The Fundamental Law of Hungary and the European Constitutional Values

by Gábor Halmai

Abstract: La legge fondamentale dell'Ungheria e i valori costituzionali europei – This article deals with the backsliding of liberal democracy in Hungary, after the 2011 new constitution, called the Fundamental Law, and also with the ways in which the European Union has coped with the deviations from the shared values of rule of law and democracy in one of its Member States. The article argues that during the fight over the compliance with the core values of the EU pronounced in Article 2 TEU with the Hungarian government, the EU institutions so far have proven incapable of enforcing compliance, which has considerably undermined not only the legitimacy of the Commission but also that of the entire rule-of-law oversight.

Keywords: Fundamental Law of Hungary; Article 2 and 7 TEU; democratic backsliding; rule-of-law mechanism; constitutional identity.

1. Introduction

In this paper, I deal with recent deviations from the shared values of rule of law and democracy—the 'basic structure' of Europe—in Hungary. The starting point of deviation is Article 2 of the Treaty of the European Union, which demands "respect for human dignity, freedom, democracy, equality, rule of law and [...] human rights including the rights of minorities". The principles of Article 2 TEU are elaborated for candidate countries of the EU in the Copenhagen criteria, laid down in the decision by the European Council of 21 and 22 June 1993, to provide the prospect of accession for transitioning countries that still had to overcome authoritarian traditions. The Treaty on the European Union sets out the conditions (Article 49) and principles (Article 6(1)) to which any country wishing to become an EU member must conform. Regarding constitutional democracy, the political criteria are decisive: stability of institutions guaranteeing democracy; the rule of law; human rights; and respect for, and protection, of minorities. This was the main instrument, which governed the largest enlargement in the Union's history: starting in 2004 with ten new Member States, mostly from the former communist countries, followed by the accession of Romania and Bulgaria in 2007,

and concluded by the admission of Croatia in 2013[1]. As Dimitry Kochenov argues, the assessment of democracy and the rule of law criteria during this enlargement was not really full, consistent and impartial, and the threshold to meet the criteria was very low. As a result, the Commission failed to establish a link between the actual stage of reform in the candidate countries and the acknowledgement that the Copenhagen political criteria had been met[2]. It happened only after Croatia's accession that the European Commission suggested various adjustments to the negotiation procedure[3]. But not only the conditionality requirements were not taken seriously, but their maintenance was also missing after accession[4]. The only time the EU expressed some doubts and extended the validity of pre-accession values-promotion in the form of a post-accession monitoring was the so-called Cooperation and Verification Mechanism applicable to Bulgaria and Romania, which remained in force even after they became full members[5]. During the 2012 Romanian constitutional crisis, the Commission successfully used the fact that the Mechanism had been expected to be discontinued in the middle of the crisis as leverage[6].

The weakness of the Copenhagen criteria and the lack of their application after accession caused a discrepancy between EU accession conditions and membership obligations, which might be one of the reasons for non-compliance after accession in some of the new Member States. The other reason is certainly the authoritarian past of the new democracies. Even though the immediate cause might have been the Austrian 'Haider affair'[7], as Wojciech Sadurski rightly argues, the Central and Eastern European applicants' history was the main reason why

[1] The Croatian enlargement was somewhat specials, as it was part of the EU's Stabilization and Association Policy and the conditionality was different as well. Inter alia it included the collaboration with the ICTY.

[2] D. Kochenov, *Behind the Copenhagen façade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law*, in *European Integration online Papers* (EIoP) Vol. 8 (2004) N° 10; eiop.or.at/eiop/pdf/2004-010.pdf. Last visited on 28 April, 2017.

[3] See Ch Hillion, *Enlarging the European Union and Deepening Its Fundamental Rights Protection*, in *European Policy Analysis*, June Issue 2013. 6.

[4] About the so-called 'Copenhagen dilemma' see C. Closa, R*einforcing EU Monitoring of the Rule of Law*, in Closa, Carlos and Kochenov, Dimitry (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016. 15-35.

[5] M. Vachudova and A. Spendzharova, Aneta, *The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession*", in 1 *SIEPS European Policy Analysis*, 2012.

[6] See *Á. Bátori, Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU*, in *Public Administration*, 2016. 10.

[7] In 2000, the far right Freedom Party headed by Jörg Haider became the coalition partner of the centre-right government, which led to unilateral measures by the Member States against Austria. But this action has left the Member States and the Union institutions extremely reluctant to use similar mechanisms. As the "report of the three wise men" mentions, the measures taken were perceived by the Austrian public as politically motivated sanctions by foreign governments against the Austrian population and therefore fostered nationalist sentiments. For a detailed analysis of the genesis of Article 7 see F. Hoffmeister, *Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?*, in A. von Bogdandy, and P. Sonnevend, *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, Hart Publishing , 2015. 202-205).

Article 7 TEU was revised in the Treaty of Nice. This new provision made it possible to react not only to a serious and persistent breach by a Member State of principles mentioned in then-Article 6(1) TEU, but also when there is a 'clear risk' thereof.[8]

The weakening of liberal constitutional democracy in Hungary has started after the landslide victory of the centre-right Fidesz party in the 2010 parliamentary elections.

2. The "Constitutional Counter-Revolution" after 2010

Hungary was one of the first and most thorough political transitions, which provided all the institutional elements of constitutionalism: checks and balances and guaranteed fundamental rights. Hungary also represents the first, and probably model case, of constitutional backsliding from a full-fledged liberal democratic system to an illiberal one with strong authoritarian elements.

The seriousness of the core values of the EU can be examined through Hungary's deliberate non-compliance with the principles of constitutional democracy, because it has not yet received significant sanctioning externally nor substantial internal opposition. Therefore, the case has broader implications for Europe and it even has current resonance in some other, especially, the former communist countries of the region.

The characteristic of system change that Hungary shared with other transitioning countries was that it had to establish an independent nation-state, a civil society, a private economy, and a democratic structure all together at the same time.[9] Plans for transforming the Stalin-inspired 1949 Rákosi Constitution into a 'rule of law' document were delineated in the National Roundtable Talks of 1989 by participants of the Opposition Roundtable and representatives of the state party. Afterwards, the illegitimate Parliament only rubberstamped the comprehensive amendment to the Constitution, which went into effect on 23 October, 1990, the anniversary of the 1956 revolution, and which was the basic document of the 'constitutional revolution' until 1 January 2012.

Before the 2010 elections, most voters had grown dissatisfied not only with the government, but also with the transition itself, more than in any other East Central European country.[10] Fidesz fed these sentiments by claiming that there had been no real transitions in 1989–1990, and that the previous nomenklatura had merely converted its lost political power into economic influence, pointing to the previous two prime ministers of the Socialist Party, both of whom became rich

[8] W. Sadurski, Wojciech, *Adding a Bite to the Bark?: A Story of Article 7, EU Enlargement, and Jörg Haider*, in 16 *CJEL*, 2010. 385, 394.

[9] The terms 'single' and 'dual' transitions are used in Przeworski. Later, Claus Offe broadened the scope of this debate by arguing that post-communist societies actually faced a triple transition, since many post-communist states were new or renewed nation-states. *See* Offe.

[10] In 2009, 51% of Hungarians disagreed with the statement that they are better off since the transition, and only 30% claimed improvements. (In Poland 14% and 23% in the Czech Republic reported worsening conditions, and 70% and 75%, respectively, perceived improvement.). Eurobarometer, 2009.

after the transition owing to privatization. The populism of the Fidesz party was directed against all elites, including the elites who designed the 1989 constitutional system (in which Fidesz had also participated), claiming that it was time for a new revolution. That is why Viktor Orbán, the head of Fidesz, characterized the results of the 2010 elections as a "revolution of the ballot boxes." His intention with this revolution was to eliminate any kind of checks and balances and even the parliamentary rotation of governing parties. In the September 2009 speech, Orbán predicted that there was "a real chance that politics in Hungary will no longer be defined by a dualist power space. Instead, a large governing party will emerge in the center of the political stage [that] will be able to formulate national policy, not through constant debates, but through a natural representation of interests." Orbán's vision for a new constitutional order—one in which his political party occupies the center stage of Hungarian political life and puts an end to debates over values—has now been entrenched in a new constitution, entered into force in April 2011.[11]

In its opinion, approved at its plenary session of June 17–18, 2011, the Council of Europe's Venice Commission expressed its concerns about the document, which was drawn up in a process that excluded the political opposition and professional and other civic organizations.[12]

Before 1 January 2012, when the new constitution came into effect, the Hungarian Parliament had been preparing a blizzard of so-called cardinal – or super-majority – laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure. These legal regulations affect the rights on freedom of information, prosecutions, nationalities, family protections, the independence of the judiciary, the status of churches, functioning of the Constitutional Court and elections to Parliament. In the last days of 2011, the Parliament also enacted the so-called Transitory Provision to the Fundamental Law, which claimed constitutional status and partly supplemented the new Constitution even before it went into effect. These new

[11] In an interview on Hungarian public radio on 5 July 2013, elected Prime Minister 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, 5 July 2013. Kossuth Rádió.

[12] See http://www.venice.coe.int/webforms/documents/CDL-AD(2011)016-E.aspx. Last visited on 24 June, 2019. . Fidesz's counterargument was that the other parliamentary parties excluded themselves from the decision-making process with their boycott, except Jobbik, which voted against the document.

regulations had bad effect for the political independence of state institutions, for the transparency of lawmaking and for the future of human rights in Hungary.

On 11 March 2013 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. Requests were rebuffing 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 most alarming change concerning the Constitutional Court is that the amendment annuls all Court decisions prior to when the Fundamental Law entered into force. At one level, this makes sense: old constitution = old decisions; new constitution = new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the terminology of the old and new constitutions were substantially the same, prior decisions Court would still be valid and could still be applied. In cases, where the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the decisions that defined and protected constitutional rights and harmonized domestic rights protection to comply with European human rights law. With the removal of these fundamental Constitutional Court decisions, the government has undermined legal security with respect to the protection of constitutional rights in Hungary. These moves renewed 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 the European Convention on Human Rights.

In April 2014, Fidesz, with 44, 5 % of the party-list votes, won the elections again, and due to 'undue advantages' for the governing party provided by the amendment to the electoral system[13] secured again two-thirds majority. In early 2015 Fidesz lost its two-thirds majority as a consequence of mid-term elections in two constituencies, but they regained it after the April 2018 elections.

3. The EU's Failed Efforts to Protect European Values

Despite the fact that the European Union has direct legal authority to protect the values of constitutionalism in the Member States, it rather prefered to use indirect means of pressure, dependent on EU economic competences to a large extent[14].

[13] "A number of amendments negatively affected the election process, including important checks and balances…The absence of political advertisements on nationwide commercial television, and a significant amount of government advertisements, undermined the unimpeded and equal access of contestants to the media," – international election monitors of the Organization for Security and Cooperation in Europe (OSCE) said in its report". See Statement of Preliminary Findings and Conclusions, International Election Observation Mission, Hungary – Parliamentary Elections, 6 April 2014.

[14] See M. Dawson, and E. Muir, *Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law*", in *German Law Journal*, Vol. 14. No. 10. 2013.

(see Dawson and Muir). Until 2013, when the Fourth Amendment to the Fundamental Law was enacted the EU did not use any of its capacities. In March 2013, after the Fourth Amendment was introduced to the Hungarian Parliament, the Danish, Finnish, Dutch and German Ministers of Foreign Affairs issued a Joint Letter, which called for a new mechanism to safeguard the fundamental values of the EU, secure compliance, and for the Commission to take an increased role in it. Later, upon the request of the European Parliament, its Committee on Civil Liberties, Justice and Home Affairs (LIBE) prepared a report on the Hungarian constitutional situation, including the impacts of the Fourth Amendment to the Fundamental Law of Hungary.[15] The report is named after Rui Tavares, a Portuguese MEP at that time, who was the rapporteur of this detailed study of Hungarian constitutional developments since 2010. On 3 July 2013, the report passed with a surprisingly lopsided vote: 370 in favour, 248 against and 82 abstentions. In a Parliament with a slight majority of the right, this tally gave the lie to the Hungarian government's claim that the report was merely a conspiracy of the left.

With its acceptance of the Tavares Report, the European Parliament has created a new framework for enforcing the principles of Article 2 of the Treaty. The report called on the European Commission to institutionalize a new system of monitoring and assessment.

The first reaction of the Hungarian government 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".[16] These words very much reflect the Orbán-government's

[15] www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN. Last visited on 24 June, 2019

[16] On the very day that the resolution of the Hungarian Parliament was announced, Hannes Swoboda (Austria), the leader of the S&D Group at the European Parliament, said in a press

view of 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".[17]

Encouraged by the Tavares report, Commission President Barroso also proposed a robust European mechanism to be "activated as in situations where there is a serious, systemic risk to the Rule of Law".[18] Commission Vice-President Reding, too, announced that the Commission will present a new policy communication.[19]

Due to the pressure, the Hungarian government finally made some cosmetic changes to its Fundamental Law, doing little to address concerns set out by the European Parliament. The changes left in place provisions that undermine the rule of law and weaken human rights protections. The Hungarian parliament, with a majority of its members from the governing party, adopted the Fifth Amendment on 16 September 2013.[20] The government's reasoning states that the amendment aims to "finish the constitutional debates at international forum" (meaning with European Union – G.H.). A statement from the Prime Minister's Office said: "The government wants to do away with those... problems which have served as an excuse for attacks on Hungary," But this minor political concession does not really mean that the Hungarian government ever respected at least the formal rule of law, as some commentators claim.[21]

As none of the suggested elements have worked in the case of Hungary, the European Commission proposed a new EU framework to the European Parliament and the Council to strengthen the rule of law in the Member States[22].

release that the resolution was an *'insult to the European Parliament'* and demonstrated that Hungary's Prime Minister, Viktor Orbán, does not yet understand the values of the EU. See Hungarian Parliament rejects Tavares report. Brussels, 05/07/2013, Agence Europe.

[17] For the original, Hungarian-language text of Orbán's speech, entitled Nem leszünk gyarmat! [We won't be a colony anymore!] 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: blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFtC. Last visited on 24 June, 2019.

[18] J. M. D. Barroso. "State of the Union address 2013". Plenary session of the European Parliament (Strasbourg: 1 September, 2013) SPEECH/13/684. http://europa.eu/rapid/ press-release SPEECH-13-684 en.htm.

[19] Reding, Vivien, "The EU and the Rule of Law – What Next?", Centre for European Policy Studies (Brussels: 4 September, 2013) SPEECH/13/677. http://europa.eu/rapid/pressrelease SPEECH-13-677 es.htm. Last visited on 24 June, 2019.

[20] Both the foreign and Hungarian Human Rights NGOs said that the 'amendments show the government is not serious about fixing human rights and rule of law problems in the constitution'. See the assessment of Human Rights Watch: www.hrw.org/news/2013/09/17/hungary-constitutional-change-falls-short (last visited on 24 June, 2019), and the joint opinion of three Hungarian NGOs: helsinki.hu/otodik-alaptorveny-modositas-nem-akarasnak-nyoges-a-vege (last visited on 24 June, 2019).

[21] A. von Bogdandy, *How to Protect European Values in the Polish Constitutional Crisis*, in *verfassungsblog.de*, 31 March, 2016.

[22] Communication from the Commission to the European Parliament and the Council of 11 March 2014, A new EU Framework to strengthen the Rule of Law, Brussels, 19.3.2014

This framework is complementary to Article 7 TEU and the formal infringement procedure under Article 258 TFEU, which the Commission can launch if a Member State fails to implement a solution to clarify and improve the suspected violation of EU law. As the Hungarian case has shown, infringement actions are usually too narrow to address the structural problem which persistently noncompliant Member States pose. This happened when Hungary suddenly lowered the retirement age of judges and removed from office the most senior ten percent of the judiciary, including a lot of court presidents, and members of the Supreme Court. The European Commission brought an infringement action, claiming age discrimination. The European Court of Justice in Commission v. Hungary established the violation of EU law[23]. But unfortunately, the decision was not able to reinstate the dismissed judges into their original position, and stop the Hungarian government from further seriously undermining the independence of the judiciary, and weakening other checks and balances with its constitutional reforms. Apparently, the ECJ wanted to stay away from Hungarian internal politics, merely enforcing the existing EU law rather than politically evaluating the constitutional framework of a Member State.[24] This was the reason that Kim Lane Scheppele suggested to reframe the ordinary infringement procedure to enforce the basic values of Article 2 through a systemic infringement action (see Scheppele).

The new framework allows the Commission to enter into a dialogue with the Member State concerned to prevent fundamental threats to the rule of law. This new framework can best be described as a 'pre-Article 7 procedure', since it establishes an early warning tool to tackle threats to the rule of law, and allows the Commission to enter into a dialogue with the Member State concerned, in order to find solutions before the existing legal mechanisms set out in Article 7 will be used. The Framework process is designed as a three steps procedure. First, the Commission makes an assessment of the situation in the member country, collecting information and evaluating whether there is a systemic threat to the rule of law. Second, if a systemic threat is found to exist, the Commission makes recommendations to the member country about how to resolve the issue. Third, the Commission monitors the response and follow-up of the member country to the Commission's recommendations.

In June 2015, the European Parliament passed a resolution condemning Viktor Orbán's statement on the reintroduction of the death penalty in Hungary and his anti-migration political campaign, and called on the Commission to launch the Rule of Law Framework procedure against Hungary.[25] But the Commission

COM(2014) 158 final/2 ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf. Last visited on 24 June, 2019.

[23] ECJ, 6 November 2012, Case C—286/12.

[24] For the detailed facts of the case and the assessment of the ECJ judgement see Halmai (2017).

[25] www.europarl.europa.eu/news/en/news-room/20150605IPR63112/hungary-meps-condemn-orb%C3%A1n%E2%80%99s-death-penalty-statements-and-migration-survey. Last visited on 24 June, 2019.

ultimately refused to launch the procedure with the argument that though the situation in Hungary raised concerns, there was no systemic threat to the rule of law, democracy and human rights.[26]

In December 2015, after the Hungarian Parliament in July and September enacted a series of anti-European and anti-rule-of law immigration laws[27], as a reaction to the refugee crisis, the European Parliament again voted on a resolution calling on the European Commission to launch the Rule of Law Framework. The Commission continued to use the usual method of infringement actions, finding the Hungarian legislation in some instances to be incompatible with EU law (specifically, the recast Asylum Procedures Directive (Directive 2013/32/EU) and the Directive on the right to interpretation and translation in criminal proceedings (Directive 2010/64/EU)).[28] This was the first time that the Commission has alleged a violation of the Charter of Fundamental Rights in an infringement action.[29]

[26] Hungary: no systemic threat to democracy, says Commission, but concerns remain, Press Release, 2 December 2015.

[27] See G. Halmai, *Hungary's Anti-European Immigration Laws*, in *Tr@nsit Online*, 4 November, 2015. www.iwm.at/read-listen-watch/transit-online/hungarys-anti-european-immigration-laws/.

[28] Regarding the asylum procedures, the Commission was concerned that there was no possibility to refer to new facts and circumstances in the context of appeals and that Hungary was not automatically suspending decisions in case of appeals - effectively forcing applicants to leave the territory before the time limit for lodging an appeal expired, or before an appeal has been heard. Regarding rights to translation and interpretation, the Commission was concerned that he Hungarian law fast-tracked criminal proceedings for irregular border crossings, which did not respect provisions of the Directive on the right to interpretation and translation in criminal proceedings, which ensures that every suspect or accused person who does not understand the language of the proceedings is provided with a written translation of all essential documents, including any judgments. Also, the Commission expressed its concerns about the fundamental right to an effective remedy and a fair trial under Article 47 of the Charter of Fundamental Rights of the EU. There were concerns about the fact that under the new Hungarian law dealing with the judicial review of decisions, in the event that an asylum application is rejected, a personal hearing of the applicant is optional. The fact that judicial decisions taken by court secretaries (a sub-judicial level) that lack judicial independence also seems to be in breach of the Asylum Procedures Directive and Article 47 of the Charter. europa.eu/rapid/press-release_IP-15-6228_en.htm. Last visited on 24 June, 2019.

[29] See this option as one of three scenarios using the Charter as a treaty obligation in Hoffmeister. (According to Hoffmeister in the first scenario, a Charter right is further specified by EU secondary law. For example, Article 8 Charter on the protection of personal data lies at the heart of Directive 95/46/EC which laregly harmonises the rules on data protection in Europe. In the second scenario, the Charter right is not underpinned by specific EU legislation. That is the case, for example, with Article 10(1) of the Charter on the freedom of thought, conscience and religion.) According to Armin von Bogdandy and his colleagues national courts could also bring grave violations of Charter rights, such as freedom of the media in Article 11 to the attention of the CJEU by invoking a breach of the fundamental status of Union citizenship in conjunction with core human rights protected under Article 2 TEU. The idea behind this proposal is that the EU and Members States can have an interest in protecting EU citizens within a given member state. See Bogdandy, Armin von et. al. The proposal was released for public debate by the German-English language public law portal *verfassungsblog.de* in February 2012; (see: Bogdandy & Kottmann & Antpöhler & Dickschen & Hentrei & Smrkolj, *A Rescue Package for EU Fundamental Rights - Illustrated with Reference to the Example of Media Freedom*, 2012, in *verfassungsblog*, 15 February, verfassungsblog.de/ein-rettungsschirm-fr-europische-grundrechte/. The debate initiated by the editors

Finally, on 12 September 2018 the European Parliament launched Article 7 TEU proceedings against Hungary - the first time ever against a Member States' government. The MEPs by 448 votes for to 197 against and with 48 abstentions adopted the report prepared by Judith Sargentini denouncing the many violation of EU values by Viktor Orbán's government. The report lists 12 major issues, among them many human rights concerns, which violate all possible values pronounced in Article 2 TEU: 1) the functioning of the constitutional and the electoral system; 2) the independence of the judiciary and of other institutions and the rights of the judges; 3) corruption and conflicts of interests; 4) privacy and data protection; 5) freedom of expression; 6) academic freedom; 7) freedom of religion; 8) freedom of association; 9) the right to equal treatment; 10) the right of persons belonging to minorities, including Roma and Jews, and protection against hateful statements against such minorities; 11) the fundamental rights of migrants, asylum seekers and refugees; 12) economic and social rights.

Unfortunately this Parliamentary resolution came too late, several years after the Orbán government's actions already represented a 'clear risk of a serious breach of the values on which the Union is founded.' Launching Article 7 meant also too little, because besides the important political function of naming and shaming Hungary as a violator of EU values, including the protection of human rights, the chances to reach real corrective measures of the procedure are extremely low[30]. Hence, one can argue that instead of Article 7 alternative means from the toolkits of the EU may be more effective[31]. Infringement actions as alternatives did not really work so far in the case of Hungary, but cutting off EU structural funds for regional development or other forms of assistance as a value conditionality approach was not really tried as of yet (See Halmai 2018).

4. The Hungarian Reaction: National Constitutional Identity

After the mentioned legislative measures the Hungarian government started a campaign against the EU's migration policy. The first step was a referendum initiated by the government. On Sunday, 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

(verfassungsblog.de/ category/schwerpunkte/rescue-english/. Last visited on 24 June, 2019) featured comments by Michaela Hailbronner, Daniel Halberstam, Dimitry Kochenov, Mattias Kumm, Peter Lindseth, Anna Katharina Mangold, Daniel Thym, Wojciech Sadurski, Pál Sonnevend, Renáta Uitz and Antje Wiener.

[30] See the same assessment of the vote by Sergio Carrera and Petra Bárd, 'The European Parliament Vote on Article 7 TEU against the Hungarian government: Too Late, Too Little, Too Political?' www.ceps.eu/publications/european-parliament-vote-article-7-teu-against-hungarian-government-too-late-too-little.

[31] Klaus Bachmann argues for using alternative tools instead of Article 7. See K. Bachmann, *Beyond the Spectacle: The European Parliament's Article 7 TEU Decision on Hungary*, in *verfassungsblog*, 17 September 2018. verfassungsblog.de/beyond-the-spectacle-the-european-parliaments-article-7-teu-decision-on-hungary/

'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, because neither the voters nor the legislation will be aware, what may be 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-color, 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 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 chief of the Prime Minister's Office 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?"

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'.[32]

After the failed constitutional amendment, the Constitutional Court, loyal to the government, came to rescue Orbán's constitutional identity defense of its

[32] During 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!"

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 of certain provisions of the Fundamental Law 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 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[33] 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.[34]

[33] The English language translation of the decision is available at the homepage of the Hungarian Constitutional Court: hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf.

[34] 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. In those very rare cases when the ECJ acknowledges a Member State's constitutional identity, it is out of respect for a national legal institution, which was established at the moment of the state's foundation.

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 reserved the "presumption of maintained sovereignty"[35] 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, the Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's self-identity."[36] 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 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 autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us.

(This happened in the Fürstin von Sayn-Wittgenstein judgment. Case C-208/09, *Sayn-Wittgenstein v. Landeshauptmann von Wien* [2011] E.T.M.R.12.)

[35] Decision 22/2016. (XII. 5.) AB. [81].

[36] Ibid. [64].

These are, among others, the achievements of our historical 17 constitution, the Fundamental Law and thus the whole Hungarian legal system are based upon".[37] The Constitutional Court further argues 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 – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State. Accordingly, sovereignty and constitutional identity have several common points, thus their control should be performed with due regard to each other in specific cases".[38]

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 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". [39]

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. Besides the failed provisions on constitutional identity the Amendment contains other topics as well from freedom of assembly though establishing special administrative courts till the entrenchment of 'Christian culture' to be protected by state authorities.

One of the issues of the amendment is 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

[37] Ibid [65].
[38] Ibid [67].
[39] hvg.hu/itthon/20161202_Orban_beszed_pentek_reggel. Last visited on 24 June, 2019.

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.'[40] 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 obligation of the state to protect our self-identity rooted in our historical constitution.'[41] 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 amended text of Article VI limits freedom of assembly and freedom of expression by defending the private and family life of others: "Everyone shall have the right to have his or her private and family life, home, communication and good reputation respected. The exercise of freedom of expression and the right of assembly shall not harm others' private and family life and their homes." Shortly after the adoption of the amendment the Parliament also enacted a new law on the Protection of Private Life. The antecedent of these limitations was a planned demonstration in front of Prime Minister's Orbán residency in December 2014 by

[40] 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 materilaization 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). Despite this opinion, the Hungarian Constitutional Court declared that the legislative package is in compliance with the Fundamental Law. See decision 3/2019. (III. 7.) AB.

[41] 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.

a group of people dissatisfied with the government's action regarding the losses of those taken mortgages in foreign currencies. Despite the fact that the that time law did not explicitly proscribed demonstrations in front of politicians' houses, both the ordinary and the Constitutional Court concurred with the police's ban. However, the Constitutional Court in its decision instructed Parliament to harmonize regulations of privacy and freedom of assembly.[42]

Due to a last minute addendum to the draft Seventh Amendment by a group of Fidesz MPs, another new provision of the Fundamental Law makes homelessness illegal: "It is forbidden to live in public places on a permanent basis." The explanation to the provision says that the state "must safeguard to use of public places", and that the municipalities "will attempt to offer accommodation to all homeless persons." This provision also has a special precedent in the history of Fidesz' illiberal agenda. Following a Fidesz-majority Budapest city council's local ordinance that banned homelessness from public places, the Orbán government extended the ban to the entire country. In November 2012 the Constitutional Court found the law unconstitutional[43]. The already mentioned Fourth Amendment added the following Section 3 to Article XXII of the Fundamental Law: "In order to protect public order, public security, public health and cultural values, an Act or a local government decree may, with respect to a specific part of public space, provide that staying in public space as a habitual dwelling shall be illegal."[44] The new provision gives an authorization also to national bodies even to criminalize homelessness in a country of 'Christian culture.'

In the future, all cases concerning demonstrations and homelessness, as well other issues important for the government, such as access to information of public interest, or electoral law disputes will be handled by the administrative courts, also established by the Seventh Amendment to the Fundamental Law. The amendment establishes the Administrative High Court as a new supreme court for administrative cases, parallel to the Curia, the supreme judicial organ of regular courts. Establishing a parallel judicial structure for administrative issues is of course not unprecedented but the actual cause of the change and the increased chance made possible by a ministerial decree from 2017 of former civil servants to be appointed for administrative court judges makes the government's true intention suspicious.

[42] Decision 13/2016. (VII. 18.) AB

[43] Decision 38/2012. (XI. 14.). AB

[44] 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). 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 packed Constitutional Court has published its shocking decision III/1628/2018. AB in early June 2019, and declared that the criminalization and imprisonment of homeless people is in line with the Fundamental Law.

5. Present and Future of Constitutionalism in Hungary

The current Hungarian constitutional system constitutes a new, hybrid type of regime, between the ideal of a full-fledged democracy and a totalitarian regime[45]. Even when there is a formal written constitution, an autocracy is not a constitutional system[46]. Therefore, China, Vietnam, Cuba, Belorussia, the former Soviet Union, and former communist countries cannot be considered to be constitutional systems, even though, as William J. Dobson argues, "today's dictators and authoritarians are far more sophisticated, savvy, and nimble than they once were."[47] What happened in Hungary is certainly less than a total breakdown of constitutional democracy, but also more than just a transformation of the way that liberal constitutional system is functioning. Hungary became an illiberal and undemocratic system[48], which was the openly stated intention of PM Orbán.[49] The Hungarian system represents an atypical form of hybrid regimes, because, as opposed to such approaches in Latin-America, the former Soviet republics or Africa, where the basis is a presidential constitution, in Hungary the formal parliamentary system remained in place with the decisive role of the Prime Minister.

The backsliding has happened through the use of 'abusive constitutional' tools: constitutional amendments and even replacement.[50] The case of Hungary

[45] For the classic differentiation between totalitarian (dictatorial) and authoritarian systems see J. Linz, *Totalitarian and Authoritarian Regimes*, 1975.

[46] About totalitarian systems with written constitutions see J. Balkin – S. Levinson, *Constitutional Dictatorship*, Yale Law School, 2010.

[47] W. Dobson, *The Dictator's Learning Curve. Inside the Global Battle for Democracy*, Doubleday, 2012. 4.

[48] As Jan-Werner Müller rightly argues, it is not just liberalism that is under attack in these two countries, but democracy itself. Hence, instead of calling them 'illiberal democracies' we should describe them as illiberal and 'undemocratic' regimes. See J-W. Müller, *The Problem With 'Illiberal Democracy'*, in *Project Syndicate*, January 21, 2016.

[49] In a speech delivered on 26 July 2014 before an ethnic Hungarian audience in neighboring Romania, Orbán proclaimed his intention to turn Hungary into a state that "will undertake the odium of expressing that in character it is not of liberal nature." Citing as models he added: "We have abandon liberal methods and principles of organizing society, as well as the liberal way to look at the world… Today, the stars of international analyses are Singapore, China, India, Turkey, Russia. . . . and if we think back on what we did in the last four years, and what we are going to do in the following four years, than it really can be interpreted from this angle. We are . . .parting ways with Western European dogmas, making ourselves independent from them . . .If we look at civil organizations in Hungary, . . .we have to deal with paid political activists here…[T]hey would like to exercise influence . . . on Hungarian public life. It is vital, therefore, that if we would like to reorganize our nation state instead of the liberal state, that we should make it clear, that these are not civilians . . . opposing us, but political activists attempting to promote foreign interests. . . .This is about the ongoing reorganization of Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating in national interests." See the full text of Viktor Orbán's speech here: budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/10592.

[50] The category of 'abusive constitutionalism' was introduced by David Landau using the cases of Colombia, Venezuela and Hungary. See D. Landau, *Abusive Constitutionalism*, in 47 *UC Davis Law Review*, 2013. 189-260. Abusive constitutional tools are know from the very beginning of constitutionalism. The recent story of the Polish Constitutional Tribunal reminds of the events in the years after the election of Jefferson, as the first anti-federalist President of the US. On 2 March 2 1801, the second to last day of his presidency, President Adams appointed

has shown that both the internal and the external democratic defense mechanisms against this abusive use of constitutional tools failed so far. The internal ones (constitutional courts, judiciary) failed because the new regimes managed to abolish all checks on their power, and the international ones, such as the EU toolkits, mostly due to the lack of a joint political will to use them.

In this illiberal system the institutions of a constitutional state (Constitutional Court, ombudsman, judicial or media councils) still exist, but their power is strongly limited. Also, as in many illiberal regimes, fundamental rights are listed in the constitutions, but the institutional guarantees of these rights are endangered through the lack of independent judiciary, and Constitutional Court. To make it clear, competences of the constitutional courts originally very strong in the beginning of the transition can be weakened provided that they still can fulfil their function as checks and balances to the governmental power, or other control mechanisms exist.

As many scholars noted, there is an incredible range of nondemocratic, non-authoritarian regimes and their relationship with each other and democracy is often imperfect and unclear. Countries in this "grey zone" inspired a lot of concepts, which were created to capture the mixed nature of these regimes. Steven Levitsky and Lucas A. Way introduced the term "competitive authoritarianism" for a distinctive type of "hybrid" civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage vis-á-vis their opponents.[51]

The hybridity of Hungarian constitutionalism differs from the authoritarian character of Putin's Russia, where due to failing competing parties and candidates the results of parliamentary and presidential elections are uncertain. Therefore, the Russian regime can be considered as authoritarian, while the Hungarian one is still democratic, even if illiberal.

The case of Hungary proves that democracy and liberalism do not necessarily go hand in hand. Besides liberal democratic (or democratic and rule of law-oriented, 'rechsstaatlich') constitutions and political systems there exist non-liberal democratic ones (radical democracies without a bill of rights, such as most of the Commonwealth constitutions until very recently, or constitutions based on popular sovereignty, but little weight to the people's interest in the day-to-day politics, such as the constitutions of Latin American countries), also liberal but non-democratic constitutions (such were the ones in France after 1815, or the

judges, most of whom were federalists. The federalist Senate confirmed them the next day. As a response, Jefferson, after taking office, convinced the new anti-federalist Congress to abolish the terms of the Supreme Court that were to take place in June and December of that year, and Congress repealed the law passed by the previous Congress creating new federal judgeships. In addition, the anti-federalist Congress had begun impeachment proceedings against some federalist judges. About the election of 1800 and its aftermath see B. Ackerman, *The Failure of the Founding Fathers. Jefferson, Marshall, and the Rise of Presidential Democracy*, Harvard University Press, 2007.

[51] See S. Levitsky, and L. Way, *Competetive Authoritarianism. Hybrid Regimes After the Cold War*, Cambridge University Press, 2010. 5.

constitutional system of the Austro-Hungarian Monarchy), and finally neither liberal nor democratic socialist constitutions (of the former and current communist countries).[52]

The problem with the Hungarian illiberal constitutional system is that the country is currently member of the European Union, which considers itself to be a union based on the principles of liberal democratic constitutionalism. Of course, the citizens of Hungary, as any other citizens of a democratic nation-state, have the right to oppose joint European measures for instance on immigration and refugees, or even the development of a liberal political system altogether. However, this conclusion must be reached through a democratic process. There are still a significant number of people who either consider themselves as supporters of liberal democracy, or at least represent views, which are in line with liberal democracy. If Hungarians ultimately opt for a non-liberal democracy, they must accept certain consequences including parting from the European Union and the wider community of liberal democracies.

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The described democratic backsliding in Hungary demonstrates that an institutional framework is a necessary but not sufficient element of a successful democratization. Behavioral elements, among them political and constitutional culture are as important as institutions. The other lesson of this case study is, on the one hand, that the very definition of democracy is changing, and it is not necessarily liberal. On the other hand, the borders between democratic, authoritarian or dictatorial regimes are blurred, and there are a lot of different hybrid systems, such as the current Hungarian regime.[53] Another important aspect of these developments that emerging democracies, for instance the one in Tunisia are not anymore influenced exclusively by the liberal democratic West.[54] There are economists claiming that the real question is not why are there less and

[52] Almost this same typology of constitutions and governance systems are used by the constitutional scholar Dieter Grimm, and the sociologists Iván Szelényi and Tamás Csillag. See See D. Grimm, *Types of Constitutions*, in Rosenfeld, Michel and Sajó, András (eds.), *The Oxford Handbook of Comparative Constitutional Law*, OUP, 2012. 98-132.; I. Szelényi and T. Csillag, *Drifting Liberal Democracy: Traditionalist/Neo-conservative Ideology of Managed Illiberal Democratic Capitalism in Post-communist Europe*, in *Intersections, EEJSP*, 1/2015. 18-48.. Besides the four joint categories, Grimm adds a fifth type of constitution to his typology, namely the social or welfare state constitutions (such as the Indian, the Brazilian, the Japanese, the South Korean or the South African), which are not liberal regarding social and economic rights.

[53] Asking the question whether liberal democracy is at risk, Ivan Krastev responds that the big difference compared to the 1930s is that even extremist parties do not contest the democratic aspect of the liberal democratic consensus. Instead, they have a problem with the liberal part of it. See I. Krastev, *Europe in Crisis: Is Liberal Democracy at Risk?*, in *Democracy in Precipice*, Council of Europe Democracy Debates 2011-2012. Council of Europe Publishing, 2012. 67-73.

[54] See R. Youngs, Richard, *Exploring 'Non-Western' Democracy*, in *Journal of Democracy*, October 2015.

less liberal democracies, but why liberal democracies still exist.[55] Others search for 'post-liberalism'[56] in the wake of financial crisis, and after Brexit[57].

The behavior of the Hungarian government, supported by the other three Visegrád countries, during the refugee crisis, has taught us that the strengthening of populist and extreme nationalist movements across Europe is incompatible with the values of the liberal democracy, and that membership in the European Union is not a guarantee for having liberal democratic regimes in all Member States. Unfortunately an outsize fear of threats, physical and social, lately, for instance, the refugee crisis and its main reason, the Syrian conflict, strengthened illiberal systems, such as Turkey and authoritarian regimes, such as Russia all over Europe, and in the case of Hungary even inside the EU[58], not to mention Trump's presidency in the US. There is a growing gap between the old and the new Member States, and the support of populist parties has been strengthened even in the old Member States.[59] EU institutions so far have proven incapable of enforcing compliance with core European values. Viktor Orbán even raised the opportunity that the mainstream in Europe will follow precisely the illiberal course that Hungary has set forth.[60]

[55] See S. Mukand and D. Rodrik, *The Political Economy of Liberal Democracy*, Institute of Advance Study, Princeton, 2015. Joschka Fischer, former German foreign minister and vice-chancellor gave an interesting explanation what might have caused the decline of liberal democracy: "How did we get here? Looking back 26 years, we should admit that the disintegration of the Soviet Union – and with it, the end of the Cold War – was not the end of history, but rather the beginning of the Western liberal order's denouement. In losing its existential enemy, the West lost the foil against which it declared its own moral superiority." See J. Fischer, Europe's Last Chance, in *Project Syndicate*, August 29, 2016. www.project-syndicate.org/commentary/europe-needs-bold-leaders-by-joschka-fischer-2016-08.

[56] See Milbank, John and Pabst, Adrian, *The Politics of Virtue, Post-Liberalism and the Human Future*, Rowman and Littlefield, 2016.

[57] M. Kettle, *Brexit Was a Revolt Against Liberalism, We Have Entered a New Political Era*, in *The Guardian*, 15 September, 2016.

[58] At a conference in the Polish town Krynica, in mid September 2016 Orbán and Kaczyński proclaimed a ´cultural counter-revolution´ aimed at turning the European Union into an illiberal project. A week later at the Bratislava EU summit the prime ministers of the Visegrád 4 countries demanded a structural change of the EU in favor of the nation states. Slawomir Sierakowski even speaks about an ´illiberal international´. See Sierakowski.

[59] Regarding the constitutional crisis of the EU, Michael Wilkinson draws attention to the dangers of 'authoritarian liberalism'. See M. Wilkinson, *The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union*, in 14 *German Law Review*, 2013. 527.

[60] See V. Orbán, *Hungary and the Crisis of Europe: Unelected Elites versus People*, in *National Review*, January 26, 2017.