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From a Pariah to a Model? Hungary's Rise as an Illiberal Member State of the EU

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Keywords

Rule of law, fundamental rights, constitution, democracy, migration crisis.

A Introduction

In the last five years, I have already reported twice on these pages about the transformation of the Hungarian constitutional order since 2010, characterizing this illiberal turn as a counter-revolution.¹ After another two years nothing has changed in Hungary, and EU institutions so far have proven incapable of enforcing compliance with core European values this time not only in Hungary, but also in Poland, which after the victory of the Law and Justice Party (known as PiS), led by Jarosław Kaczyński at the parliamentary elections in October 2015, the country has followed the Hungarian path. In the European migration and refugee crisis in 2015-2016 Viktor Orbán's harsh criticism of the EU's policy was supported also by the other members of the Visegrád countries.

In this paper I look at the Hungarian government's reaction to the mass migration, and the way, how this led to a new concept of constitutional identity in order to justify the refusal of EU obligations.

¹ Gábor Halmai, From the 'Rule of Law Revolution' to the Constitutional Counter-Revolution, in Benedek et al. (eds.), *European Yearbook of Human Rights 2012* (2012), 367-384; Gábor Halmai, An Illiberal Constitutional System in the Middle of Europe, in Benedek et al. (eds.), *European Yearbook of Human Rights 2014* (2014), 497-514.

B The Government's Anti-Migration Policy and Legislation

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, thereby violating EU norms.

In order to legitimate this policy against Hungary's unwanted immigrants the government announced it would hold a 'national consultation'. (A similar consultation was held in 2011, shortly before the enactment of the new Fundamental Law. Its results have never been made public.) The government sent out eight million questionnaires to the voting-age population, in the expectation that one million would be filed and returned. Because there was no legal requirement to make the responses public, they were seen again exclusively by government officials.² To see the demagoguery and populism behind the 'consultation', it is worth quoting some of the questions without comments: "How important is the spread of terrorism as far as your own life is concerned? Do you agree that mistaken immigration policies contribute to the spread of terrorism? Do you agree with the opinion that economic immigrants endanger the jobs and livelihoods of the Hungarian people? In your opinion did Brussels' policies on immigration and terrorism fail? Would you support a new regulation that would allow the government to place immigrants who illegally entered the country into internment camps? Do you agree with the government that instead of allocating funds to immigration we should support Hungarian families and those children yet to be born?"

After this psychological preparation the government also tried to convince the public that the only way to enforce EU law and protect both the Hungarian and the Schengen border of Europe was to build a 175-km long razor-wire fence along the entire border with Serbia, and later along the 377-km long border with Croatia. In July 2015, the Parliament amended the asylum law, and adopted a

² The official reasoning of the Parliamentary Resolution on the message to the leaders of the European Union without referring to any source claims that during the consultation 1 million people expressed their negative opinion about the permissive immigration policy of the EU. In a speech held in the Hungarian Parliament on **21 September** 2015, PM Orbán, referring to the unpublished outcome of the national consultation, claimed that more than 80 % of those responded agreed that the migration policy of the EU has failed and Hungary must be protected, <http://www.kormany.hu/en/the-prime-minister/news/it-is-hungary-s-historic-and-moral-obligation-to-protect-europe>.

National List of Safe Countries, considering Serbia as a safe third country for asylum-seekers (in contradiction with the clear position of the European Court of Human Rights and the Hungarian Supreme Court). These changes, which entered into force on 1 August, accelerated the asylum proceedings, rendering an ineffective one-instance judicial review with unreasonably short deadlines into a quasi-automatic rejection at first glance of over 99 % of asylum claims (as 99 % of asylum-seekers entered Hungary from Serbia)³.

Another piece of legislation, which came into effect on 15 September – by the time Hungary registered over 170,000 asylum claims – allowed for the construction of so-called transit zones, where immigration and asylum procedures are conducted.⁴ On 15 September 2015, when the border to Serbia was closed, two transit zones started to operate: one in Röszke and another in Tompa. The one in Röszke is a compound of approximately 50 smaller border containers, which are integrated into the border fence. The introduced border procedure is a specific type of admissibility procedure, which can only be initiated if the applicant submitted the asylum claim in the transit zone. The inadmissibility decisions are delivered partly by judges appointed for a fixed term or by court clerks within less than an hour (!), and they immediately expel the rejected asylum seeker and order a ban on entry and stay for one or two years. In parallel with this regulation the law also amended the Criminal Code, creating new crimes, including illegally entering the country and damaging state property, such as the fence. Under basic definition these criminal acts are punishable by up to three years imprisonment, but in aggravated cases sentences can increase up to 20 years or even life imprisonment.

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

The fence and the new laws not only violate international treaties, especially Article 31 of the Geneva Convention of 1951 signed by Hungary⁵, but also

³ See <https://www.hrw.org/news/2015/10/14/dispatches-hungarys-criminal-punishment-people-fleeing-syria>

⁴ The provision of illegal border crossing as offence is set out in Article 352/A of Act C of 2012 on the Criminal Code (*2012. évi C. törvény a Büntető Törvénykönyvről*; Criminal Code), available at: njt.hu/cgi_bin/njt_doc.cgi?docid=152383.297990#foot_121_place. The provision was introduced in the Criminal Code by Act CXL of 2015 on the amendment of certain laws as a result of the migrant situation (*2015. évi CXL. törvény egyes törvényeknek a tömeges bevándorlás kezelésével összefüggő módosításáról*; Act CXL of 2015), available at: njt.hu/cgi_bin/njt_doc.cgi?docid=177552.298006. Act CXL of 2015 entered into force on 15 September 2015.

⁵ Amnesty International published a report titled 'Fear and Fences – Europe's Approach to Keeping Refugees at Bay' on 17 November 2015. The report heavily criticises Hungary for installing fences at the Hungarian-Serbian borderline that served as the main entry point of new arrivals in the first eight months of 2015. The subchapter titled 'Refugees Unwelcome: Hungary's Efforts to Keep Refugees Out' states that Hungary systematically established legal and physical barriers in order to keep the asylum-seekers out. Amnesty International

Fidesz's own Fundamental Law, which did not regulate this emergency situation, and did not allow the army to be deployed within the country except in emergency situations prescribed in the constitution. This was the reason that on 7 June 2016, National Assembly representatives from the Fidesz-KDNP governing alliance and the radical-nationalist opposition party Jobbik approved the Sixth Amendment to the Fundamental Law. This amendment authorizes the National Assembly to declare, at the initiative of the government, a "terrorism state of emergency" (*terrorveszélyhelyzet*) in the event of a terrorist attack or a "significant and direct danger of a terrorist attack" (*terrortámadás jelentős és közvetlen veszélye*). The amendment furnishes the government with the right to suspend existing laws and to take other 'extraordinary measures' that depart from existing laws during a declared terrorism state of emergency. The amendment stipulates that the declaration of a terrorism state of emergency and possible extension of such a state of emergency require the approval of a two-thirds majority of National Assembly representatives. The Sixth Amendment to the Fundamental Law permits the government to issue resolutions affecting state administration, law-enforcement and national-security organizations and the military for a period of up to 15 days after initiating the declaration of a terrorism state of emergency, even if the National Assembly has not approved such a state of emergency.⁶

C Failed Anti-Migrant Referendum and Constitutional Amendment

After the legislative measures the government started a campaign against the EU's migration policy. The first step was a referendum initiated by the government. On 2 October 2016, Hungarian voters went to the polls to answer one referendum question: "Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?" Although 92 % of those who casted votes and 98% of all the valid votes agreed with the government answering 'no' (6 % were spoiled ballots), the referendum was invalid since the turnout was only around 40 %.. 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 % of the voters to cast a vote, the new law requires at least 50 % 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.

states that Hungary violated the 1951 Geneva Convention on the Status of Refugees through efforts aimed at either preventing the arrival of asylum-seekers in the country or ensuring their speedy return to where they come from. The report declares that these actions of Hungary redirected asylum-seekers toward more dangerous sea and land routes that caused more fatalities. Fear and Fences – Europe's Approach to Keeping Refugees at Bay, available at: <http://www.amnesty.hu/data/file/1915-fear-and-fences-updated-web-finalv3.pdf?version=1415642342>.

⁶ See the text of the Sixth Amendment to the Fundamental Law in Hungarian: <http://www.parlament.hu/irom40/10416/10416.pdf>

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 questions to be answered by referendum enumerated in Hungarian electoral law, because neither the voters nor the legislation will be aware, what may be, if any, the legal consequences of the referendum. But the Election Commission, the majority of which consisted of governmental appointees, approved the question, and so did the Supreme Court (*Kúria*) following an appeal. The Parliament officially approved the referendum with the 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 the 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.”⁷

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.

⁷ About the campaign see: <http://nepszava.hu/cikk/1093909-uzenjunk-brusszelnek-hogy-ok-is-megertsek>

Hence opposition-headed municipalities would have to take responsibility for not producing enough 'no' votes in the form of having to take in more refugees than other municipalities in the country. The cabinet chief of the Prime Minister confirmed that the compulsory distribution of migrants to Hungary would result in cuts in social benefits – the recipients of which are, in many cases, Roma. This has been interpreted as a thinly-veiled message to increase voter turnout among the Roma electorate. But the highlight of the hate-filled campaign was when the deputy chair of the parliamentary commission for national security announced that it would pursue a national security screening of 22 NGOs that were protesting against the inhumane politics of the Hungarian government against refugees and calling for the public to invalidate the referendum.

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

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.⁸

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

⁸ See the full text of the Seventh Amendment in English: <http://abouthungary.hu/news-in-brief/proposed-seventh-amendment-to-the-fundamental-law-full-text-in-english/>

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.”⁹

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 to repeal 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’.¹⁰

D The Constitutional Court’s Decision on Constitutional Identity

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

- 1 Whether the prohibition of expulsion from Hungary in Article XIV (1) of the Fundamental Law forbids only this kind of action by the Hungarian authorities, or if it also covers actions by Hungarian authorities which they use to promote the prohibited expulsion implemented by other states.

⁹ Ibid

¹⁰ 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!”.

- 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. AB¹¹ 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.¹²

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

¹¹ Decision of the Constitutional Court of Hungary published on 5 December 2016 in Hungarian Official Gazette, 'Magyar Közlöny'.

¹² 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. (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.)

sovereignty review is Article B) (1) of the Fundamental Law, which states that “Hungary shall be an independent, democratic rule-of-law State”. Paragraphs (3) and (4) contain the popular sovereignty principle: “(3) The source of public power shall be the people”, “(4) The power shall be exercised by the people through elected representatives or, in exceptional cases, directly”. The Court warned that “Article E) (2) should not empty Art B)” and it establishes the “presumption of reserved sovereignty” in relation to judging the common exercise of other competences that have already been conferred to the EU.

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

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

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

Viktor Orbán’s first jubilant reaction shows how enthusiastic he was that the Court has helped the government’s ideals come true by making up for the failed referendum and the Seventh amendment: “I threw my hat in the air when the Constitutional Court ruled that the government has the right and obligation to stand up for Hungary’s constitutional identity. This means that the cabinet cannot support a decision made in Brussels that violates Hungary’s sovereignty”, adding that the Court decision is good news for “all those who do not want to see the country occupied”. In the same interview given to the Hungarian Public Radio, Orbán pointed out the next subject of national constitutional identity, referring to the latest EU plan to terminate Hungarian state regulation of public utility prices. He said that the European Commission incorrectly argued that competition in the energy sector leads to lower prices. “Therefore Hungary insists on reducing utility

rate cuts and we shall defend it in 2017. Although this will be a very tough battle, we have a chance of success".¹³

The next sign of this battle regarding asylum seekers was another speech of Viktor Orbán delivered in February 2017, in which he stated: „I find the preservation of ethnic homogeneity very important.”¹⁴ On March 5 a newspaper reported on Hungary’s shameful treatment of asylum seekers, including severe beatings with batons, the use of attack dogs.¹⁵ Two days after the report was published, on March 7 the Hungarian Parliament passed an amendment to the Asylum Act that forces all asylum seekers into guarded detention camps.¹⁶ 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.¹⁷

On March 14 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 Court also found a violation of Article 3 on account of the applicants’ expulsion to Serbia insofar as they had not had the benefit of effective guarantees to protect them from exposure to a real risk of being subjected to inhuman and degrading treatment.¹⁸ 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.

E Conclusion

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,

13 Interview with PM Orbán in the Hungarian Public Radio on 2 December 2016. http://hvg.hu/itthon/20161202_Orban_beszed_pentek_reggel.

¹⁴ Speech delivered on 28 February 2017 at the annual gathering of the Hungarian Chamber of Commerce. See Éva S. Balogh, Viktor Orbán’s ‘ethnically homogenous Hungary’, Hungarian Spectrum, March 3, 2017. <http://hungarianspectrum.org/2017/03/01/viktor-orbans-ethnically-homogeneous-hungary/>

¹⁵ 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>

¹⁶ http://www.upi.com/Top_News/World-News/2017/03/07/UN-Hungary-plan-for-refugee-camps-illegal-harmful-to-children/4631488910166/

¹⁷ On the very same day that the Parliament voted for the bill, Viktor Orbán delivered a speech at the swearing-in-ceremony of 462 new ‘border hunters’. In the speech Orbán described ‘migration as a Trojan horse of terrorism’, and he also dismissed criticism of the new law as ‘charming human rights nonsense’. See Éva S. Balogh, The Hungarian government’s shameful treatment of asylum seekers, The Hungarian Spectrum, March 10, 2017. <http://hungarianspectrum.org/2017/03/09/the-hungarian-governments-shameful-treatment-of-asylum-seekers/>

¹⁸ Judgment of 14 March, 2017 in the case of Ilias and Ahmed v. Hungary (application no. 47287/15).

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,¹⁹ 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.²⁰ As EU institutions so far have proven incapable of enforcing compliance with core European values. After coming to the conclusion that the traditional mechanism of the infringement procedure does not work, and in the fear from the unanimity requirement for sanctioning according to Article 7(2), the Commission duplicated the preventive mechanism of Article 7(1) by introducing the Rule of Law mechanism. Due to political considerations, it was not used against Hungary at all, and in the case of Poland despite the very strongly worded Commission recommendations and their disregard by the Polish government nothing really happened, which considerably undermined not only the legitimacy of the Commission, but also that of the entire rule of oversight. The fear from Hungary's veto in the case of Poland indicates that the desired oversight for the effective use of Article 7 would require Treaty amendment. Unfortunately the scenarios of European Commission's White Paper on the Future of Europe²¹ published on 1 March do not aim at Treaty changes and do not seem to provide institutional guarantees against populism and illiberal states within the EU. We can hope only hope that the opportunity the opportunity raised by Viktor Orbán that the mainstream in Europe will follow precisely the illiberal course that Hungary has set forth²² won't become reality in the future of Europe.

19 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. Sławomir Sierakowski even speaks about an 'illiberal international'. Sławomir Sierakowski, The Illiberal International, Social Europe (13 September 2016).

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

²¹ White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025. European Commission COM (2017) 2025 of 1 March 2017. https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf

²² See Viktor Orbán, Hungary and the Crisis of Europe: Unelected Elites versus People, *National Review* (26 January 2017).