictive rules enacted in 2015.

Invalid anti-migrant referendum

After the legislative measures the government started a campaign against the EU's migration policy. The first step was a referendum initiated by the government. On 2 October 2016, Hungarian voters went to the polls to answer one referendum question: "Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?" Although 92 % of those who casted votes and 98 of all the valid votes agreed with the government answering 'no' (6 % were spoiled ballots), but since the turnout was only around 40 percent, the referendum was invalid. This was an own goal made by the Orbán government, which after overthrowing its predecessor as a result of a popular referendum made it more difficult to initiate a valid referendum. While the previous law required only 25 percent of the voters to cast a vote, the new law requires at least 50 percent of those eligible to vote to take part, otherwise the referendum is invalid. Based on the old law all but one of the six referendums held since 1989 were valid.

The referendum was announced by Prime Minister Viktor Orbán at the end of February 2016 to ask the Hungarian voters whether to accept the September 2015 decision of the Council of the European Union on the mandatory quotas for relocating 160.000 migrants over two years, out of which Hungary would be obliged to take 1.294 altogether. In his announcement Orbán said "it is no secret that the Hungarian government refuses migrant quotas" and will be campaigning for "no" votes. Orbán argued the quota system would "redraw Hungary's and Europe's ethnic, cultural and religious identity, which no EU organ has the right to do". Hungary's Foreign Minister added that "We are challenging the quota decision at the European Court of Justice and we firmly believe that that decision was made with a disregard to EU rules."

The referendum question was legally challenged before the National Election Commission, which was authorized to approve the question. The challenge was based on Article 8 (2) of the Fundamental Law, which states that "National referendums may be held about any matter falling within the functions and powers of the National Assembly". The petitioners stressed that since the Parliament has no jurisdiction over the binding decision of the European Council on the quotas, the question also violated the requirement of certainty regarding a question to be answered by referendum enumerated in Hungarian electoral law, because neither the voters nor the legislation will be aware, what may be, if any, the legal consequences of the referendum. But the Election Commission, the majority of which consisted of governmental appointees, approved the question, and so did the Supreme Court (*Kúria*) following an appeal. The Parliament officially approved the referendum with votes of the governing party, and the extreme right-wing opposition Jobbik party, while the left-wing opposition boycotted the plenary session. The Constitutional Court rejected the appeals against plans to hold the referendum, and finally the former Fidesz party member President of Hungary set 2 October 2016 as the date for the plebiscite.

In the campaign period the government aggressively promoted the 'no' votes, spending 15 billion forints or €48.6 million on the campaign, 7.3 times more than the cost of the Brexit campaigns. In early September, the government spent 4.1 million of Euros on full-colour, B4-sized booklets to Hungarians at home and abroad making the government's case for why Hungarians should vote 'no': "*Let's send a message to Brussels so they can understand too! We must stop Brussels! We can send a clear and*

²⁷ Judgment of 14 March, 2017 in the case of Ilias and Ahmed v. Hungary (application no. 47287/15).

unequivocal message to Brussels with the referendum. We must achieve that it withdraws the dangerous proposal.”

The government did not even shy away from violating laws. For instance, as the Supreme Court ruled in a case overturning a decision of the National Election Committee related to Hungarians living abroad: “campaign letters sent on behalf of the government to ethnic Hungarians abroad violated the principles of equal opportunity and citizens’ entitlement to exercise their rights in a bona fide way”. Also, ministry officials were making phone calls on behalf of Fidesz during working hours to voters in rural districts, encouraging them to vote ‘no’. Prime Minister Orbán in a speech at the plenary session of the Parliament hinted that the globalist opposition planned to strike a deal with Brussels and resettle thousands of migrants in municipalities controlled by the fake left-wing parties. Hence opposition-headed municipalities would have to take responsibility for not producing enough ‘no’ votes in the form of having to take in more refugees than other municipalities in the country. The cabinet chief of the Prime Minister confirmed that the compulsory distribution of migrants to Hungary would result in cuts in social benefits – the recipients of which are, in many cases, Roma. This has been interpreted as a thinly-veiled message to increase voter turnout among the Roma electorate. But the highlight of the hate-filled campaign was when the deputy chair of the parliamentary commission for national security announced that it would pursue a national security screening of 22 NGOs that were protesting against the inhumane politics of the Hungarian government against refugees and calling for the public to invalidate the referendum.

Despite all the immoral and unlawful efforts of the government to influence the Hungarian voters, the majority of them did not cast votes, which rendered the referendum invalid. Disregarding this result, on the night of the referendum, Prime Minister Orbán announced an amendment of the constitution “in order to give a form to the will of the people” and tried to push Brussels by claiming that “in an EU member state today 92 % of the participants said that they do not agree with the EU proposal; can Brussels force the quotas on us after this?”

Failed constitutional amendment

Despite the fact that at the time of the referendum the idea of a constitutional amendment was not on the table, arguing with the 3.3 million Hungarians who voted in favor of the anti-EU referendum, Prime Minister Orbán introduced the Seventh Amendment to defend Hungarian constitutional identity to get an exemption from EU law in this area. The draft amendment touched upon the National Avowal, the Europe clause in the Foundation part, and two provisions in the part on Freedoms and Responsibilities.

Following the sentence, “We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary’s statehood and the unity of the nation,” the following sentence would have appeared in the National Avowal: “We hold that the defense of our constitutional self-identity, which is rooted in our historical constitution, is the fundamental responsibility of the state.”

Paragraph 2 of Europe clause (Article E) of the Fundamental Law was planned to be amended to read:

Hungary, as a Member State of the European Union and in accordance with the international treaty, will act sufficiently in accordance the rights and responsibilities granted by the founding treaty, in conjunction with powers granted to it under the Fundamental Law together with other Member States and European Union institutions. The powers referred to in this paragraph must be in harmony with the fundamental rights and freedoms established in the Fundamental Law and must not place restrictions on the Hungarian territory, its population, or the state, its alienable rights.

The following new paragraph 4 would have been added to Article R: “(4) It is the responsibility of every state institution to defend Hungary’s constitutional identity.”

Paragraphs 1-3 of Article XIV were planned to be replaced with the following text:

(1) No foreign population can be settled into Hungary. Foreign citizens, not including the citizens of countries in the European Economic Area, in accordance with the procedures established by the National Assembly for Hungarian territory, may have their documentation individually evaluated by Hungarian authorities.

(2) Hungarian citizens on Hungarian territory cannot be deported from Hungarian territory, and those outside the country may return whenever they so choose. Foreigners residing on Hungarian territory may only be deported by means of legal proclamation. It is forbidden to perform mass deportations.

(3) No person can be deported to a state, nor can any person be extradited to any state, where they are in danger, discriminated against, subject to persecution, or where they are at risk of any other form of inhumane treatment or penalty."

Paragraph 4 of Article XIV would also be expanded with the following text:

(4) Hungary will provide asylum to non-Hungarian citizens if the person's country of origin or other countries do not provide protection, and also for those who, in their homeland or place of residence, are persecuted for their race, ethnicity, social standing, religion, or political convictions, or if their fear of persecution is well-founded.

All 131 National Assembly representatives from the Fidesz-KDNP governing coalition voted in favor of the proposed amendment, while all 69 opposition representatives either did not vote (66 representatives) or voted against the amendment (3 representatives). The proposed amendment thus fell two votes short of the two-thirds majority required to approve amendments to the Fundamental Law. Although Jobbik in principle supported the proposed Seventh Amendment, the party's MPs did not participate in the vote because the government had failed to satisfy Jobbik's demand that the Hungarian Investment Immigration Program, which grants permanent residency in Hungary to citizens of foreign countries who purchase 300,000 euros in government 'residency bonds'.²⁸

The constitutional court rubberstamps the constitutional identity defense

After the failed constitutional amendment, the Constitutional Court, loyal to the government, came to rescue Orbán's constitutional identity defense of its policies on migration, and everywhere where it may disagree with the EU. The Court carved out an abandoned petition of the also loyal Commissioner for Fundamental Rights, filed a year earlier, before the referendum was initiated. In his motion the ombudsman asked the Court to deliver an abstract constitutional interpretation in connection with the European Council decision 2015/1601 of 22 September 2015. He asked the following four questions:

1. Whether the prohibition of expulsion from Hungary in Article XIV (1) of the Fundamental Law forbids only this kind of action by the Hungarian authorities, or if it also covers actions by Hungarian authorities which they use to promote the prohibited expulsion implemented by other states.
2. Whether under Article E) (2), state bodies, agencies, and institutions are entitled or obliged to implement EU legal acts that conflict with fundamental rights stipulated by the Fundamental Law. If they are not, which state organ can establish that fact?
3. Whether under Article E) (2), the exercise of powers bound to the extent necessary may restrict the implementation of the *ultra vires* act. If state bodies, agencies, and institutions are not entitled or obliged to implement *ultra vires* EU legislation, which state organ can establish that fact?
4. Whether Article XIV (1) and Article E) can be interpreted in a way that authorizes or restricts Hungarian state bodies, agencies, and institutions, within the legal framework of the EU, to facilitate the relocation of a large group of foreigners legally staying in one of the Members States

²⁸During the vote on the amendment, Jobbik MPs displayed a sign referring to the program reading "He [or she] Is a Traitor Who Lets Terrorists in for Money!"

without their expressed or implied consent and without personalized and objective criteria applied during their selection.

The Court in its decision 22/2016 (XII. 5.) AB by rendering the petition admissible, decided to answer the first question related to the interpretation of Article XIV of the Fundamental Law in a separate judgment. Answering questions 2-4, the Court, relying on the German Federal Constitutional Court's methods of constitutional review of EU law, developed a fundamental rights review and an *ultra vires* review, the latter composed of a sovereignty review and an identity review.²⁹

The fundamental rights review is based on Article E) (2) and Article I (1) of the Fundamental Law. The latter provision declares that "The inviolable and inalienable fundamental rights of MAN shall be respected. It shall be the primary obligation of the State to protect these rights." Having these rules in mind, and after referring to the *Solange* decisions of the German Federal Constitutional Court, and explicitly to 'Solange III' of 15 December 2015 (2 BvR 2735/14), and the need for cooperation in the EU and the primacy of EU law, the Court states that it cannot renounce the ultima ratio defense of human dignity and other fundamental rights. It further argues that as the state is bound by fundamental rights, this binding force of the rights are applicable also to cases when public power, under Article E), is exercised together with the EU institutions or other Member States.

Regarding the *ultra vires* review the Court argued that there are two main limits on conferred or jointly exercised competencies, under Article E) (2): it cannot infringe the sovereignty of Hungary (sovereignty review) and its constitutional identity (identity review). The constitutional foundation of the sovereignty review is Article B) (1) of the Fundamental Law, which states that "Hungary shall be an independent, democratic rule-of-law State". Paragraphs (3) and (4) contain the popular sovereignty principle: "(3) The source of public power shall be the people", "(4) The power shall be exercised by the people through elected representatives or, in exceptional cases, directly". The Court warned that "Article E) (2) should not empty Art B)" and it establishes the "presumption of reserved sovereignty" in relation to judging the common exercise of other competences that have already been conferred to the EU.

The identity test, the Court argued, was based on Article 4 (2) TEU and on continuous cooperation, mutual respect, and equality. Even if it sounds tautological, according to the Court "constitutional identity is synonymous with the constitutional (self-) identity of Hungary". Its content is to be determined by the Constitutional Court on a case-by-case basis based on an interpretation of the Fundamental Law as a whole and its provision in accordance with Article R) (3), which states that "the provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution". The Court held that the constitutional (self-)identity of Hungary does not contain an exhaustive list of enumerated values, but the text mentions some of them: freedoms, the division of power, the republican form of state, respect for the autonomy of public law, freedom of religion, legality, parliamentarism, equality before the law, recognition of judicial power, protection of nationalities that are living with us. These are achievement of the Hungarian historical constitution on which the legal system rests.

The Court held that the constitutional (self-)identity of Hungary was a fundamental value that had not been created, but only recognized, by the Fundamental Law and, therefore, it could not be renounced by an international treaty. The defense of the constitutional (self-)identity of Hungary will be the task of the Constitutional Court as long as Hungary has sovereignty. Because sovereignty and constitutional identity are in contact with each other in many points, therefore the controls of sovereignty and identity need to be employed considering one another.

²⁹ The German Federal Constitutional Court frequently referred to constitutional identity, but the ECJ has never acknowledged constitutional pluralism. Most recently in the so called OMT decision (Case C-62/14, Gauweiler and Others v. Deutscher Bundestag) the Luxembourg Court stridently defended the supremacy of EU law over national law. The ECJ acknowledges a Member State's constitutional identity only in very rare cases. (See for instance the Fürstin von Sayn-Wittgenstein judgment. Case C-208/09, Sayn-Wittgenstein v. Landeshauptmann von Wien [2011] E.T.M.R.12.)

Based on the above, the Hungarian justices ruled that the Court itself can examine whether the EU's exercise of power violates (a) human dignity or any other fundamental right, (b) Hungary's sovereignty, or (c) Hungary's constitutional identity rooted in its historical constitution, and based on this examination, had the power to override EU law in the name of constitutional identity.

Viktor Orbán's first jubilant reaction shows how enthusiastic he was that the Court has helped the government's ideals come true by making up for the failed referendum and the Seventh amendment: "I threw my hat in the air when the Constitutional Court ruled that the government has the right and obligation to stand up for Hungary's constitutional identity. This means that the cabinet cannot support a decision made in Brussels that violates Hungary's sovereignty", adding that the Court decision is good news for "all those who do not want to see the country occupied". In the same interview given to the Hungarian Public Radio, Orbán pointed out the next subject of national constitutional identity, referring to the latest EU plan to terminate Hungarian state regulation of public utility prices. He said that the European Commission incorrectly argued that competition in the energy sector leads to lower prices. "Therefore Hungary insists on reducing utility rate cuts and we shall defend it in 2017. Although this will be a very tough battle, we have a chance of success".³⁰ The next sign of this battle regarding asylum seekers was another speech of Viktor Orbán delivered in February 2017, in which he stated: „I find the preservation of ethnic homogeneity very important.”³¹ On March 5 a newspaper reported on Hungary's shameful treatment of asylum seekers, including severe beatings with batons, the use of attack dogs.³²

What's wrong with Hungary's new constitutional identity?

Both the Seventh Amendment to the Fundamental Law of Hungary and the decision of the Constitutional Court on the interpretation of the country's constitutional identity seem to be carefully crafted documents to fit into the most refined European discourse about national constitutional identity. According to this discourse the concept of 'constitutional identity' in Article 4(2) TEU means that the Member States can define national identity, but the decision about the compatibility of the national identity with EU obligations since the Treaty of Lisbon is always vested in the European Court of Justice, which makes the ultimate decision on *Kompetenz-Kompetenz*. Ever since its seminal judgment in *International Handelsgesellschaft*³³ the ECJ has confirmed that national constitutional norms in conflict with secondary legislation should be inapplicable. But under the revised identity clause of Article 4 (2) TEU member state constitutions can specify matters of constitutional identity, and constitutional courts can apply identity control tests to EU acts, and under certain limited circumstances, are even permitted to invoke constitutional limits to the primacy of EU law. The limits of these constitutional limits are embedded in the principle of sincere cooperation contained in Article 4 (3) TEU.

This understanding of the relationship between EU law and the constitutional law of the member states complements concepts such as constitutional pluralism,³⁴ the network concept,³⁵ multilevel

³⁰ http://hvg.hu/itthon/20161202_Orban_beszed_pentek_reggel

³¹ Speech delivered on 28 February 2017 at the annual gathering of the Hungarian Chamber of Commerce. See Éva S. Balogh, Viktor Orbán's 'ethnically homogenous Hungary', *Hungarian Spectrum*, March 3, 2017. <http://hungarianspectrum.org/2017/03/01/viktor-orbans-ethnically-homogeneous-hungary/>

³² The report from Belgrade was published in the Swedish newspaper *Aftonbladet*. <http://www.aftonbladet.se/nyheter/a/noLbn/flyktingarna-den-ungerska-polisen-misshandlar-och-torterar-oss>

³³ Case C-11/70, *International Handelsgesellschaft mbH* [1970] ECR 01125.

³⁴ N. MacCormick, 'The Maastricht Urteil: Sovereignty Now', 1 *European Law Journal*, 1995. 259.; N. Walker, 'The Idea of Constitutional Pluralism', *MLR*, 2002, 317.; M. Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (Ed.), *Sovereignty in Transition*, Hart, 2003. 501.; for a representative collection of essays on constitutional pluralism pro and con, see M. Avbelj and J. Komárek (Eds.), *Constitutional Pluralism*, Oxford: Hart, 2012.

³⁵ See A. Peters, *Elemente einer Theorie der Verfassung*, Duncker & Humblot, 2001.

constitutionalism,³⁶ and composite constitutionalism (*Verfassungsverbund*)³⁷, all of which aim to overcome the absolute primacy of EU law.³⁸ The joint characteristic of these scholars's arguments is that rather than seeking to definitely resolve the standoff between ECJ and the national constitutional courts through any 'all-purpose superiority of one system over another' (McCormick), they suggest to leave the questions of *Kompetenz-Kompetenz* unsettled, and trying to avoid conflicts through mutual accommodation between constitutional courts (Maduro). Critics of constitutional pluralism, like Martin Loughlin argue that it is oxymoronic.³⁹ Others, like Daniel Kelemen go even as far as claiming that the concept is not only untenable, but also immoral, and scholarly community supporting it should end its 'dangerous dalliance' with constitutional pluralism⁴⁰. But Kelemen also admits that the threat to the EU legal order comes not from the national constitutional courts claims of *Kompetenz-Kompetenz* as such, but from the remedy they propose for violations, namely the inapplicability of unconstitutional EU law. As appropriate and feasible remedy he can only accept the amendment of the national constitution, or secure an opt-out, or if necessary, to withdraw from the EU altogether.⁴¹ Hence Kelemen concludes that the supremacy of EU law and the deference to the ECJ on questions of *Kompetenz-Kompetenz* does not threaten constitutional identity of the Member States, because they remain free to leave the Union.⁴² In other words, even the most inexorable critic of constitutional pluralism accepts that national constitutional courts must retain the authority for – as the German Federal Constitutional Court puts it - 'safeguarding the inviolable constitutional identity' of their states, as long as they rethink the appropriate remedies for its violations.⁴³

What's wrong then with the decision of the Hungarian Constitutional Court, which also wants to break with absolute primacy of EU law?

First, it is important to clarify, under which of the possible scenarios of usage of constitutional identity the Hungarian decision falls. It is certainly not aimed at placing the legality of an EU legislative act under review. Although, as mentioned, the parliamentary commissioner in his petition to the Constitutional Court referred to the European Council decision 2015/1601 of 22 September 2015 on the quota system, he did not ask for a review of its legality, and the Court did not provide such review.⁴⁴ Hence the decision cannot be considered neither as an *ultra vires* nor as an identity review. It is rather an attempt to derogate from Hungary's obligation under EU law, claiming that transposing the quota system into national law conflicts with legitimate interests and principles which are deeply entrenched in the Hungarian national constitutional identity. As the ECJ has stressed in its standing jurisprudence public policy derogations have to be interpreted strictly so as to be applicable only when the case at

³⁶ See I. Pernice, 'Multilevel Constitutionalism in the European Union', 5 *EL Rev.*, 2002. 511.

³⁷ I. Pernice, 'Theorie und Praxis des Europäischen Verfassungsbundes, in Callies (Ed.), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund*, Mohr Siebeck, 2007.

³⁸ A. v. Bogdandy and S. Schill, 'Overcoming Absolute Primacy under the Lisbon Treaty', *CMLR*, 2011. 48: 1-38.

³⁹ M. Loughlin, 'Constitutional Pluralism: An Oxymoron?', 3 *Global Constitutionalism*, 2014. 9-30. It isn't clear, whether Loughlin rejects constitutional pluralism because the ultimate legal authority is vested uniquely in the ECJ, or because political authority remains uniquely vested in the Member States.

⁴⁰ D. Kelemen, 'On the Unsustainability of Constitutional Pluralism. European Supremacy and the Survival of the Eurozone', 23 *Maastricht Journal*, 136-150, at 139. Despite these harsh words, Kelemen admits that there was a period of constitutional pluralism, when it may have served as a useful developmental stage for the EU legal order.

⁴¹ *Ibid.* 149.

⁴² *Ibid.* 140. Here he does not mention the possibility of opting out, whatever it means.

⁴³ *Ibid.* 147.

⁴⁴ Independently from this procedure, the Hungarian government, right after its Slovakian counterpart's submission also challenged the quota decision before the European Court of Justice. This procedure is still pending, but the ECJ in its decision won't take into account the text of the Hungarian constitution or the domestically binding interpretation of it by the Constitutional Court.

hand entails a ‘genuine and sufficiently serious threat to a fundamental interest of society’.⁴⁵ Of course, the compatibility of constitutionally entrenched values with EU law has to be ascertained by the ECJ on a case-by-case basis, but the Luxembourg Court made it also clear that member states have to exercise their competences in accordance with EU law.⁴⁶

There is no strict and exhaustive list of constitutional identity-sensitive matters accepted by the ECJ, but taking into account the jurisprudence of the Court there are some more frequently acknowledged issues, such as decisions on family law, the form of State, foreign and military policy, and protection of the national language.⁴⁷ The subject matter of the Hungarian Constitutional Court decision was the quota decision of the European Council, on the basis of which 1294 asylum seekers would be relocated from Greece and Italy to Hungary, and the Hungarian authorities would be obliged to process their asylum applications. What interests of the society can legitimately trump the international obligation here? The will of the government not to have any refugees, even if supported by 3.3 million voters during the invalid referendum, certainly contradicts the requirement of sincere cooperation of Article 4(3) TEU.

And whose ‘human dignity and other fundamental rights cannot be renounced’ by the Court? The only right, which need ‘ultima ratio defence’ here, is those of the migrants and refugees, but their rights will be ignored if Hungary exempts itself from the quota decision and any other solution to the refugee and migrant crisis. In other words, the references to the *Solange* jurisprudence of the German Federal Constitution are misleading, because the German Court’s invocation of constitutional identity aims at promoting higher standards than EU law requires, while the Hungarian judges reference serves to lower the standards of fundamental rights protection.

Another problem with the Constitutional Court’s interpretation is that it claims that ‘Hungary’s constitutional identity is rooted in its historical constitution’. But the substantive meaning of the text of the Fundamental Law on ‘the achievements of our historical constitution’ is totally ambiguous⁴⁸; there is no legal-scientific consensus in Hungary regarding their precise nature⁴⁹. Presumably, since the case law of the Constitutional Court prior to 2011 has been annulled, it should not include precedents stemming from the Court’s accumulated practice of legal interpretation since the regime change. As opposed to the British tradition of the unwritten constitution, in the thousand years of the Hungarian historical constitution – with the exception of some short moments, such as during the failed revolution of 1848 - the dominant approach was an authoritarian one.⁵⁰

Conclusion

When the Hungarian Constitutional Court, on behalf of the government, protects Hungary’s current constitutional identity, without defining its content, but aiming at not taking part in the joint European solution of the refugee crisis, it does so in a way that is inconsistent with many of the joint values of Article 2, as well as with the requirement of sincere cooperation of Article 4(3) TEU. It promotes national constitutional identity, without accepting the constitutional discipline demanded by the

⁴⁵ Case C-208/09, Sayn-Wittgenstein, para 86.

⁴⁶ See for instance Case C-135/08, Janko Rottmann (2009) OJ C 113, 1.5.2010.

⁴⁷ See these matters mentioned in P. Faraguna, ‘Taking Constitutional Identities Away from the Courts’, *Brook. J. Int’l L.* Vol. 41:2. 2016. 491, at 506-508.

⁴⁸ Some critics of the historical constitution even raise the possibility that the Court might consider the Hungarian Jewish laws, first of such acts in Europe as part of it.

⁴⁹ See G. Schweitzer, ‘Fundamental Law – Cardinal Law – Historical Constitution: the Case of Hungary since 2011’, 4 *Journal on European History of Law*, 124-128.

⁵⁰ See I. Császár, B. Majtényi, ‘Hungary: The Historic Constitution as the Place of Memory’, M. Suksi, K. Agapiou-Josephides, J-P. Lehnars, M. Nowak (eds.) *First Fundamental Rights Documents in Europe*, Cambridge: Intersentia, 2015. 57-69.

European legal order⁵¹. This alleged constitutional identity has nothing to do with any of the rules or principles of the Hungarian constitution, therefore it cannot be subject of Article 4(2) TEU, according to which it might not violate EU law if a member state refuses to apply EU law in a situation where a fundamental national constitutional commitment is in play.⁵² This abuse of constitutional identity and constitutional pluralism is nothing but national constitutional parochialism,⁵³ which attempts to abandon the common European constitutional whole. This misuse of constitutional identity for merely nationalistic purposes discredits every genuine and legitimate reference to national constitutional identity claims, and strengthens the calls for an end of constitutional pluralism in the EU altogether, calling for unlimited hierarchy,⁵⁴ in order to avoid to disintegration of the EU as a value community.⁵⁵

⁵¹ This is what Joseph Weiler calls the principle of constitutional tolerance, which lies at the heart of what makes European integration possible. See J.H.H. Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg', in J.H.H. Weiler and M. Wind, *European Constitutionalism Beyond the State*, CUP, 2003.

⁵² See M. Kumm and V. Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union', 3 *ICON*, 473, 491 and 492.

⁵³ See the term used M. Kumm, 'Rethinking Constitutional Authority: On Structure and Limits of Constitutional Pluralism', in M. Avbelj and J. Komárek, *Constitutional Pluralism in the European Union and Beyond*, Hart, 2012. 51.

⁵⁴ See Joseph Weiler arguing that as a check on the hubris of unbound liberty, both of the collective and the individual, the European as any other constitutional order besides pluralism needs hierarchy as well. J.H.H. Weiler, 'Prologue: Global and Pluralist Constitutionalism – Some Doubts', in G. de Búrca and J.H.H. Weiler, *The Worlds of European Constitutionalism*, CUP, 2012. 17.

⁵⁵ In a recent article, Viktor Orbán warned the 'unionist' of the EU, who call for a United States of Europe and mandatory quotas, if they refuse to accept the 'sovereignists' desire for a Europe of free and sovereign nations, who will not hear of quotas of any kind, the mainstream will follow precisely the course that Hungary has set forth to affirm its constitutional affirmation of Christian roots, its demographic policy, and its effort to unify the nation scattered across borders. See V. Orbán, 'Hungary and the Crisis of Europe: Unelected Elites versus People', *National Review*, January 26, 2017.