

# The decline of human dignity and solidarity through the misuse of constitutional identity – the case Hungary

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## Abstract

Dignity and solidarity are interrelated values in a democratic society, but solidarity is challenged in many ways, even in the course of defining the constitutional identity of a closed society and an illiberal democracy.

The chapter reveals on the one hand, how the effective protection of human dignity may trigger the enforcement of social security rights and solidarity. For this purpose, it analyses the more or less good practice of the Hungarian Constitutional Court before 2010, and then against this background assesses the backsliding of solidarity in the post-2010 illiberal regime

The chapter also analyses how the packed Constitutional Court rubberstamped the government’s anti-migration legislation after the 2015 refugee crisis against the EU’s relocation scheme. The Court argued that the planned relocation of asylum seekers can result in violation of their human dignity, and at the same time Hungary’s constitutional identity as an ethnically homogenous country. With this the Court also broke away from its previous liberal jurisprudence, which in the early 1990s had established its concept of human dignity as a ‘mother right’, a subsidiary of all rights in defence of individual autonomy, such as self-identity, self-determination as part of the ‘general personality right’.

The chapter argues that the Constitutional Court misuses the concept of constitutional identity by cynically referring to human dignity and other fundamental rights, and while doing so devastates both social and European solidarity. With this the Court serves the government’s efforts to dismantle constitutional democracy, and to build up an illiberal system with authoritarian tendencies instead.

**Keywords:** human dignity, solidarity, common European constitutional values, constitutional backsliding, constitutional identity, Hungarian constitutional law

## Introduction

The constitutional backsliding in Hungary since 2010 is well-known.<sup>1</sup> The ‘rule by law’ governance and the frequently amended new constitution of 2011 beyond challenging the

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1 M. VARJU and N. CHRONOWSKI, ‘Constitutional backsliding in Hungary’ *TvCR Tijdschrift voor Constitutioneel Recht* 2015/3, juli 296-310., Gábor Attila TÓTH (ed.), *Constitution for a Disunited Nation*, CEU Press, Budapest 2012, B. MAJTÉNYI, ‘The Nation’s Will as Trump in the Hungarian Fundamental Law’ *European Yearbook on Human Rights* 2015, 247–259., A. L. PAP, ‘Constitutional identity? The Hungarian model of illiberal democracy’ In M. S. Fish, G. Gill and M. Petrovic (eds.): *A quarter century of post-communism assessed*, Palgrave Macmillan,

common European values, also reformulated the frameworks of the protection of human dignity and social solidarity. The decline of the standards in this field is spectacular and visible. In the meantime, a new governmental identity politics emerged, visioning an illiberal state, and this development was accompanied with a kind of ‘populist constitutionalism’<sup>2</sup>. The system of ‘national cooperation’ has left behind the vulnerable members of society, homeless people and the refugees, and tries to diminish or cut the solidary actions of the members of Hungarian society. These political attempts step by step became constitutional practice through constitutional amendments and the opportunism of a packed Constitutional Court.

The misuse of constitutional identity cannot be derived from the previous jurisprudence of the Court, which in the early 1990s established its concept of human dignity as ‘mother right’, a subsidiary of all rights in defence of individual autonomy, such as self-identity, self-determination as part of the ‘general right of the individual’. As Catherine Dupré’s book<sup>3</sup> on the import of the concept of human dignity shows, the Hungarian judges first carefully chose the German as a suitable model, and then instrumentalized it through a very activist interpretation of the Hungarian constitution. On that basis, the Court developed its own, autonomous concept of human dignity. The Constitutional Court in the mid 1990’s was even willing to strike down austerity measures for the protection of social rights closely tying them to the protection of equal human dignity. Although social solidarity was underdeveloped societal practice for several reasons, the Constitutional Court strongly committed itself to the protection of human dignity and this way guaranteed a higher profile for social (solidarity) rights, especially in case of social care based on neediness. The first part of the chapter discusses this issue.

Then, as a contrast, the ‘non-solidary’ system of the Hungarian Fundamental Law and the new directions of the constitutional case law will be discussed in the second part. In the constitution of the ‘national cooperation’ social security does not appear as a fundamental right, but merely as something the state “shall strive” for, which is a step backward in comparison with the former Constitution. Social insurance is not a constitutional institution any more. Even in the time of their adaption, the formulation of certain paragraphs of the new constitutions raised serious concerns regarding equal dignity. The member states have a wide margin of appreciation regarding their social security system, thus the rules of the Fundamental Law itself does not

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London 2017, 161-186., Z. SZENTE, F. MANDÁK and Zs. FEJES (eds.), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development: Discussing the New Fundamental Law of Hungary*, Éditions L’Harmattan, Paris 2015, P. SONNEVEND, A. JAKAB and L. CSINK, ‘The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary’ In *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania* (eds. A. von Bogdandy and P. Sonnevend), C.H. Beck – Hart – Nomos, Oxford – Portland, Oregon 2015, A. VINCZE, ‘Wrestling with constitutionalism: the supermajority and the Hungarian Constitutional Court’ (8) *Vienna Journal on International Constitutional Law* 2014/1., N. CHRONOWSKI, *Human rights in a Multilevel Constitutional Area. Global, European and Hungarian Challenges*, L’Harmattan, Paris, 2018, 105-179. G. HALMAI, ‘The Coup Against Constitutional Democracy. The Case of Hungary’, in M. Graber, S. Levinson, M. Tushnet (eds.), *Constitutional Democracy in Crisis?* OUP, 2018., G. HALMAI, ‘The Rise and Fall of Constitutionalism in Hungary’, *Paul Blokker (ed.), Constitutional Acceleration within the European Union and Beyond*, Routledge, 2018.

<sup>2</sup> One of us argues elsewhere that the claim of ‘populist constitutionalism’ by an authoritarian regime, like the current Hungarian is an oxymoron. See G. HALMAI, ‘Populism, Authoritarianism and Constitutionalism’, 20 *German Law Journal*, No. 3. 2019.

<sup>3</sup> C. DUPRÉ, *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity*, Hart Publishing, 2003.

breach the EU law directly, but the new Hungarian constitutional regulation on social security does not guarantee the equal dignity and the former level of property protection. The recent case law of the Constitutional Court reaffirms the initial concerns, the dignity supported social solidarity got lost in the post-democratic and illiberal transitions in the past ten years.

Solidarity *in the European Union* is a common value recognised also by the preamble of the Charter and Articles 2-3 of the TEU, which can be considered as an identity-forming feature, and socially it may serve the supranational community-building.<sup>4</sup> In other articles of the founding treaties ‘mutual solidarity’ and fair sharing of responsibility are presented as principles which determine relations among member states in the domains of external and security policies, and of freedom, security and justice.<sup>5</sup> Solidarity rights – as a separate chapter of the Charter of Fundamental Rights – were codified by the EU Fundamental Rights Convention in 2000 with regard to their close connection to the value of dignity. The principle of social solidarity also appeared in the case law of the CJEU as the foundation of social welfare system,<sup>6</sup> and in a range of judgments in the area of competition and freedom of movement law the principles of solidarity help to determine the proper balance between market principles and social protection objectives in EU law.<sup>7</sup> Solidarity inspires policies and legislation in the field of financials (e.g. ESM), asylum and border management (e.g. refugee relocation), and intra-EU labour mobility.

The solidarity polity of the European Union reaffirmed by law and policies of the institutions will however prevail if member states are loyal to the Union and committed strongly to the principle of solidarity.<sup>8</sup> Unfortunately, in the latest years in Hungary not just the loyal cooperation but also the internal social solidarity was undermined, which imperils the vision of social Europe and supranational solidarity as well.

The government of Viktor Orbán from the very beginning has justified its non-compliance with European values by referring to national sovereignty<sup>9</sup>, and lately – as an immediate reaction to

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<sup>4</sup> J. OTTMANN, ‘The Concept of Solidarity in National and European Law: The Welfare State and the European Social Model’ [2008] 1 *Vienna Journal on International Constitutional Law* – [www.icl-journal.com](http://www.icl-journal.com) 36, 43-44.

<sup>5</sup> See A. W.M. GERRITS, ‘Solidarity and the European Union: From the Welfare State to the Euro Crisis’ <<http://media.leidenuniv.nl/legacy/solidarity-and-the-european-union.pdf>>; “The ‘mutual defence clause’ of Article 42.7 of the TEU requires member states to collaborate in the case of armed aggression; while the ‘Solidarity Clause’, framed in Article 222 of the TFEU, formulates an explicit demand on the member states to come to each other’s assistance in the event of terrorist attacks, natural or man-made disasters.”

<sup>6</sup> A. SOMEK, ‘Solidarity Decomposed. Being and time in European citizenship’ *University of Iowa Legal Studies Research Paper* 07-13, 2007, 4. Available at <[ssrn.com/abstract=987346](http://ssrn.com/abstract=987346)>

<sup>7</sup> A. SANGIOVANNI, ‘Solidarity in the European Union’ *Oxford Journal of Legal Studies* 2013, 1-29., 2.

<sup>8</sup> J. HABERMAS, ‘Democracy, Solidarity and the European Crisis’ In *Roadmap to a Social Europe* (eds. Anne-Marie Grozelier, Björn Hacker, Wolfgang Kowalsky, Jan Machnig, Henning Meyer and Brigitte Unger) 2013, <[http://www.abetterway.ie/download/pdf/roadmap\\_to\\_social\\_europe\\_sej\\_oct\\_2013.pdf#page=9](http://www.abetterway.ie/download/pdf/roadmap_to_social_europe_sej_oct_2013.pdf#page=9)> 11.

<sup>9</sup> 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

the EU's efforts to solve the refugee crisis - to the country's constitutional identity referred to in Article 4 (2) TEU. And the packed Constitutional Court in its decision 22/2016 AB on the interpretation of Article E) (2) of the Fundamental Law rubberstamped this constitutional identity defence of the government. The reason for the Court to change its practice on limited primacy of EU law as well as on human dignity 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 by abandoning its concept of human dignity.

## I. The concept of human dignity and solidarity after 1989 – the Constitution and the Constitutional Court jurisprudence

The Hungarian Constitution of 1989/90 did not expressly lay down the principle of solidarity; however, it contained several rules inspired by some aspects of solidarity. In its practice, the Constitutional Court has invoked the principle of solidarity primarily by interpreting the right to social security and the social security system guaranteeing this right, however, the case law was not coherent in this field. The Constitutional Court was divided and somehow uncertain when the question of social rights and security was tabled. In the two decades of the liberal constitutionalism three approaches characterised the Court in its relation to social rights.<sup>10</sup> In the early 1990's the Constitutional Court represented the idea that social rights merely prescribe state duties, and on that basis the state guarantees certain social allowances to the citizens.<sup>11</sup> That time the Court did not decide clearly whether these duties are just aims for the state or they do implicate subjective individual rights upon which claims may be filed in social matters.<sup>12</sup> However, the Court took the standpoint that "for the period covered with allowance the social insurance care must be guaranteed".<sup>13</sup> Doing so, the case law connected the issue

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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](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>>).

<sup>10</sup> Zs. BALOGH, 'Paradigmaváltás lehetőségei a szociális jogok védelme terén' [Changing paradigm in the field of protection of social rights] *Jogtudományi Közöny* 2005/9, 367., L. SÓLYOM, *Az alkotmánybíráskodás kezdetei Magyarországon*, Osiris, Budapest 2001, 658.; M. LANGFORD, 'Hungary – Social Rights or Market Redivivus?' In *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (ed. M. Langford). Cambridge University Press, Cambridge 2008, 252-260.

<sup>11</sup> CC Decision 32/1991. (VI. 6.) AB, ABH 1991. 147, 163

<sup>12</sup> CC Decision 772/B/1990. AB, ABH 1991. 516, 522. SÓLYOM, op. cit. (n. 10) 663. See e.g. CC Decision 45/1991. (IX. 10.) AB, ABH 1991. 206, 208.

<sup>13</sup> CC Decision 11/1991. (III. 29.) AB, ABH 1991. 34, 35. SÓLYOM, op. cit. (n.10) 663.

with the rule of law principle.<sup>14</sup> The first turning point came in 1995, when the government tried to adopt severe austerity measures to control the increasing public debt.<sup>15</sup> The Constitutional Court refused the economic crisis-argumentation of the government and went into the in-depth analysis of right to social security. A range of decisions dealt with the constitutionality of deprivation from social allowances.<sup>16</sup> The Court created effective constitutional protection without deducing subjective rights; instead, it referred to the principle of legal certainty, the protection of acquired rights and legitimate expectations, the requirement of gradual reduction of allowances and in case of insurance-based social cares the measures of private property protection were applied.<sup>17</sup>

In the third stage the so-called minimum-decisions were adopted, and the Constitutional Court established that the right to social security means a minimum allowance guaranteed by the state through the system of social cares which is *indispensable for human dignity* to prevail. More precisely, the Court ruled that right to social security shall guarantee the minimum livelihood necessary for human life, and this based on the right to life and human dignity.<sup>18</sup> The state shall ensure the protection of right to life and human dignity in the evolvement and operation of the state insurance and social care system. Thus the state is obliged to care for the very essential conditions of human existence – e.g. in case of homelessness the state shall intervene in all situations when the life of a human being is directly in danger.<sup>19</sup> Later the Court ruled that human dignity functionally implies a claim for care.<sup>20</sup>

Although the case law was controversial and uncertain and never reaffirmed clear justiciable and enforceable individual social rights, moreover it accepted even the discretion of the legislation,<sup>21</sup> still, the Constitutional Court triggered social solidarity by introducing a minimum-standard and thus a limitation for the governmental margin of appreciation regarding the level of social care and benefit – this was the right to human life and dignity. In the absence of ‘social justice’ or ‘social state’ principle, the human dignity meant the very core of the social rights and social solidarity in the pre-2010 constitutional order. This guaranteed a minimum level of constitutional protection also to the vulnerable groups beyond the protection of the social interests of the middle-class.

## II. The ‘non-solidary’ system of the Hungarian Fundamental Law of 2011

Although the value of *human dignity* is recognized in the preamble<sup>22</sup> and in Article II of Fundamental Law,<sup>23</sup> the rights connected with the right to life and human dignity might be interpreted restrictively. Just a few examples to highlight, from the point of view of solidarity,

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<sup>14</sup> SÓLYOM, op. cit. (n. 10) 653.

<sup>15</sup> It was the so-called „Bokros-package” after the name of the then minister of public finances, Lajos Bokros.

<sup>16</sup> CC Decision 43/1995. (VI. 30.) AB, ABH 1995. 188.

<sup>17</sup> A. SAJÓ, ‘How the Rule of Law Killed Hungarian Welfare Reform’ 5 *E. Eur. Const. Rev.* 31 (1996)

<sup>18</sup> CC Decision 32/1998. (VI. 25.) AB, ABH 1998, 251, 254.

<sup>19</sup> CC Decision 42/2000. (XI. 8.) AB, ABH 2000, 329.

<sup>20</sup> CC Decision 37/2011. (V. 10.) AB, ABH 2011, 225, 235.

<sup>21</sup> LANGFORD, op. cit. (n. 10) 259.

<sup>22</sup> ‘We hold that human existence is based on human dignity.’

<sup>23</sup> Article II of the FL: ‘Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; embryonic and foetal life shall be subject to protection from the moment of conception.’

why the Fundamental Law constitutes a lower profile than the former Constitution did.<sup>24</sup> Article XIX(3) initially gave reason for concern from the viewpoint of equal dignity, as it contains the new measure of ‘usefulness of activity to the community’, which may be taken into account in deciding on the nature and extent of social aids.

Another rule is contradicting the principle of dignity – and societal solidarity, humanity in wider sense – after the Seventh Amendment of 2018: it is the issue of criminalizing homelessness. Article XXII(3) of the FL reads as follow: ‘Using a public space as a habitual dwelling shall be prohibited.’ The amendment overrode a former decision of the Constitutional Court on the Misdemeanour Act,<sup>25</sup> in which the Court stated that the punishment of unavoidable living in a public area fails to meet the requirement of the protection of human dignity. Right after the Seventh Amendment the Misdemeanour Act was also modified, and introduced the regulatory offence of habitual dwelling on a public place accompanied with a humiliating procedure: police officers are empowered to order homeless people into shelters and can arrest them if they disobey after being ordered three times in a 90-day period. Punishments include jail, community service and their possessions being destroyed (also pets are taken away).<sup>26</sup> Five judges from different courts of first instance challenged this piece of legislation before the Constitutional Court from October 2018 and in the upcoming months, stating that the new regulation infringes human dignity, legal certainty, right to fair trial and personal liberty etc. The Constitutional Court has published its shocking decision in early June 2019,<sup>27</sup> and declared that the criminalization and imprisonment of homeless people is in line with the FL.<sup>28</sup> According to the majority decision: “ (...) nobody has the right to poverty and homelessness, this condition is not part of the right to human dignity,” which means that people living in neediness or at streets shall not be protected by the right to human dignity, they do not share the value of equal dignity. Nine constitutional court justices think that homeless persons shall be punished if they do not cooperate with the state – by which they were left behind earlier, when the same state missed to fulfil its obligation for social care. These justices state that the enjoyment of fundamental rights is dependent on the fulfilment of constitutional duties of the person, which characterised the state-socialist (i.e. totalitarian) rights regime before 1989. The majority holds that, “according to the Fundamental Law, human dignity is the dignity of an individual *living in a society and bearing the responsibility of social co-existence*.” This attitude establishes the misuse of solidarity, and it means a complete disruption with the dignity-interpretation of 1990’s, the core of which was that a person’s dignity was inviolable irrespective of development or conditions, or fulfilment of human potential. Based on these most important fundamental

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<sup>24</sup> For the former case law see C. DUPRÉ, ‘The Right to Human Dignity in the Hungarian Constitutional Case Law’ In *The Principle of Respect for Human Dignity*, Council of Europe, Strasbourg 1999, 68-79.

<sup>25</sup> CC Decision 38/2012. (XI. 14.) AB, see the press release here: <<https://hunconcourt.hu/announcement/provisions-of-the-act-on-contraventions-criminalizing-people-living-at-public-areas-permanently-are-against-fundamental-law/>>.

<sup>26</sup> New Hungary law bans rough sleepers, rights groups complain, Reuters, October 15, 2018 <<https://www.reuters.com/article/us-hungary-homeless/new-hungary-law-bans-rough-sleepers-rights-groups-complain-idUSKCN1MPIEB>>.

<sup>27</sup> CC Decision III/1628/2018. AB, not yet available in English.

<sup>28</sup> Streetlawyer Association: The Constitutional Court has made an inhumane decision on the confinement of homeless people, <<https://utcajogasz.hu/en/resources/misdemeanour-cases/the-constitutional-court-has-made-an-inhumane-decision-on-the-confinement-of-homeless-people/>>

rights which formed the foundation of a person's legal status, the Constitution did not permit the revocation or restriction of any part of the legal position already attained by a human being.<sup>29</sup> The Seventh Amendment constitutionalised the Orbán-government's anti-immigration policy, which is undermining again the value of dignity, (international and societal) solidarity and humanity as well. According to article XIV of the FL, 'No foreign population shall be settled in Hungary. [...] A non-Hungarian national shall not be entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution.' The political context of these measures is the increasing hostility towards refugees and domestic civilians (NGOs) helping them, which was triggered by the government.<sup>30</sup> We discuss this issue in the third part of the chapter.

As to the traditional social solidarity,<sup>31</sup> the FL does not contain either the protection in the event of unjustified dismissal<sup>32</sup>, or any guarantees to reconcile family and professional life. Article XVII(2) of the FL refers to the protection of parents in the workplace, but the level of this protection depends on the measures adopted by the State, thus it is not a fundamental right.

Social security does not appear as a fundamental right in the FL, but merely as something the State "shall strive" for, thus it only appears to be a state goal. Already before the entering into force of the Fundamental Law, the former Constitution was amended in order to create constitutional basis for changing pension system and get rid of early retirement benefits.<sup>33</sup> In Article XIX(1) of Fundamental Law among the titles to statutory subsidies (within the group of people in need) old age is not listed; it appears separately from the categories of neediness, in paragraph (4). Social insurance does not appear as a constitutional institution, instead, in Article XIX(2) the expression 'a system of social institutions and measures' is used as the means of achieving the defined state goal. The paragraph (3) of Article XIX raises serious concerns as it refers to uncertain measures: 'The nature and extent of social measures may be determined by law in accordance with the usefulness to the community of the beneficiary's activity.' What is useful to the community and who decides on the usefulness in certain cases? Might the social support be withheld in the absence of "useful activity" on this constitutional bases, even if the person concerned is needy and the cause of the situation falls outside his or her own fault? The principle of "self-responsibility" stipulated in Article O) is also weakened by the regulation of the Fundamental Law relating to social security, especially by the obligation of the State to maintain a general state pension system based on social solidarity. As a basis for the state pension system (as a constitutional institution) the Fundamental Law specifies exclusively social solidarity, although the system is based on individual financial contribution, thus the right

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<sup>29</sup> This position of the Constitutional Court has first been formulated in its decision 23/1990 AB on the death penalty, and again in decision 64/1991 AB on abortion. See for instance the summary of the later decision: [http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1991-s-003?fn=document-frameset.htm\\$f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1991-s-003?fn=document-frameset.htm$f=templates$3.0)

<sup>30</sup> G. HALMAI, 'Hungary's Anti-European Immigration Laws' at <<http://www.iwm.at/transit/transit-online/hungarys-anti-european-immigration-laws/>> on 4.11.2015.

<sup>31</sup> CHRONOWSKI, 'Human rights...' (n. 1) 190-206.

<sup>32</sup> It is no surprise. Until 31 May 2011 the government officers and until 7 April 2011 the public servants were dismissed without reasoning, by this time annulled the Constitutional Court the challenged laws. See CC Decision 8/2011. (II. 18.) AB and 29/2011. (IV. 7.) AB. Later the European Court of Justice ruled that Hungary violated the Convention when enabled layoff without reasoning, *K.M.C. v. Hungary*, Judgment of 10 July 2012.

<sup>33</sup> Act LXI of 2011 (published on 14 June 2011).

to property,<sup>34</sup> and the principle of individual responsibility should also be guaranteed. The member states has a wide margin of appreciation regarding their social security system, but it is worth to mention that the Hungarian constitutional regulation on social security initially does not properly guarantee the equal dignity and the property protection, which is unfortunately reaffirmed by the case law of the Constitutional Court in the past years.

The Constitutional Court recognised in 2012 that the Fundamental Law completely abandoned the approach of the former Constitution on right to social security, thus found necessary to distinguish and overrule the former case law. The Court emphasized that no fundamental rights are provided by the new constitutional regulation on social security, instead, only state duties and aims are prescribed in Article XIX.<sup>35</sup> This article mentions rights just in two cases, first the right to state pension of the elderly prescribed by law, and second the right to statutory subsidies in certain situations (maternity, illness, disability, handicap, widowhood, orphanage and unemployment for reasons outside of his or her control). These are far not enforceable right, their protection depends on the opportunities and economic situation of the state.<sup>36</sup> On the basis of the amendment to the former Constitution in 2011 and the new constitutional environment the Court found legitimate and just that the government reconstructed the system of early retirement, substituted the pensions with aids and allowances, which are completely ex gratia subsidies thus not even fall under the protection of private property. The constitutional protection of property is applicable to those social subsidies in the future where individual financial contribution justifies it. The ex gratia subsidies are subject to the legislative discretion thus they are not protected as fundamental or constitutional rights – the only criterion that they cannot based on arbitrary decision.<sup>37</sup> From the argumentation of the Court references to human dignity or social solidarity have totally disappeared.

The level of protection of the social rights may be reduced by the state, argues the Court, and the state duties are restricted to – on the one hand – the establishment of an institutional system in which the constitutional rights may prevail, and – on the other – the statutory rights shall be outlined for the access to the social institutions. The Court noted that the Fundamental Law just reaffirmed the limited economic capacity of the state and respected the fact that the former welfare model was unsustainable.<sup>38</sup> However, some kind of constitutional protection is still not excluded, because the certain situations enumerated by the Fundamental Law – although do not generate subjective, justiciable fundamental rights but – create ‘constitutional background’ to the statutory rights.<sup>39</sup>

Civilized constitutional democracies recognised that individuals are not equal just in their civil and political rights but also in their risks on the basis of equal dignity. While the formal belonging together of a political community finds expression in citizenship, interdependence caused by personal and individual neediness and risk are manifested in social rights and

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<sup>34</sup> Cf. the first sentence of Article XIII(1) of the FL: ‘Every person shall have the right to property and inheritance.’

<sup>35</sup> CC Decision 40/2012. (XII. 6.) AB, 9/2016. (IV. 6.) AB.

<sup>36</sup> CC Decision 28/2015. (IX. 24.) AB.

<sup>37</sup> CC Decision 32/2015. (XI. 19.) AB, reasoning [32], CC Decision 25/2016. (XII. 21.) AB, reasoning [24]

<sup>38</sup> CC Decision 25/2016. (XII. 21.) AB, reasoning [21]

<sup>39</sup> CC Decision 28/2015. (IX. 24.) AB, reasoning [34]



institutions. The Hungarian constitutional system and its actors do not recognise this, and they leave the vulnerable groups of the society unprotected.

### **III. The migration crisis as a challenge of European solidarity – the Hungarian reaction**

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’. The government sent out eight million questionnaires to the voting-age population, with questions, like these: “Do you agree that mistaken immigration policies contribute to the spread of terrorism? 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?”

In the Summer of 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 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). 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 entitled 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.

In June 2016, as part of the Hungarian government’s anti-migration policy the National Assembly representatives of 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*).<sup>40</sup> In March 2017, the Hungarian Parliament passed an amendment to the Asylum Act that forced all asylum seekers into guarded detention camps. 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<sup>41</sup>.

With these legislative measures adopted, the government started a campaign against the EU’s relocation plan. 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), the referendum was invalid because the turnout was only around 40 percent, instead of the required 50 percent.<sup>42</sup>

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 politically legitimise non-compliance with EU law in this area. The draft amendment touched upon the National Avowal, the Europe clause and the provision on the interpretation of the Fundamental law in the Foundation part, and the provision on prohibition of expulsion of Hungarian citizens and the collective expulsion of foreigners in the part on Freedoms and Responsibilities.<sup>43</sup>

The proposal was to add a new sentence to the National Avowal, 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 new sentence would read: “We hold that the defence of our constitutional self-identity, which is rooted in our historical constitution, is the fundamental responsibility of the state.”

Paragraph 2 of the Europe clause (Article E) of the Fundamental Law would be amended to read: “Hungary, as a Member State of the European Union and in accordance with the

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<sup>40</sup> See to this Renáta UITZ: ‘Hungary’s attempt to manage threats of terror through a constitutional amendment’ *Constitutionnet* 28 April 2016 <[www.constitutionnet.org/news/hungarys-attempt-manage-threats-terror-through-constitutional-amendment](http://www.constitutionnet.org/news/hungarys-attempt-manage-threats-terror-through-constitutional-amendment)>

<sup>41</sup> On 14 March 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 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 Chamber judgment 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 (Judgment of 14 March 2017 in the case of Ilias and Ahmed v. Hungary, Application no. 47287/15). 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.

<sup>42</sup> Zoltán SZENTE: The Controversial Anti-Migrant Referendum in Hungary is Invalid. *Constitutional Change* 11 October 2016 <[constitutional-change.com/the-controversial-anti-migrant-referendum-in-hungary-is-invalid/](http://constitutional-change.com/the-controversial-anti-migrant-referendum-in-hungary-is-invalid/)>

<sup>43</sup> The National Avowal is the preamble of the 2011 Fundamental Law of Hungary, the Foundation part contains the main principles, while the Rights and Responsibilities part contains the fundamental rights and obligations.

international treaty, will act sufficiently in accordance with 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, the state, or its inalienable rights.*” (new sentence in italics)

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

The following new Paragraph 1 was planned to be added to Article XIV: “(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”.

All 131 MPs of the Fidesz-KDNP governing coalition voted in favour of the proposed amendment, while all 69 opposition MPs 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 residence in Hungary to citizens of foreign countries who purchase 300,000 euros in government ‘residency bonds’, be repealed.<sup>44</sup>

After the April, 2018 parliamentary elections, when Fidesz regained its 2/3 majority, on 20 June the government finally enacted the *Seventh Amendment*, this time with the votes of Jobbik. The most important issue of the amendment is still the continued struggle against immigration by forbidding settlement of foreigners in the country en masse: “No alien population shall be settled in Hungary”. (New Article XIV Section (1) of the Fundamental Law). For this reason, the ‘Stop Soros’ legislative package, named after Hungarian-American philanthropist George Soros enacted together with the amendment criminalizes NGOs and activists aiding ‘illegal migrants in any way.’<sup>45</sup> According to Justice Minister László Trócsányi migration threatens the ‘self-identity’ of Hungarians the Seventh Amendment supplemented the preamble of the constitution, called National Avowal with the following text: “We hold that it is a fundamental

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<sup>44</sup> During the vote on the amendment, Jobbik MPs displayed a sign referring to the program reading “He [or she] Is a Traitor Who Lets in Terrorists for Money!”

<sup>45</sup> In its Opinion, adopted on 22-23 June, two days after the enactment of the ‘Stop Soros’ bill, but leaked to the BBC prior to the vote in the Hungarian Parliament the Council of Europe’s Venice Commission recommended to repeal the provision of the law on illegal migration, because it „criminalizes organizational activities which are not directly related to the materialization of the illegal migration.” CDL-AD(2018)013-e Hungary - Joint Opinion on the Provisions of the so-called “Stop Soros” draft Legislative Package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018).

obligation of the state to protect our self-identity rooted in our historical constitution.<sup>46</sup> Also Article R was supplemented with the following Section (4): “All bodies of the State shall protect the constitutional identity of Hungary.” In order to make any further European Union joint effort, similar to the relocation plan of the Council to solve the migration constitutionally questionable Section (2) of Article E (the so-called EU clause) was replaced with the following wording: the joint exercise of certain powers with the EU “shall not limit Hungary’s inalienable right of disposal related to its territorial integrity, population, form of government and governmental organisation.”

The original provision of Article R Section (3) already prescribed that “The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievement of our historical constitution.” Due to the Seventh Amendment the constitutional self-identity and the Christian culture of Hungary will already be a binding element of constitutional interpretation, but the new text of Article 28 commits the courts to use of the legal reasoning of laws and their amendments. Since it isn’t the legislature itself, but the initiator of bills, in most of the cases the government who encloses reasoning to the drafts, their reasoning binds the courts while interpreting the Fundamental Law.

The Amendment added another element to the text, which also meant to be part of Hungary’s constitutional identity, namely about the Christian culture. This new provision reads: “The protection of Hungary’s self-identity and its Christian culture is the duty of all state organizations.”

The purpose of the proposed provision was questioned at the preparatory meeting of the judicial committee by members of opposition parties. The only explanation MPs of the governing Fidesz party, who initiated the new text were able to provide was a paraphrase of an alleged sentence by Robert Schuman, founding father of the European Union: “Without Christian culture there is neither Europe nor Hungary.” The major points of the recent constitutional amendment, namely the criminalization of any civil assistance to refugees and the declaration of homelessness as an unlawful behaviour are deeply contradictory to the very idea of Christian culture.

The refugee crisis of 2015 has demonstrated the intolerance of the Hungarian governmental majority, which styled itself as the defender of Europe’s ‘Christian civilization’ against an Islamic invasion. In the beginning of the crisis, Prime Minister Viktor Orbán claimed that “Christian culture is the unifying force of the nation... [and] Hungary will either be Christian or not at all.”<sup>47</sup> In another speech held in early September, Orbán went further by stating that: “The Christian-national idea and mentality will regain its dominance not just in Hungary but in the whole of Europe.” This new era should follow ‘the age of liberal blah blah,’ because the origin of the mass migration and the consequent refugee crisis is ‘the crisis of liberal identity’:

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<sup>46</sup> The Hungarian historical constitution did not follow the English example, which was the model of an organic, progressively reformed basic law, but its dominant approach was rather authoritarian.

<sup>47</sup> Orbán’s speech in Debrecen on 18 May 2015. [http://index.hu/belfold/2015/05/18/orban\\_magyarorszag\\_kereszteny\\_lesz\\_vagy\\_nem\\_lesz/#](http://index.hu/belfold/2015/05/18/orban_magyarorszag_kereszteny_lesz_vagy_nem_lesz/#)

“For years we have told them that 'the world is a global village' ... we have talked about universal human rights to which everybody is entitled to. We forced our ideology on them: freedom is the most important thing, we said. We bombed the hell out of those who didn't accept our ideology.... We created the Internet, we declared the freedom of information, and we told them that every human being should have access to it. We sent them our soap operas. They watch what we do.... We sent our TV stars into their homes.... they now think that our virtual space is also their space and that in this virtual space everybody can meet anybody else. ... These people, partly because of our culture lent to them or forced upon them, are no longer tied to their own land and to their past.”<sup>48</sup>

But should the alleged defense of Christianity from the ‘Muslim hordes’ be taken seriously? In a speech on 26 July 2012 Orbán explains why authoritarianism is needed to treat Hungarians: ‘*Joining forces is not a matter of intentions, but of sheer force. With a half-Asian lot such as ours, there is no other way* [than compulsion or force – G.H.]’<sup>49</sup> This assessment is very similar to that of the late Imre Kertész, the Nobel laureate in literature, who argued that Hungary's ill-fate stemmed from its inability to choose between Asia and Western Europe.<sup>50</sup> Historically in Hungary, the bloody conflicts of the Reformation meant that until the Horthy era no church could fully identify itself with the Hungarian nation. Although the Catholic Church dominated the Protestants, both numerically and politically, the Catholic Church still played little historical role in preserving national consciousness, so that Catholicism has never become equated with Hungarian patriotism. Under communism, the Roman Catholic church neither served as a symbol of national independence, nor as a source of protection for the opposition, as it happened in Poland.<sup>51</sup>

Christianity and religion serve as reference points that Orbán’s right wing populism uses opportunistically. Fidesz, that used to be a liberal party with a militantly anti-clerical views, has started to become conservative from the mid-90s, turning to an openly positive stance towards religion. Still, religion has never been taken as significant part of its identity, rather played a purely instrumental, opportunistic role in the party’s political strategy (even after joining the European People’s Party (EPP), the center-right party family of the European Parliament,<sup>52</sup> Fidesz uses religious symbols in an eclectic way in which references to Christianity are often mentioned together with the pre-Christian pagan traditions. This refers to the idea of ‘two Hungary’s’: the Western Christian, and the Eastern pagan, tribal one.<sup>53</sup> Orbán once voiced his conviction that the Turul bird, a symbol of ancient pre-Christian Hungarians, ‘the symbol of

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<sup>48</sup> Speech in Kötése on 5 September 2015. <https://vastagbor.atlatszo.hu/2015/09/17/a-vagatlan-kotcsei-beszed/>

<sup>49</sup> See B. SZABÓ, 'Félázsiai származékoknál, mint mi, csak így megy' [*With a half-Asian lot such as ours, there is no other way*], *Népszabadság*, 27 July 2012.

<sup>50</sup> 'La Hongrie est une fatalité', *Le Monde*, 10 February 2012.

<sup>51</sup> A. GRZYMALA-BUSSE, Whither Eastern Europe? Changing Political Science Perspectives on the Region. Studying Religion and Politics in East Central Europe, University of Michigan, 5 December 2013, <http://users.clas.ufl.edu/bernhard/whitherpapers/Florida%20workshop%20ECE.pdf>

<sup>52</sup> Only 22% of Fidesz voters are followers of churches, and the same percentage of them consider themselves as explicitly non-religious. Political Capital Institute’s research, Budapest, 2012.

<sup>53</sup> See A. BOZÓKI and Z. ÁDÁM, State and Faith: Right-wing Populism and Nationalized Religion in Hungary, *East European Journal of Society and Politics*, 2016/1.

national identity of living,<sup>54</sup> is the image Hungarians are born in. Fidesz interprets this pre-Christianity within the framework of nationalism, and this ethno-nationalism provides sufficient basis of political identification as a type of surrogate-religion. In this respect Fidesz follows the authoritarian traditions of the Horthy regime between the two World Wars, in which the nation-religion ('nemzetvallás') played a crucial role. Another example of Christianity being instrumental for Orbán is the fact that when he listed the illiberal regimes he admires from Singapore through China, Turkey, India, Singapore, and Russia all of them are either non-Christian or Orthodox.

The Seventh amendment to the Fundamental Law of Hungary with the state's obligation to protect Christian culture – besides its potential to limit fundamental rights – strengthens the role of religion to constitutionally legitimize the concept of ethnic nation. In this concept the nation, as subject of the Fundamental Law isn't just the community of ethnic Hungarians, but is also a Christian community, which means that those who do not associate themselves with Christianity, can feel themselves excluded from the nation as well. In this constitutional order the state is not necessarily obliged to tolerate all religions, and the representatives of the Christian religion can feel themselves entitled to be intolerant towards the representatives of other religions.

#### **IV. The misuse of constitutional identity and human dignity**

After the failed constitutional amendment in 2016, the Constitutional Court, loyal to the government, came to the rescue of Orbán's constitutional identity defence of its policies on migration. The Court carved out an abandoned<sup>55</sup> petition of the also loyal Commissioner for Fundamental Rights (hereinafter: Commissioner), filed a year earlier, before the referendum was initiated. In his motion, the Commissioner asked the Court to deliver an abstract interpretation of the Fundamental Law in connection with the Council Decision 2015/1601 of 22 September 2015<sup>56</sup>.

In its decision 22/2016 (XII. 5.) AB,<sup>57</sup> the Court argues that the protection of constitutional identity is based on Article 4 (2) TEU and on "an – informal cooperation with the ECJ based

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<sup>54</sup> 'Minden magyar a turulba születik' [All Hungarian Are Born Into the Turul Bird], *Népszabadság*, Sept. 29, 2012.

<sup>55</sup> The Constitutional Court has no deadline to decide on petitions.

<sup>56</sup> The petition was based on Section 38 para. (1) of the Act CLI of 2011 on the Constitutional Court, which reads: "On the petition of Parliament or its standing committee, the President of the Republic, the Government, or the Commissioner of the Fundamental Rights, the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a concrete constitutional issue, provided that the interpretation can be directly deduced from the Fundamental Law".

<sup>57</sup> The English translation of the decision is available at the homepage of the Constitutional Court: <[https://hunconcourt.hu/uploads/sites/3/2017/11/en\\_22\\_2016.pdf](https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf)>. The citations are from this translation. See a more detailed analysis of the decision: G. HALMAI, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law', *Review of Central and East European Law*, 43 (2018), 23-42. The decision was also harshly criticized in the Hungarian legal literature, see

on the principles of equality and collegiality, with mutual respect to each other”.<sup>58</sup> The Court “interprets the concept of constitutional identity as Hungary’s self-identity and it unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Article R) (3) of the Fundamental Law”.<sup>59</sup> The Court held that “the constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today – can be highlighted as examples: freedoms, the division of powers, republic as the form of government, respect of autonomy under public law, freedom of religion, the exercise of lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us”.<sup>60</sup> According to the Court these are achievement of the Hungarian historical constitution on which the legal system rests.

The Court held that “the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law, consequently constitutional identity cannot be waived by way of an international treaty.”<sup>61</sup> Therefore, the Court argued, “the protection of the constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State.”<sup>62</sup> Because sovereignty and constitutional identity are in contact with each other in many points, “their control should be performed with due regard to each other in specific cases.”<sup>63</sup>

Based on the above, the Court answered the question of the transfer of third country nationals in the context of the EU in the framework of this abstract constitutional interpretation as follows: “If human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution can be presumed to be violated due to the exercise of competences based on Article E) (2) of the Fundamental Law, the Constitutional Court may examine, on the basis of a relevant petition, in the course of exercising its competences, the existence of the alleged violation”.<sup>64</sup> And this very sentence is also the holdings (dictum) of the judgement, which stands at the very beginning of the decision.

Viktor Orbán’s first jubilant reaction in an interview given to the Hungarian Public Radio shows how enthusiastic he was that the Court has helped the government’s wishes 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

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e.g. Nóra Chronowski and Attila Vincze, ‘Önazonosság és európai integráció – Az Alkotmánybíróság az identitáskeresés útján’ *Jogtudományi Közöny* 3 (2017) 117-132.

<sup>58</sup> *Ibid.* [63]

<sup>59</sup> *Ibid.* [64]

<sup>60</sup> *Ibid.* [65]

<sup>61</sup> *Ibid.* [67]

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.* [69]

up for Hungary's constitutional identity<sup>65</sup>. 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".<sup>66</sup> The next sign of the 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.”<sup>67</sup> On 5 March a newspaper reported on Hungary's shameful treatment of asylum seekers, including severe beatings with batons and the use of attack dogs.<sup>68</sup> Between August 2018 and March 2019 the European Court of Human Rights – upon the claim of the Hungarian Helsinki Committee - granted in eight cases interim measures (emergency orders) to prevent people in detention in the transit zones from starvation by the Hungarian authorities.<sup>69</sup>

The Constitutional Court in its decision 3/2019. (III. 7.) AB also decided about the constitutionality of certain elements of the Stop Soros legislative package, and ruled that the criminalization of 'facilitating illegal immigration' does not violate the Fundamental Law. The Court again refers to the constitutional requirement to protect Hungary's sovereignty and constitutional identity to justify this clear violation of freedom of association, freedom of expression hiding behind the alleged obligation to protect Schengen borders against 'masses entering uncontrollably and illegitimately' the EU<sup>70</sup>. Besides infringing the rights of the NGOs, the decision deprives all asylum seekers of the protection of all fundamental rights by stating that „the fundamental rights protection ... clearly does not cover the persons arrived in the territory of Hungary through any country where he or she had not been persecuted or directly threatened with persecution. Therefore, the requirements set forth by Article I Paragraph (3) of the Fundamental Law regarding the restriction of fundamental rights shall not be applied to the regulation of the above listed cases”<sup>71</sup>. With this the Court denies the core of human dignity: the right to have rights.

## Conclusion

The illiberal Hungarian turn and the afterwards constitutional developments of the last decade enable us to learn what happens if a packed Constitutional Court becomes the servant of a non-solidary governmental societal policy. The recent case law of the Hungarian Constitutional Court reaffirms the initial concerns, that solidarity supported by human dignity got lost in

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<sup>65</sup> In the context of the Constitutional Court's decision it is clear that the Prime Minister was not merely referring to the possibility of the government bringing proceeding before the ECJ, but to the Court's established power to declare the EU law inapplicable.

<sup>66</sup> [http://hvg.hu/itthon/20161202\\_Orban\\_beszed\\_pentek\\_reggel](http://hvg.hu/itthon/20161202_Orban_beszed_pentek_reggel)

<sup>67</sup> Speech delivered on 28 February 2017 at the annual gathering of the Hungarian Chamber of Commerce. See Éva S. BALOGH, 'Viktor Orbán's 'ethnically homogeneous Hungary'', Hungarian Spectrum, March 3, 2017. <http://hungarianspectrum.org/2017/03/01/viktor-orbans-ethnically-homogeneous-hungary/>

<sup>68</sup> 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>

<sup>69</sup> Hungarian Helsinki Committee: Hungary Continues to Starve Detainees in the Transit Zones, <https://www.helsinki.hu/wp-content/uploads/Starvation-2019.pdf>

<sup>70</sup> Para [43] of 3/2019. (III. 7.) AB.

<sup>71</sup> *Ibid.* [49].



illiberal transition. Vulnerable groups – people living in deep poverty, homeless people, refugees – cannot rely on the protection of their dignity.

In a deeply divided and disunited, non-solidary society – such as the Hungarian<sup>72</sup> – it would be extremely important to build on the common European societal values – pluralism, non-discrimination, tolerance, justice, solidarity and equality as enumerated in Article 2 TEU – in constitutional identity-forming.

When the Hungarian Constitutional Court protects Hungary's constitutional identity, using the pretext of protecting the rights of the asylum seekers against collective expulsion, but at the same time denying their basic rights, and aiming at not taking part in the joint European solution of the refugee crisis<sup>73</sup>, it does so in a way that is inconsistent with the requirement of sincere cooperation of Article 4(3) TEU. It promotes national constitutional identity, without accepting the constitutional discipline demanded by the European legal order<sup>74</sup>. The reference to national constitutional identity of Article 4 (2) is legitimate only, if the Member State refuses to apply EU law in a situation where a fundamental national constitutional commitment is in play.<sup>75</sup> The Hungarian abuse of constitutional identity is nothing but national constitutional parochialism,<sup>76</sup> which attempts to abandon the common European constitutional whole, including human dignity referred to in Article 2 TEU.

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<sup>72</sup> In Hungary the Kádár era was favourable for achieving modest individual prosperity and influenced public atmosphere in the direction of self-interest pursuing behaviour. As a result of these circumstances, there was a lower level of social solidarity in Hungary even right after the democratic transition, than in other post-socialist countries with a similar line of development. On the other hand, there is a high demand for government intervention and high expectation of solutions of redistribution, in many cases without the recognition of the justified need for readiness to individual sacrifice. The reactions of the Orbán-governments to the financial and refugee crisis, the 'welfare for the wealthy' social policy measures after 2010 deteriorated further the solidarity. These features may serve as explanation to the question why solidarity as a constitutional value has such a low impact on the actual state of reality in Hungary. See also: Dorottya SZIKRA, 'Welfare for the Wealthy. The Social Policy of the Orbán-regime, 2010-2017' Analysis, Friedrich Ebert Stiftung, 2018. [https://www.researchgate.net/publication/323880087\\_Welfare\\_for\\_the\\_Wealthy\\_The\\_Social\\_Policy\\_of\\_the\\_Orban-regime\\_2010-2017](https://www.researchgate.net/publication/323880087_Welfare_for_the_Wealthy_The_Social_Policy_of_the_Orban-regime_2010-2017)

<sup>73</sup> In an 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.

<sup>74</sup> 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.

<sup>75</sup> 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.

<sup>76</sup> 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.