The Misuse of Human Dignity and Constitutional Identity: The Case of Hungary

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Abstract

This chapter contrasts the concept of human dignity elaborated by the activist Constitutional Court of Hungary in the early 1990s, with its recent misuse in decision 22/2016 AB on the interpretation of Article E) (2) of the Fundamental Law by the packed Constitutional Court as a defining element of constitutional identity in order to justify the Hungarian government’s refusal to apply the European Union’s refugee relocation scheme. As a reaction to the 2015 refugee crisis, the government of Hungary adopted a series of anti-rule-of-law immigration laws followed by an anti-migrant referendum, which failed to reach the required 50% participation threshold, and an also failed constitutional amendment. As a result, the government until they regained the two-third majority in 2018 had to drop their plan to modify the constitution with a view to legitimize their non-compliance with the EU’s relocation plan and. The packed Constitutional Court came to the rescue and rubberstamped the Government’s constitutional identity defence, using the argument of human dignity as a core element for defining constitutional identity. The Court argued that the planned relocation of asylum seekers can result in violation of their human dignity, and at the same time Hungary’s constitutional identity as an ethnically homogenous country.

Based on a close and critical analysis of this ruling, the paper highlights the following points. Firstly, the Constitutional Court arguably broke away from the previous liberal jurisprudence of the Court, which in the early 1990s had established its concept of human dignity as a ‘mother right’, a subsidiary of all rights in defence of individual autonomy, such as self-identity, self-determination as part of the ‘general personality right’. The Constitutional Court’s mild approach of limited EU law primacy approach did not change immediately after Viktor Orbán’s government introduced an illiberal constitutional system and packed the Constitutional Court after 2010. The reason for change has been the government’s anti-migration policy, and as the chapter argues in its second part, the Court has been instrumental in justifying the government’s desire to exclude refugees from Hungary and to evade its obligations under European Union law, and under the 2011 Fundamental Law’s provision on human dignity. In so doing the Court not only gave a governmental policy constitutional status through its ruling, but it also went against the will of the people as expressed in the referendum on this topic. In conclusion, the chapter argues that the Constitutional Court misused the concept of constitutional identity, by
cynically referring to human dignity and other fundamental rights, therefore aligning with the Government’s merely nationalistic policies and supporting governmental efforts to dismantle constitutional democracy, and to build up an illiberal system with authoritarian tendencies instead. This move, the chapter argues, has the potential to discredit every genuine and legitimate reference to national constitutional identity claims, and strengthens the calls for a narrower definition of constitutional pluralism in the EU altogether.

Introduction

As a reaction to the 2015 refugee crisis, the government of Hungary after psychological preparations adopted a series of anti-rule-of-law immigration laws followed by an invalid anti-migrant referendum. After a failed constitutional amendment, which aimed at legitimizing the no-refugee policy of the government, the packed Constitutional Court came to the rescue, and rubberstamped the constitutional identity defence. The misuse of constitutional identity cannot be derived from the previous jurisprudence of the Court, which in the early 1990s established its concept of human dignity as ‘mother right’, a subsidiary of all rights in defence of individual autonomy, such as self-identity, self-determination as part of the ‘general right of the individual’. As Catherine Dupré’s book on the import of the concept of human dignity shows, the Hungarian judges first carefully chose the German as a suitable model, and, than instrumentalized it through a very activist interpretation of the Hungarian constitution. On that basis, the Court developed its own, autonomous concept of human dignity.

Right before and after the EU accession of the country the Constitutional Court followed a mild approach of limited EU law primacy approach, which did not change immediately after Viktor Orbán’s government introduced an illiberal constitutional system and packed the Constitutional Court after 2010. This process began with the alteration of the system for nominating Constitutional Court judges, giving the governing parties the exclusive opportunity to nominate and subsequently replace judges. The new Fundamental Law of

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2 The new procedure replaced the previous consensual one. In July, 2010, the government made use of the new rules, and elected two new judges to the bench, who did not even fulfil the legal requirements set for justices. Later that year the government also expanded the number of justices on the Court from 11 to 15 to give themselves four more seats to fill with non-consensual candidates.
2011\(^3\) also considerably restricted on ex-post control power of the Court by withdrawing its right to review financial laws. In 2013 the Fourth Amendment\(^4\) to the new constitution annulled all of the case law of the Constitutional Court from 1990-2011. By that time the majority of the judges were loyal to the governing parties\(^5\).

The government of Viktor Orbán from the very beginning has justified its non-compliance with European values by referring to national sovereignty\(^6\), and lately - as an immediate reaction to the EU’s efforts to solve the refugee crisis - to the country’s constitutional identity guaranteed in Article 4 (2) TEU. And the packed Constitutional Court in its decision 22/2016 AB on the interpretation of Article E) (2) of the Fundamental Law rubberstamped this constitutional identity defence of the government. The reason for the Court to change its practice on limited primacy of EU law as well as on human dignity has been the government’s anti-migration policy, and the Court was instrumental to justify the government’s desire to

\(^3\) For the ‘official’ English translation of the Fundamental Law, see: http://www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf


\(^5\) In February 2013, an eighth justice out of the 15 members of the Constitutional Court was added and in April 2013 a ninth Fidesz justice joined the bench with the exclusive votes of the governing parties without any consultation with opposition parties, civil or professional organizations. This way the justices elected by consensus became a minority. By now all the members of the Court are loyal to the government.

\(^6\) The first reaction of the Hungarian government to the ‘Tavares report’ of 3 July 2013 report of the European Parliament on the Hungarian constitutional situation (http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN) was not a sign of willingness to comply with the recommendations of the report, but rather a harsh rejection. Two days after the European Parliament adopted the report at its plenary session, the Hungarian Parliament adopted Resolution 69/2013 on “the equal treatment due to Hungary”. The document is written in first person plural as an anti-European manifesto on behalf of all Hungarians: “We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain.” The resolution argues that the European Parliament exceeded its jurisdiction by passing the report, and creating institutions that violate Hungary's sovereignty as guaranteed in the Treaty on the European Union. The Hungarian text also points out that behind this abuse of power there are business interests, which were violated by the Hungarian government by reducing the costs of energy paid by families, which could undermine the interest of many European companies which for years have gained extra profits from their monopoly in Hungary. In its conclusion, the Hungarian Parliament calls on the Hungarian government “not to cede to the pressure of the European Union, not to let the nation's rights guaranteed in the treaty be violated, and to continue the politics of improving life for Hungarian families”. These words very much reflect the Orbán-government’s view of ‘national freedom’, the liberty of the state (or the nation) to determine its own laws: “This is why we are writing our own constitution...And we don’t want any unsolicited help from strangers who are keen to guide us...Hungary must turn on its own axis”. (For the original, Hungarian-language text of Orbán’s speech, entitled Nem leszünk gyarmat! [We won’t be a colony anymore!] see e.g. <http://www.miniszterelnok.hu/beszed/nem_leszunk_gyarmat_.The English-language translation of excerpts from Orbán’s speech was made available by Hungarian officials, see e.g. Financial Times: Brussels Blog, 16 March 2012, at: <http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFtC>).
exclude refugees from Hungary and to evade its obligations under European law by abandoning its concept of human dignity.

The Government’s Anti-Migration Policy

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

In order to legitimate this policy against Hungary’s unwanted immigrants the government announced it would hold a ‘national consultation’. The government sent out eight million questionnaires to the voting-age population, with questions, like these: “Do you agree that mistaken immigration policies contribute to the spread of terrorism? In your opinion did Brussels' policies on immigration and terrorism fail? Would you support a new regulation that would allow the government to place immigrants who illegally entered the country into internment camps?”

After this psychological preparation, the Parliament amended the asylum law, and adopted a National List of Safe Countries, considering Serbia as a safe third country for asylum-seekers (in contradiction with the clear position of the European Court of Human Rights and the Hungarian Supreme Court). These changes, which entered into force on 1 August 2015, accelerated the asylum proceedings, rendering an ineffective one-instance judicial review with unreasonably short deadlines into a quasi-automatic rejection at first glance of over 99% of asylum claims (as 99% of asylum-seekers entered Hungary from Serbia). The same
amendments also entitled the government to declare a ‘state of migration emergency’, if more than 500 migrants seek asylum per day for a month, or if 2000 migrants are in transit camps for a week, or if migrants riot anywhere in the country. The emergency situation entitled the government to send soldiers to guard the borders, fully armed, to use dogs, rubber bullets, and teargas in addition to the police, which is normally authorized to do that.

The Sixth and the Failed Seventh Amendments to the Fundamental Law

In June 2016, as part of the Hungarian government’s anti-migration policy the National Assembly representatives of the Fidesz-KDNP governing alliance and the radical-nationalist opposition party Jobbik approved the Sixth Amendment to the Fundamental Law. This amendment authorizes the National Assembly to declare, at the initiative of the government, a “terrorism state of emergency” (terrorveszélyhelyzet) in the event of a terrorist attack or a “significant and direct danger of a terrorist attack” (terrortámadás jelentős és közvetlen veszélye). In March 2017, the Hungarian Parliament passed an amendment to the Asylum Act that forced all asylum seekers into guarded detention camps. While their cases are being decided, asylum seekers, including women and children over the age of 14, will be herded into shipping containers surrounded by a high razor-fence on the Hungarian side of the border.

With these legislative measures adopted, the government started a campaign against the EU’s relocation plan. The first step was a referendum initiated by the government. On 2 October 2016, Hungarian voters went to the polls to answer one referendum question: “Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?” Although 92 % of those who casted votes and 98 of all the valid votes agreed with the government, answering ‘no’ (6 % were spoiled

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7 On 14 March 2017 the European Court of Human Rights found that the detention of two Bangladeshi asylum-seekers for more than three weeks in a guarded compound without any formal, reasoned decision and without appropriate judicial review had amounted to a de facto deprivation of their liberty (Article 5 of the Convention) and right to effective remedy (Article 13). The Chamber judgment also found a violation of Article 3 on account of the applicants’ expulsion to Serbia insofar as they had not had the benefit of effective guarantees to protect them from exposure to a real risk of being subjected to inhuman and degrading treatment (Judgment of 14 March 2017 in the case of Ilias and Ahmed v. Hungary, Application no. 47287/15). We should take into account that this unlawful detention of the applicants in the transit zone was based on less restrictive rules enacted in 2015.
ballots), the referendum was invalid because the turnout was only around 40 percent, instead of the required 50 percent.

Despite the fact that at the time of the referendum the idea of a constitutional amendment was not on the table, arguing with the 3.3 million Hungarians who voted in favor of the anti-EU referendum, Prime Minister Orbán introduced the Seventh Amendment to defend Hungarian constitutional identity to politically legitimise non-compliance with EU law in this area. The draft amendment touched upon the National Avowal, the Europe clause and the provision on the interpretation of the Fundamental law in the Foundation part, and the provision on prohibition of expulsion of Hungarian citizens and the collective expulsion of foreigners in the part on Freedoms and Responsibilities.⁸

The proposal was to add a new sentence to the National Avowal, following the sentence, “We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary’s statehood and the unity of the nation”. The new sentence would read: “We hold that the defence of our constitutional self-identity, which is rooted in our historical constitution, is the fundamental responsibility of the state.”

Paragraph 2 of the Europe clause (Article E) of the Fundamental Law would be amended to read: “Hungary, as a Member State of the European Union and in accordance with the international treaty, will act sufficiently in accordance with the rights and responsibilities granted by the founding treaty, in conjunction with powers granted to it under the Fundamental Law together with other Member States and European Union institutions. The powers referred to in this paragraph must be in harmony with the fundamental rights and freedoms established in the Fundamental Law and must not place restrictions on the Hungarian territory, its population, the state, or its inalienable rights.” (new sentence in italics)

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

The following new Paragraph 1 was planned to be added to Article XIV: "(1) No foreign population can be settled into Hungary. Foreign citizens, not including the citizens of

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⁸ The National Avowal is the preamble of the 2011 Fundamental Law of Hungary, the Foundation part contains the main principles, while the Rights and Responsibilities part contains the fundamental rights and obligations.
countries in the European Economic Area, in accordance with the procedures established by the National Assembly for Hungarian territory, may have their documentation individually evaluated by Hungarian authorities”.

All 131 MPs of the Fidesz-KDNP governing coalition voted in favour of the proposed amendment, while all 69 opposition MPs either did not vote (66 representatives) or voted against the amendment (3 representatives). The proposed amendment thus fell two votes short of the two-thirds majority required to approve amendments to the Fundamental Law. Although Jobbik in principle supported the proposed Seventh Amendment, the party’s MPs did not participate in the vote because the government had failed to satisfy Jobbik’s demand that the Hungarian Investment Immigration Program, which grants permanent residence in Hungary to citizens of foreign countries who purchase 300,000 euros in government ‘residency bonds’, be repealed.⁹

The Decision of the Constitutional Court on Hungary’s Constitutional Identity

After the failed constitutional amendment, the Constitutional Court, loyal to the government, came to the rescue of Orbán’s constitutional identity defence of its policies on migration. The Court carved out an abandoned¹⁰ petition of the also loyal Commissioner for Fundamental Rights (hereinafter: Commissioner), filed a year earlier, before the referendum was initiated. In his motion, the Commissioner asked the Court to deliver an abstract interpretation of the Fundamental Law in connection with the Council Decision 2015/1601 of 22 September 2015¹¹. The Commissioner asked the following four questions:
1. Whether the absolute prohibition of expulsion of foreigners from Hungary in Article XIV (1) of the Fundamental Law¹² forbids this kind of action only by the Hungarian authorities,

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⁹ During the vote on the amendment, Jobbik MPs displayed a sign referring to the program reading “He [or she] Is a Traitor Who Lets in Terrorists for Money!”
¹⁰ The Constitutional Court has no deadline to decide on petitions.
¹¹ The petition was based on Section 38 para. (1) of the Act CLI of 2011 on the Constitutional Court, which reads: “On the petition of Parliament or its standing committee, the President of the Republic, the Government, or the Commissioner of the Fundamental Rights, the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a concrete constitutional issue, provided that the interpretation can be directly deduced from the Fundamental Law”.
¹² Article XIV (1) reads as follows: „Hungarian citizens shall not be expelled from the territory of Hungary and may return at any time from abroad. Foreigners staying in the territory of Hungary may only be expelled on the basis of a lawful decision. Collective expulsion shall be prohibited”.
or if it also covers actions by Hungarian acts performed by the bodies or institutions of the Hungarian State as necessary for the implementation of an unlawful collective expulsion executed by another State.

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 Commissioner’s own interpretation was clear from the formulations of the questions.

With regard to the first question, the Commissioner argued that “the rules of international law grant a right for the asylum seekers waiting to be transferred to stay in Italy or in Greece until the end of the asylum procedure”. In the context of the Council decision, the Commissioner concluded that although “the collective expulsion – prima facie – implemented by these two Member States”, but since “the transfer cannot be exercised by a Member State without the reception act of another Member State (according to the petition this Member State would be Hungary if implementing the relocation plan – G.H.): the latter is an indispensable act of the former one”. The question does not seem to take into account that Article XIV (1) of the Fundamental Law applies explicitly to Hungarian citizens, or the collective expulsion of foreigners from the territory of Hungary, and that non-Hungarian asylum seekers relocated due to the Council Decision would not be expelled by Italy or Greece. But the petition is judgmental also regarding the powers of the EU, when claiming that “the European Union has no competence to adopt regulations affecting the staying of certain groups of foreigners in the territory of the Member States”.

13 In my view the legal basis for this is article 78(3) of the Treaty on the Functioning of the European Union (TFEU) which states that: “In the event of one or more Member States being confronted by an emergency
By rendering the petition admission, in its decision 22/2016 (XII. 5.) AB, the Court decided to answer the first question related to the interpretation of Article XIV of the Fundamental Law in a separate judgment. Imre Juhász, one of the justices, wrote a concurring opinion in which he disagreed with the majority’s decision to separate the part of the petition on interpreting Article XIV (1) of the Fundamental Law. In his view “the separation – which is in fact postponing the adoption of the decision for an indefinite period of time – is indeed questionable in the light of the fact that the Council Decision is applicable to the persons who arrive(d) to the territory of Italy or Greece.”

The Court identified question 2 as a reference to the issue, whether a legal act of the European Union can violate fundamental rights, while question 3 concerned the evaluation of ultra vires acts of the Union. These two questions, the Court argued, are clearly constitutional issues to be examined by the Court directly at the level of the Fundamental Law, as they satisfy the condition of concreteness under Article 38 (1) of the Act on the Constitutional Court.

Question 4 could only be interpreted in the framework of questions 2 and 3. Therefore the Court explained its response to question 4 in its response to questions 2 and 3. In other words, the Court tried to avoid directly answering the question about the constitutionality of the EU’s relocation power.

Answering questions 2-4, the Court established that its own competence was regulated neither by the Fundamental Law nor the Act on the Constitutional Court on fundamental rights review and ultra vires review, the latter composed of a sovereignty review and an identity review. But before creating these new competences for themselves, the justices examined the positions taken by the European Court of Justice and the Member States’ constitutional situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.  

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14 The English translation of the decision is available at the homepage of the Constitutional Court: http://hunconcourt.hu/letoltesek/en_22_2016.pdf. The citations are from this translation.
15 See Injunction X/3327-31/2015. On the separation: The Constitutional Court has the power to separate parts of a petition, and decide them separately from each other. The decision on the interpretation of Article XIV (1) of the Fundamental Law has not been published yet.
16 Section 38 (1) reads: “On the petition of Parliament or its standing committee, the President of the Republic, the Government, or the Commissioner of the Fundamental Rights, the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a concrete constitutional issue, provided that the interpretation can be directly deduced from the Fundamental Law”. (italics added – G.H.)
courts. Referring to Costa v. Enel\textsuperscript{17} the Hungarian Constitutional Court acknowledged “the fact that from the point of view of the ECJ, EU law is defined as an independent and autonomous legal order”, but quoting the Kloppenburg judgment\textsuperscript{18} of the German Federal Constitutional Court, the Hungarian justices stated that it is Member States “national enforcement acts that ultimately determine the extent of primacy to be enjoyed by EU law against the relevant Member State’s own law in the Member State concerned”.

On the basis of the review of case law of many of the Member States’ supreme and constitutional courts, including the Lisbon judgement of the German Federal Constitutional Court, the Hungarian justices established that “within its own scope of competences on the basis of a relevant petition, in exceptional cases and as a resort of ultima ratio, i.e. while respecting the constitutional dialogue between the Member States, it can examine whether exercising competences on the basis of Article E) (2) of the Fundamental Law results in the violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the State) and the constitutional self-identity of Hungary”.\textsuperscript{19}

With regard to the fundamental rights review, the Court established that “any exercise of public authority in the territory of Hungary (including the joint exercise of competences with other Member States) is linked to fundamental right”.\textsuperscript{20} 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 the decision of 15 December 2015 (2 BvR 2735/14), and the need for cooperation in the EU and the primacy of EU law, the Court stated that it “cannot set aside the ultima ratio protection of human dignity and the essential contents of fundamental rights, and it must grant that the joint exercising of competences under Article E) (2) of the Fundamental Law would not result in a violation of human dignity or the essential content of fundamental rights”.\textsuperscript{21}

\textsuperscript{17} Costa v ENEL [1964] ECR 585
\textsuperscript{18} BVerfGE 75, 223 [242] (1987)
\textsuperscript{19} 22/2016. (XII. 5.) AB. [46]
\textsuperscript{20} Ibid. [47]
\textsuperscript{21} Ibid. [49]
Regarding the *ultra vires* review, the Court argued that there were two main limits on conferred or jointly exercised competencies under Article E) (2): “the joint exercise of a competence shall not violate Hungary’s sovereignty (sovereignty control), and on the other hand it shall not lead to the violation of constitutional identity (identity control)”\(^{22}\). But the Court also emphasized that “the direct subject of sovereignty- and identity control is not the legal act of the Union or its interpretation, therefore the Court shall not comment on the validity or invalidity of the application of primacy with respect to such acts of the Union”.\(^{23}\)

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 these provisions of the Fundamental Law “shall not be emptied out by the Union-clause in Article E)”, and it established that “the maintenance of Hungary’s sovereignty should be presumed when reviewing the joint exercise of competences” that have already been conferred to the EU.\(^{24}\)

The protection of constitutional identity, the Court argued, is based on Article 4 (2) TEU and on “an – informal cooperation with the ECJ based on the principles of equality and collegiality, with mutual respect to each other”.\(^{25}\) The Court “interprets the concept of constitutional identity as Hungary’s self-identity and its unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Article R) (3) of the Fundamental Law”.\(^{26}\) The Court held that “the constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today – can be highlighted as examples: freedoms, the division of powers, republic as the form of government, respect of autonomy under public law, freedom of religion, the

\(^{22}\) *Ibid.* [54]  
\(^{23}\) *Ibid.* [56]  
\(^{24}\) *Ibid.* [59]-[60]  
\(^{25}\) *Ibid.* [63]  
\(^{26}\) *Ibid.* [64]
exercise of lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us.”. 27 According to the Court these are achievement of the Hungarian historical constitution on which the legal system rests.

The Court held that “the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law, consequently constitutional identity cannot be waived by way of an international treaty.” 28. Therefore, the Court argued, “the protection of the constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State”. 29. Because sovereignty and constitutional identity are in contact with each other in many points, “their control should be performed with due regard to each other in specific cases”. 30

Based on the above, the Court came back to the question of the Commissioner related to the transfer of third country nationals in the context of the EU, and answered it in the framework of this abstract constitutional interpretation as follows: “If human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution can be presumed to be violated due to the exercise of competences based on Article E) (2) of the Fundamental Law, the Constitutional Court may examine, on the basis of a relevant petition, in the course of exercising its competences, the existence of the alleged violation”. 31 And this very sentence is also the holdings (dictum) of the judgement, which stands at the very beginning of the decision.

Looking at the competence of the Constitutional Court, neither the Fundamental Law nor the Act on the Constitutional Court authorizes the Court to perform this review. In Article 24 (2) of the Fundamental Law, one can find that in every listed jurisdiction of normative control (points a)-c) and e)) the subjects of the review are either Hungarian legal norms or judicial decisions. Article T) (2) of the Fundamental Law lists all the legal regulations of Hungarian authorities, without mentioning the legal acts of the European Union, which consequently

27 Ibid. [65]  
28 Ibid. [67]  
29 Ibid.  
30 Ibid.  
31 Ibid. [69]
cannot be subject to any review procedure of the Hungarian Constitutional Court. According to Article 23 (3) of the Act on the Constitutional Court, the Court is authorized to carry out preliminary review of the conformity of an international treaty or of its provisions with the Fundamental Law, but this competence certainly does not apply to EU legal regulations.

Interestingly, three of the justices recognised that the Hungarian Constitutional Court does not have the power to review EU legal acts, but this did not motivate them to write a dissent by rejecting the petition of the Commissioner. István Stumpf, in his concurring opinion, claimed that the holdings of the decision is limited to approving the review of “the joint exercising of competences under Article E) (2) of the Fundamental Law”, and although the reasoning deals with the review of EU laws, the holdings “only reaches a self-evident conclusion”. 32 But he fails to explain how the task could possibly be completed without reviewing the EU legal regulation. In my view, a review of a Hungarian application of an EU decision would not amount to the review of EU law. In his concurring opinion, Béla Pokol takes it for granted that the holdings of the decision declared the monitoring of the Constitutional Court’s procedure against the legal acts of the Union as a possibility in the course of exercising all of its competences, although as I pointed out, it is not prescribed by either the Fundamental Law, or the Act on the Constitutional Court. Pokol thinks that “the right of initiating the procedure should have only be given to the Government”- by the Court.33 In other words, Pokol assumes a non-existent legislative power of the Constitutional Court. László Salamon, the author of the single dissenting opinion goes even further by stating that “in addition to establishing its own competence of review, the Constitutional Court should also declare the applicability of this requirement (namely the duty of ultra vires review – G.H.) to the whole of the State’s system”. 34 Make no mistake, he did not dissent on the ground that the Constitutional Court exceeded the limits of its own competences, but because he thought that the majority decision “fails to provide a complete answer to the questions aimed at the interpretation of the Constitution, as asked by the Commissioner for Fundamental Rights”. 35

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

32 Ibid. [96]
33 Ibid. [92]
34 Ibid. [117]
35 Ibid. [113]
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[36]. 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, Orbán anticipated the next issue relating to which Hungary's national constitutional identity can be invoked, 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”. The next sign of the battle regarding asylum seekers was another speech of Viktor Orbán delivered in February 2017, in which he stated: „I find the preservation of ethnic homogeneity very important.” On 5 March a newspaper reported on Hungary’s shameful treatment of asylum seekers, including severe beatings with batons and the use of attack dogs.

What’s Wrong with the New Constitutional Identity?

I have to admit here that both the failed Seventh Amendment to the Fundamental Law of Hungary and the decision of the Constitutional Court on the interpretation of the country’s constitutional identity look like carefully crafted documents, which seem to fit into the discourse about constitutional identity under several EU Member States’ constitutional laws, as well as about national identity under EU law. Ever since its seminal judgment in *International Handelsgesellschaft*[41] the ECJ has confirmed that national constitutional norms in conflict with secondary legislation should be inapplicable. On the other hand, Member State constitutions can specify matters of national identity, and constitutional courts claim

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

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


identity control tests to EU acts. In other words, national constitutional courts must retain the authority for – as the German Federal Constitutional Court puts it - ‘safeguarding the inviolable constitutional identity’ of their states.

Decisions of the German Federal Constitutional Court, and other high courts, claiming jurisdiction to protect national identity are usually referring to their co-operative relationship with the European Court of Justice, emphasizing their ‘Europe-friendliness’\(^{42}\), and aiming to increase the level of protection offered by the EU\(^{43}\). In the case of the European Central Bank’s Outright Monetary Transaction (OMT) programme about the ‘irreversibility of the Euro the German Court in its first preliminary reference ever de facto declared the OMT programme illegal, and called the Court of Justice to strike it down.\(^{44}\) But after the ECJ’s ruling delivered on 16 June 2015 reaffirmed the rule that a judgment of the Court of Justice “is binding on the national courts, as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings,”\(^{45}\) the German Court complied with the answer given by the ECJ.\(^{46}\)

Similarly to their German colleagues in Gauweiler, the Italian Constitutional Court in its preliminary reference order 24/2017 explains to the ECJ the reasons why the Italian justices think that ECJ Grand Chamber judgment of 8 September 2015 in case C-105/14 in Taricco infringes upon the Italian coconstitution’s principle not to be prosecuted beyond the statute of limitation period that was applicable at the time of the criminal offence was committed, and invites the ECJ to correct or qualify its decision. As Davide Paris rightly observes, even though the ECJ might well be unhappy with this development of ‘threatening references of appeal’, it is better than seeing national constitutional courts invoking constitutional identity to decide whether and to what extent the Member States shall comply with EU law, without the ECJ having the opportunity to express its opinion.\(^{47}\)

\(^{42}\) See for instance the judgement of the GFCC of 24 April 2013 on the Counter-Terrorism Database Act, 1 BvR 1215/07. This judgment was referred to by the Supreme Court of the United Kingdom in State v. Secretary of State for Transport, 22 January 2014.


\(^{44}\) BVerfG, Case No. 2 BvR 2728/13, order of 7 February 2014.

\(^{45}\) Case C-62/14 Gauweiler, para 16.


In the framework of a dialogue between national constitutional courts and the ECJ, also the Spanish Tribunal Constitucional emphasizes the harmony between the European and Spanish basic values and read into the identity clause a confirmation that an infringement of the core principles of the Spanish Constitution would also violate the European Treaty.\(^{48}\) Similarly, in the reading of the French Conseil d’Etat what is ‘inherent’ in the constitutional identity of a Member State is what is very crucial and distinctive of it, namely the ‘essential of the Republic’.\(^{49}\) The conclusion of the Conseil d’Etat in the case of Arcelor has been that if in the EU legal order there is an equivalent protection of the principle of rights safeguarded by the Constitution, the review of legality of the EU law should be deferred to the ECJ.\(^{50}\) The Czech Constitutional Court, although reserving its power to review the constitutionality of EU law, but at the same time reserved this possibility for exceptional cases, such as the ‘abandoning the identity of values’ or exceeding the scope of conferred powers.\(^{51}\)

Provided that we ignore the lack of the competence of the Constitutional Court in the current Hungarian constitutional system to review EU law, as argued earlier, what is wrong then with the decision of the Hungarian Constitutional Court, which also wants to break with the absolute primacy of EU law?

First, it is important to clarify the legal nature of the decision. It is certainly not aimed at placing the legality of an EU legislative act under review. Although, as mentioned, the parliamentary Commissioner in his petition to the Constitutional Court referred to Council decision 2015/1601 of 22 September 2015 on the quota system, he did not ask for a review of its legality, and the Court did not provide such review.\(^{52}\) Hence the decision cannot be


\(^{50}\) Ibid.


\(^{52}\) Independently from this procedure, the Hungarian government, right after its Slovakian counterpart’s submission, also challenged the quota decision before the European Court of Justice. This procedure is still pending, but the ECJ in its decision will not take into account the text of the Hungarian constitution or the domestically binding interpretation of it by the Constitutional Court. Why not? What if Hungary argued that a
considered as an ultra vires act nor as an identity review of the Council decision itself. It is rather an announcement of what the Court could do to review such an EU decision, whether it violates “human dignity, another fundamental rights, the sovereignty of Hungary or its identity based on the country’s historical constitution”.\(^{53}\)

As the ECJ has stressed in its standing case law on derogations, EU laws have to be interpreted strictly so as to be applicable only when the case at hand entails a ‘genuine and sufficiently serious threat to a fundamental interest of society’.\(^{54}\) There is no strict and exhaustive list of constitutional identity-sensitive matters accepted by the ECJ, but taking into account the jurisprudence of the ECJ there are some more frequently acknowledged issues, such as decisions on family law, the form of State, foreign and military policy, and protection of the national language.\(^{55}\) The subject matter of the Hungarian Constitutional Court decision was the quota decision of the Council, on the basis of which 1294 asylum seekers would be relocated from Greece and Italy to Hungary, and the Hungarian authorities would be obliged to process their asylum applications. What ‘fundamental interests of the society’ can \textbf{legitimately trump} the requirement of sincere cooperation of Article 4(3) TEU here? As I pointed out earlier, this could not be the alleged collective expulsion of asylum seekers by Italy and Greece claimed by the Commissioner in his petition because the Hungarian Fundamental Law prohibits the collective expulsion of non-Hungarians from the territory of Hungary, and not from a third country. In other words, the human dignity and other fundamental rights of refugees not staying in Hungary cannot be protected under the text of the current Hungarian Constitution.

\(^{53}\) See the wording of the holdings of 22/2016. (XII. 5.) AB: Case C-208/09, Sayn-Wittgenstein, para 86.

\(^{54}\) See these matters mentioned in P. Faraguna, ‘Taking Constitutional Identities Away from the Courts’, Brook. J. Int’l L. Vol. 41:2, 2016. 491, at 506-508. In addition, Sayn-Wittgenstein, Faraguna mentions the Groener judgment (Case C-379/87) from 1989, and the more recent Runevi judgment (Case C-208/09). Barbara Guastaferro discusses also the Omega and Dynamic Medien Cases (Case C-391/09), the Spain v. Eurojust Case (Case 160/03), as well as the Affatato Case (Case 3/10). See B. Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause’, Yearbook of European Law, Vol. 31. No. 1 (2012), 263-318. Besides these cases, Monica Claes also mentions from the pre-Lisbon case-law the Michaniki case (Case 213/07) and Adria Energia AG (Case 205/08), where the reference was to the protection of the national cultural identity of the relevant Member States rather than to the more political form of it. See M. Claes, ‘National Identity: Trump Card or Up for Negotiation?’, in A. S. Arnaiz and C. A. Llivina (eds.), \textit{National Constitutional Identity and European Integration}, Intersentia, 2013. 109-139, at 131-32.
Another problem with the Constitutional Court’s interpretation of the constitution is that it claims that ‘Hungary’s constitutional identity is rooted in its historical constitution’. But the substantive meaning of the text of the Fundamental Law on ‘the achievements of our historical constitution’ is totally ambiguous; there is no legal-scientific consensus in Hungary regarding its precise nature. Presumably, since the case law of the Constitutional Court prior to 2011 has been annulled, it should not include precedents stemming from the Court’s accumulated practice of legal interpretation since the regime change. Justice András Varga Zs. in his concurring opinion claims that ‘the constitutional governance of the country has been one of the core values the nation has always stuck to, and that has been a living values even at the times when the whole or the majority of the country was occupied by foreign powers’. By contrast, in my view, the thousand years of the Hungarian historical constitution – with the exception of some short moments, such as during the failed revolution of 1848 or shortly after 1945, until the communist parties take over, and also after 1989, when liberal democracy again seemed to be the ‘end of history’ - the dominant approach was an authoritarian one.

When the Hungarian Constitutional Court protects Hungary’s current constitutional identity using the pretext of protecting the human dignity of the asylum seekers against collective expulsion, but aiming at not taking part in the joint European solution of the refugee crisis, it does so in a way that is inconsistent with the requirement of sincere cooperation of Article 4(3) TEU. It promotes national constitutional identity without accepting the constitutional

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56 Because there is no list of laws officially considered as part of the historical constitution, an extreme interpretation could be made that the Jewish laws adopted in the 1930s, earlier than similar legislation in the Nazi Germany belong to it.
58 22/2016. (XII. 5.) AB. [110]
59 See the results of the research project “Negotiating Modernity”: History of Modern Political Thought in East-Central Europe, led by Balázs Trecsényi, and supported by the European Research Council, https://erc.europa.eu/negotiating-modernity-history-modern-political-thought-east-central-europe
61 In an article, Viktor Orbán warned the ‘unionists’ of the EU, who call for a United States of Europe and mandatory quotas, that if they refuse to accept the ‘sovereignist’s desire for a Europe of free and sovereign nations, who reject quotas of any kind, the mainstream will follow precisely the course that Hungary has set forth to affirm its constitutional values[?], Christian roots, its demographic policy, and its effort to unify the nation scattered across borders. See V. Orbán, ‘Hungary and the Crisis of Europe: Unelected Elites versus People’, National Review, January 26, 2017.
discipline demanded by the European legal order. The reference to national constitutional identity of Article 4 (2) is legitimate only if the Member State refuses to apply EU law in a situation where a fundamental national constitutional commitment is in play. The Hungarian abuse of constitutional identity is nothing but national constitutional parochialism, which attempts to abandon the common European constitutional whole.

The Finally Adopted Seventh Amendment and the Instrumental Role of Religion in National Identity

After the April, 2018 parliamentary elections, when Fidesz regained its 2/3 majority, on 20 June the government finally enacted the Seventh Amendment, this time with the votes of Jobbik. The most important issue of the amendment is still the continued struggle against immigration by forbidding settlement of foreigners in the country en masse: “No alien population shall be settled in Hungary”. (New Article XIV Section (1) of the Fundamental Law). For this reason, the ‘Stop Soros’ legislative package, named after Hungarian-American philanthropist George Soros enacted together with the amendment criminalizes NGOs and activists aiding ‘illegal migrants in any way.’ 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.”

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65 In its Opinion, adopted on 22-23 June, two days after the enactment of the ‘Stop Soros’ bill, but leaked to the BBC prior to the vote in the Hungarian Parliament the Council of Europe’s Venice Commission recommended to repeal the provision of the law on illegal migration, because it criminalizes organizational activities which are not directly related to the materialization of the illegal migration.” CDL-AD(2018)013- e Hungary - Joint Opinion on the Provisions of the so-called “Stop Soros” draft Legislative Package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018).
66 As I will show in chapter IV, 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.
“All bodies of the State shall protect the constitutional identity of Hungary.” In order to make any further European Union joint effort, similar to the relocation plan of the Council to solve the migration constitutionally questionable Section (2) of Article E (the so-called EU clause) was replaced with the following wording: the joint exercise of certain powers with the EU “shall not limit Hungary’s inalienable right of disposal related to its territorial integrity, population, form of government and governmental organisation.”

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

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

The purpose of the proposed provision was questioned at the preparatory meeting of the judicial committee by members of opposition parties. The only explanation MPs of the governing Fidesz party, who initiated the new text were able to provide was a paraphrase of an alleged sentence by Robert Schuman, founding father of the European Union: “Without Christian culture there is neither Europe nor Hungary.” The major points of the recent constitutional amendment, namely the criminalization of any civil assistance to refugees and the declaration of homelessness as an unlawful behaviour are deeply contradictory to the very idea of Christian culture. (Most probably the same intention to legitimate his anti-European idea lead Prime Minister Orbán recently to reframe his concept of ‘illiberal democracy’ as a fulfilment of ‘Christian democracy.’) But this reasoning does not reveal the compensatory message sent to the European People’s Party, the party family of Fidesz in the European
Parliament, and to its most powerful member, the German CDU-CSU: even if we may have strange views on European values, but we are good Christians, like you are. Besides the political message of the amendment towards Europe, there will be clear internal constitutional law consequences of the new provision, as it can be used as a basis of reference to annul any legal norm allegedly violating Christian culture, a tool that can be useful for the packed Constitutional Court or any court in Hungary.

Not that the text of the Fundamental Law would have been ideologically neutral so far. This new constitution, which was passed by the Parliament in April 2011, shows the role of religion in national legitimation through characterizing the nation referred to as the subject of the constitution not only as the community of ethnic Hungarians, but also as a Christian community, narrowing even the range of people who can recognize themselves as belonging to it. The preamble to the Fundamental Law, which is compulsory to take into consideration when interpreting the main text, commits itself to a branch of Christianity, the Hungarian Roman Catholic tradition. According to the text of the preamble, “We are proud that our king Saint Stephen built the Hungarian state on solid ground and made our country a part of Christian Europe”, the members of the Hungarian nation recognise Christianity’s “role in preserving nationhood”, and honours the fact that the Holy Crown “embodies” the constitutional continuity of Hungary’s statehood. Besides the sacral symbols, this choice of ideology is reflected—inter alia—in the Fundamental Law’s concept of community and its preferred family model, and its provision regarding the protection of embryonic and foetal life from the moment of conception.

The preamble, while giving preference to the thousand-year-old Christian tradition, states, that “we value the various religious traditions of our county”. The choice of words displays its model of tolerance, under which the various worldviews do not have equal status, although following them is not impeded by prohibition and persecution. It is however significant that the tolerance thus declared only extends to the various “religious traditions,” but does not apply to the more recently established branches of religion, or to those that are new to Hungary, or to non-religious convictions of conscience.

The refugee crisis of 2015 has demonstrated the intolerance of the Hungarian governmental majority, which styled itself as the defender of Europe’s ‘Christian civilization’ against an
Islamic invasion. In the beginning of the crisis, Prime Minister Viktor Orbán claimed that “Christian culture is the unifying force of the nation… [and] Hungary will either be Christian or not at all.” In another speech held in early September, Orbán went further by stating that: “The Christian-national idea and mentality will regain its dominance not just in Hungary but in the whole of Europe.” This new era should follow ‘the age of liberal blah blah,’ because the origin of the mass migration and the consequent refugee crisis is ‘the crisis of liberal identity’: “For years we have told them that 'the world is a global village' ... we have talked about universal human rights to which everybody is entitled to. We forced our ideology on them: freedom is the most important thing, we said. We bombed the hell out of those who didn't accept our ideology.... We created the Internet, we declared the freedom of information, and we told them that every human being should have access to it. We sent them our soap operas. They watch what we do.... We sent our TV stars into their homes.... they now think that our virtual space is also their space and that in this virtual space everybody can meet anybody else. ... These people, partly because of our culture lent to them or forced upon them, are no longer tied to their own land and to their past.”

But should the alleged defense of Christianity from the ‘Muslim hordes’ be taken seriously? In a speech on 26 July 2012 Orbán explains why authoritarianism is needed to treat Hungarians: ‘Joining forces is not a matter of intentions, but of sheer force. With a half-Asian lot such as ours, there is no other way [than compulsion or force – G.H.].’ This assessment is very similar to that of the late Imre Kertész, the Nobel laureate in literature, who argued that Hungary's ill-fate stemmed from its inability to choose between Asia and Western Europe. Historically in Hungary, the bloody conflicts of the Reformation meant that until the Horthy era no church could fully identify itself with the Hungarian nation. Although the Catholic Church dominated the Protestants, both numerically and politically, the Catholic Church still played little historical role in preserving national consciousness, so that Catholicism has never become equated with Hungarian patriotism. Under communism, the

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69 See B. Szabó, 'Félázsiai származékonál, mint mi, csak így megy' [With a half-Asian lot such as ours, there is no other way], Népszabadság, 27 July 2012.
70 'La Hongrie est une fatalité', Le Monde, 10 February 2012.
Roman Catholic church neither served as a symbol of national independence, nor as a source of protection for the opposition, as it happened in Poland.  

Christianity and religion serve as reference points that Orbán’s right wing populism uses opportunistically. Fidesz, that used to be a liberal party with a militantly anti-clerical views, has started to become conservative from the mid-90s, turning to an openly positive stance towards religion. Still, religion has never been taken as significant part of its identity, rather played a purely instrumental, opportunistic role in the party’s political strategy (even after joining the European People’s Party (EPP), the center-right party family of the European Parliament, Fidesz uses religious symbols in an eclectic way in which references to Christianity are often mentioned together with the pre-Christian pagan traditions. This refers to the idea of ‘two Hungarys’: the Western Christian, and the Eastern pagan, tribal one. Orbán once voiced his conviction that the Turul bird, a symbol of ancient pre-Christian Hungarians, ‘the symbol of national identity of living,’ is the image Hungarians are born in. Fidesz interprets this pre-Christianity within the framework of nationalism, and this ethno-nationalism provides sufficient basis of political identification as a type of surrogate-religion. In this respect Fidesz follows the authoritarian traditions of the Horthy regime between the two World Wars, in which the nation-religion (‘nemzetvallás’) played a crucial role. Another example of Christianity being instrumental for Orbán is the fact that when he listed the illiberal regimes he admires from Singapore through China, Turkey, India, Singapore, and Russia all of them are either non-Christian or Orthodox.

The Seventh amendment to the Fundamental Law of Hungary with the state’s obligation to protect Christian culture – besides its potential to limit fundamental rights – strengthens the role of religion to constitutionally legitimize the concept of ethnic nation. In this concept the


72 Only 22% of Fidesz voters are followers of churches, and the same percentage of them consider themselves as explicitly non-religious. Political Capital Institute’s research, Budapest, 2012. See A. Bozóki and Z. Ádám, State and Faith: Right-wing Populism and Nationalized Religion in Hungary, East European Journal of Society and Politics, 2016/1.

73 ’Minden magyar a turulba születik’ [All Hungarian Are Born Into the Turul Bird], Népszabadság, Sept. 29, 2012.
nation, as subject of the Fundamental Law isn’t just the community of ethnic Hungarians, but is also a Christian community, which means that those who do not associate themselves with Christianity, can feel themselves excluded from the nation as well. In this constitutional order the state is not necessarily obliged to tolerate all religions, and the representatives of the Christian religion can feel themselves entitled to be intolerant towards the representatives of other religions.

Conclusion

When the Hungarian Constitutional Court protects Hungary’s Christian culture and constitutional identity, using the pretext of protecting the rights of the asylum seekers against collective expulsion, but aiming at not taking part in the joint European solution of the refugee crisis\(^\text{75}\), it does so in a way that is inconsistent with the requirement of sincere cooperation of Article 4(3) TEU. It promotes national constitutional identity, without accepting the constitutional discipline demanded by the European legal order\(^\text{76}\). The reference to national constitutional identity of Article 4 (2) is legitimate only, if the Member State refuses to apply EU law in a situation where a fundamental national constitutional commitment is in play.\(^\text{77}\) The Hungarian abuse of constitutional identity is nothing but national constitutional parochialism,\(^\text{78}\) which attempts to abandon the common European constitutional whole, including human dignity referred to in Article 2 TEU.

\(^{75}\) In an article, Viktor Orbán warned the ‘unionist’ of the EU, who call for a United States of Europe and mandatory quotas, if they refuse to accept the ‘sovereignists’ desire for a Europe of free and sovereign nations, who will not hear of quotas of any kind, the mainstream will follow precisely the course that Hungary has set forth to affirm its constitutional affirmation of Christian roots, its demographic policy, and its effort to unify the nation scattered across borders. See V. Orbán, ‘Hungary and the Crisis of Europe: Unelected Elites versus People’, National Review, January 26, 2017.

