Abusive Constitutionalism in Hungary

KRISZTINA JUHÁSZ

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Abstract: *The study, using the concept of abusive constitutionalism, examines those formal and informal constitutional changes which took place after the Fidesz-KDNP coalition had come into power in 2010 and resulted in the hybridisation of the Hungarian political system. The paper, using qualitative research methods such as analysis of the relevant literature and primary resources, including the in-depth analysis of the relevant Constitutional Court decisions, comes to the conclusion that the Orbán governments first dismantled the checks and balances, foremost the Constitutional Court via formal abusive constitutional changes, and as a next step, with the contribution of the weakened and packed Constitutional Court, the government aims to eliminate the EU's legislation and intervention on the field of asylum policy via formal and informal abusive constitutional changes based on the concepts of constitutional pluralism and identity.*

Keywords: ***legal constitutionalism, political constitutionalism, abusive constitutionalism, constitutional identity, asylum and migration, Hungary***

I. Introduction

Hungary has left the path of liberal democracies and turned to an authoritarian direction in the last ten years, undoubtedly since the entering into force of the new constitution, the so-called Fundamental Law on 1 January 2012 (Bárd – Grabowska-Moroz 2020; Kelemen 2020; Bozóki – Hegedűs 2018; Hegedűs 2019, Halmai 2021, Scheppele 2018, European Parliament 2022). Prime Minister Viktor Orbán phrased the Hungarian political system as an illiberal democracy in his Tusnádfürdő speech in 2014 (Orbán 2014). The establishment of the illiberal state went hand in hand with the systematic dismantling of the rule of

law that caused a heated debate between the EU and Hungary and resulted in the application of some of the measures belonging to the rule of law tools of the European Union, such as infringement procedures (European Commission 2015, 2017a, 2017b, 2019), or the Article 7 procedure (European Parliament 2018a), and most recently the conditionality mechanism (European Commission 2022). In this debate, the Hungarian government, similar to the Polish one anyway,[1] frequently refers to the concepts of political constitutionalism, constitutional pluralism and constitutional identity (Trócsányi 2014; Orbán 2016a; Varga 2021: 2–4) to legitimise the systematic breaches of the rule of law and certain EU legal acts as well.

The study intends to show how the Orbán governments, with the support of the packed Hungarian Constitutional Court, have been systematically abusing the concepts of political constitutionalism, as well as constitutional pluralism and identity to undermine the rule of law and to defend themselves in the rule of law debate, especially in the field of asylum policy. Understanding the nature of the Hungarian constitutional processes is crucial, since abusive constitutional practices are on the rise in Central and Eastern Europe in the last few years as David Kosar and Katarína Sipulová (2018: 84) have pointed out, and Hungary is perceived as a 'model to emulate' in Poland (Sadurski 2018: 3).

The main research question is whether political constitutionalism, according to the argument of the Hungarian government and the Constitutional Court, can explain the ongoing constitutional processes, or rather the concept of abusive constitutionalism provides the appropriate approach. Another question emerges from the previous one: what exactly is the role of the Constitutional Court in these constitutional processes?

The study argues, based on the previous findings of David Landau (2013), Gábor Halmai (2017), David Kosar and Katarina Sipulova (2017) and Nóra Chronowski et al. (2022), that Hungarian constitutional changes cannot be described as political constitutionalism, instead abusive constitutionalism is the appropriate framework of interpretation and analysis. Through the analysis of the relevant literature and primary sources such as the national legislation of Hungary (including constitutional rules), decisions of the Constitutional Court, legal acts of the EU or decisions of the EU Court of Justice, the paper examines those formal and informal abusive constitutional changes which resulted in the hybridisation of the Hungarian political system and the rule of law related debate with the European Union. The in-depth analysis of the relevant Constitutional Court decisions including the related dissenting and concurring opinions of the Constitutional Court judges, which usually fall out of the scope

1 Although the author recognises that there are differences in the constitutional developments of Hungary and Poland, consequently in the level of hybridisation of their political systems too, as is pointed out in great detail by the relevant literature (Sadurski 2018; Bozóki – Hegedűs 2018), still there are similar elements and features as well (Drinóczi – Bień-Kacała 2019).

of the examination, however, may contain important relevant legal opinions, and underpins the supportive role of the Hungarian Constitutional Court in this process. Choosing the distinction between strong and weak forms of abusive judicial review elaborated by David Landau and Rosalind Dixon (2020), the study reveals the exact methods of the Hungarian Constitutional Court in the course of abusive judicial review.

II. Theoretical Background

Critical Approach to Legal Constitutionalism – Political Constitutionalism

After gaining its two-third majority for the first time as a result of the 2010 parliamentary elections, the Orbán government, leaning on the concept of political constitutionalism, started to undermine the dominant concept of constitutionalism at that time, namely legal constitutionalism and the constitution of the political transition (Constitution 1989) too.[2] As a first step, several amendments were adopted to the Constitution 1989, and in 2011 the parliamentarian two-thirds majority accepted a new constitution (Fundamental Law of Hungary), although there was no reference to any constitutional reform in the campaign of Fidesz before the elections. The amendments to the Constitution 1989, the circumstances of the preparation and adoption of the Fundamental Law, some of its provisions and, furthermore, the subsequent amendments of it triggered harsh critiques not only from the Hungarian opposition, but from academics and international actors (such as the Venice Commission) as well, and caused a heated rule of law debate with the European Union. According to the critics, the 'constitutional revolution' resulted in an authoritarian turn in Hungary and the creation of a hybrid regime (Bárd – Grabowska-Moroz 2020; Kelemen 2020; Bozóki – Hegedűs 2018; Hegedűs 2019, Halmai 2021, Scheppele 2018, European Parliament 2022).

The government and the parliamentarian majority have been referring to, with the contribution of certain (mostly) right-wing academics, the concept of political constitutionalism to defend and legitimise their constitutional amuck (Tellér 2014; Lánczi 2015; Pokol 2015; Stumpf 2014, 2020; Orbán 2016b).). However, it is worthy to examine whether the steps of the Orbán governments can be interpreted in the framework of political constitutionalism or if the approach of abusive constitutionalism provides the appropriate interpretational frame.

Since political constitutionalism is a reactive form of constitutionalism posing critiques and offering an alternative to legal constitutionalism (Bellamy 2011; Blokker 2019), it's worth first overviewing the substance of legal constitu-

2 Constitution 1989 was not a new constitution at the time of the transition, but a comprehensive amendment of the constitution 1949.

tionalism. Legal constitutionalism became dominant after the Second World War in the liberal democratic states, and based on the literature it can be described with the following features: the main aims and missions of constitutionalism are the protection of human rights, and furthermore to guarantee the separation of power and the limitation of governmental power in order to prevent despotism (Sajó – Uitz 2017:13). To be able to achieve the above-mentioned goals, legal constitutionalism considers constitution as a structure of law that is separated from its subjects and has relative autonomy. In other words, a constitution is ultimately dependent on the people for its legitimation, but once constituted, 'it becomes a relatively autonomous set of meta-norms and rules that constitutes social and political interaction' (Blokker 2019: 336). In modern democracies, constitutions are designed to transfer popular sovereignty from the people to the institutions created based on the constitution. Legal constitutionalism devotes special attention to judicial institutions, especially to constitutional courts, repositioning the relationship between legislation and judiciary, claiming that after the formation and adoption of the constitution the formal authority of legislation is weakened. At the same time, the judiciary, or more specifically constitutional courts, acquire responsibilities for strong constitutional review of statutes and for ensuring conformity between domestic and international law (Blokker 2019: 336). According to Alec Stone Sweet, constitutional courts have four core tasks: counterweight to majority rule, protect human rights, pacify political conflicts and legitimate public policies (Stone Sweet 2000: 137). Prioritisation of judicial institutions, especially constitutional courts and the concept of rule of law is connected to the judicialisation of the society and the political system as well, which includes the shift of power away from legislatures towards courts and shifting political claims away from representative institutions to the legal arena (Ferejohn 2002: 41).

Legal constitutionalism became a decisive approach to constitutionalism in Hungary after the political transition, between 1989 and 2010. At the same time, the concept has been criticised for several years both by politicians and (mostly) right-wing academics. The main challenging concept is political constitutionalism, which has been used as a theoretical and legitimation basis by the Orbán governments since 2010. Efforts of the government and the parliamentary majority to cut back legal constitutionalism and its substance strong judicial review were supported by academics from the right wing such as Gyula Tellér (2014), András Lánczi (2015), Béla Pokol (2015) and István Stumpf (2014; 2020).

As Mac Amhlaigh points out, the most contested question between political and legal constitutionalism is 'whether courts or legislatures should have ultimate decision-making authority on the identification, interpretation and application of the fundamental values, usually expressed as fundamental rights, of a particular legal order or constitutional settlement' (Amhlaigh 2016: 176). The initial presumption of political constitutionalism is that constitutions and

constitutionalism are not an uncontested set of values, ideas and institutional arrangements, but rather a framework for the articulation and deliberation over these elements (Bellamy 2011: 90; Blokker 2019: 337). This approach consequentially leads to the next claim of political constitutionalism, namely the denial of the relative autonomy of constitutions which situates constitutions above or beyond politics. As one of the main representatives of political constitutionalism, Richard Bellamy phrases: 'So any system of rights has to be politically negotiated and will be the product of the institutional arrangements that exist to arbitrate these debates' (Bellamy 2011: 90).

The main target of the critique of political constitutionalism is strong judicial review implies that the courts have general authority to determine what the constitution means, and the courts' constitutional interpretations are authoritative and binding on the other branches of power including legislation (Tushnet 2003: 2784). In the continental European legal systems, constitutional courts became the stakeholders of constitutional review, consequently the main target of political constitutionalism as well. For political constitutionalists, it is the legislature that is ultimately best able to represent the diversity of viewpoints on constitutional values, rights and institutional arrangements in society (Blokker 2019: 337). Political equality and legitimacy of decision-making are at the centre of their argument, claiming that the most legitimate form of decision--making authority is one which makes decisions according to a procedure, and which is respectful of all citizens involved in disagreements by treating them equally (Waldron 1999: 102) and where they are 'regarded as equals and their multifarious rights and interests accorded equal respect and concern' (Bellamy 2007: 5). According to Bellamy, due to the deliberative qualities of legislatures, as compared with courts and the accountability of legislators to citizens, legislation and its majority rule of decision-making provides the most legitimate form of decision-making (Bellamy 2011: 92). At the same time, this means that if the accountability and deliberativeness of the legislature drop, then the legitimacy of the decision-making and political equality of citizens are in danger.

Accountability of legislators is secured only if there is a chance for real competition among the political parties, and fair elections, while deliberativeness is ensured when the parliamentarian majority is willing to have a dialogue with the opposition and other political and social actors as well. Nevertheless, these two core features are missing from the Hungarian legislature, since we cannot speak about fair elections due to the modifications of the electoral rules and to the undermining of media pluralism as well as transparency of campaign funding (European Parliament 2013, 2018b; Rácz 2018: 1–3; Scheppele 2022; OSCE 2014, 2018, 2022). Nor can we consider the Hungarian parliament as a deliberative one, since the parliamentary majority 'not only decides every single issue without any dialogue, but there is practically no partner for such a dialogue, as the independence of both the ordinary judiciary and the Consti-

tutional Court has been eliminated' (Halmai 2019: 303). Furthermore, because of the different kinds of state of emergency (due to mass migration; due to the pandemic; given because of the armed conflict in a neighbouring country) the government, via government decrees, became the main actor of legislation, instead of the parliament. Consequentially, agreeing with Gábor Halmai, what we witness in Hungary since 2010 cannot be described by the concept of political constitutionalism (Halmai 2019; 2021), but rather by the approach of abusive constitutionalism (Landau 2013; Chronowski et al. 2022).

Abusive Constitutionalism

David Landau's research about constitutional changes resulting in democratic backsliding provides an alternative explanatory framework, namely the concept of abusive constitutionalism. It involves the use of formal and informal mechanisms of constitutional and even sub-constitutional change to undermine democracy and rule of law. 'Constitutional change allows authoritarian actors to remove members of the political opposition and to replace them with officials loyal to the incumbents; to weaken, disable, or pack courts as well as other mechanisms of accountability; and to establish government control over the media and other key institutions' (Landau 2013: 194). In other words, constitutional change is labelled as abusive if it 'makes the constitutional order meaningfully less democratic than it was initially' (Landau – Dixon 2020: 1322). The outcome is usually not a full-fledged authoritarian but rather a hybrid regime which maintains the 'democratic façade' (Chronowski et al. 2022: 2) via upholding free but not fair elections, as well as packing and weakening the judiciary and other institutions to eliminate checks and balances.

The formal mechanism of constitutional change involves the amendment or the replacement of the constitution, while the informal mechanism covers the abusive judicial review (Landau – Dixon 2020) and interpretation carried out by the Constitutional Court (Drinóczi – Bień-Kacała 2019: 1153–1154). Abusive constitutionalism involves even sub-constitutional changes when, as a result of the adoption or amendment of cardinal and ordinary acts, political and legal institutions (courts, ombudspersons, media authorities, etc.) become less independent and democratic (Landau – Dixon 2020:1320).

Especially abusive judicial review and interpretation, as informal ways of abusive constitutional change, are a grateful tool in the hand of a would-be authoritarian leader since courts, and especially constitutional courts, are seen 'as one of the main defences against the threat posed by the new authoritarians' (Landau – Dixon 2020: 1320), because 'judicial decisions enjoy a presumptive form of respect in most constitutional systems and societies, and international actors often agree to respect the outcome of a constitutional decision, even where they disagree with the outcome' (Landau – Dixon 2020: 1135–1336).

According to the definition of Landau and Dixon, judicial review is abusive when it 'intentionally undermines the minimum core of electoral democracy' (Landau – Dixon 2020: 1322). Furthermore, they differentiate between two types of abusive judicial reviews: strong and weak ones. In the case of weak judicial review, the constitutional court upholds, via the dismissal of a constitutional challenge, legislation or executive action that significantly undermines the democratic minimum core legitimising the act of the political leadership. In the course of strong abusive judicial review, the constitutional court itself acts intentionally in a way that removes or undermines democratic protections (Landau – Dixon 2020: 1345–1346).

In the following chapter, through the in-depth analysis of the relevant legislation and constitutional court decisions, the paper intends to highlight each step and form of abusive constitutionalism in Hungary and the role of the constitutional Court therein.

III. Abusive Constitutionalism in Hungary

Formal abusive constitutional changes to eliminate legal constitutionalism

Formal constitutional changes started with the amendments to the Constitution 1989, altogether twelve times between May 2010 and December 2021, undermining the pillars of legal constitutionalism in Hungary (Antal 2013: 62). Among the most significant amendments we have to mention the amendment of 5 July 2010 which repealed Article 24 (5) that prescribed a majority of four-fifths of the votes of the Members of Parliament to pass the parliamentary resolution specifying the detailed regulations for the preparation of the new constitution. The amendment prescribed a two-thirds majority for the adoption of a new constitution which meant a clear message that 'there was no need for any political support or consensus from the opposition, and it underlined the non-inclusive character of the constitution-changing and constitution-making processes' (Drinóczi – Bień-Kacała 2019: 1153).

Besides the alteration of the adoption of a new constitution, the government and the supporting parliamentary majority turned against the Constitutional Court adopting constitutional amendments, which led to the weakening and packing of the Constitutional Court. The amendment of 5 July modified the nomination rules of the Constitutional Court judges. Previously, the nomination was the task of a parliamentary committee formed by the members of political party factions based on parity; consequently, a consensus was required between the governing majority and the opposition in course of the nomination. Due to the amendment, the nominating parliamentary committee consists of the members of parliamentary factions upon majority rule (Chronowski et al. 2022:

7–10). This amendment, just like the previously mentioned, undermined deliberation about constitutional issues within the parliament, so it obviously went against the arguments of political constitutionalism.

At the same time, the governing majority didn't finish increasing its influence on the composition of the Constitutional Court but continued the packing of the Court with the amendment of 14 June 2011 that, on the one hand, increased the number of judges from eleven to fifteen, and on the other hand, prescribed that the president of the Constitutional Court is elected by the parliament with a two-thirds majority of the votes, while previously the judges elected their president (Act LXI of 2011).

Not only the composition but also the competences of the Constitutional Court were affected by abusive constitutional amendments. Act CXIX of 2010 has limited the constitutional review competences of the Court regarding budgetary issues. According to the amendment, the Constitutional Court can assess and annul the constitutionality of acts related to the state budget, central taxes, duties and contributions, custom duties and central conditions for local taxes only on limited constitutional grounds, exclusively based on the right to life and human dignity, the protection of personal data, freedom of thought, conscience and religion or the right related to Hungarian citizenship. The amendment can be conceived as revenge of the government since the Constitutional Court in its Decision 184/2010. (X. 28.) AB annulled the rules of an act on 98% special tax applied to certain severance pays against good morals in public service (Chronowski et al. 2022: 12).

The height of formal constitutional changes was inevitably the adoption of the new constitution, officially named the Fundamental Law of Hungary in April 2011. The governing parliamentary majority eliminated the dialogue and consensus-seeking not only with the parliamentary opposition but with the society as well, since there was no substantive deliberation on the new constitution. The Venice Commission expressed its concerns about the lack of transparency in the elaboration process and the inadequate consultation of the Hungarian society, and furthermore about the tight timeframe for the adoption of the Fundamental Law (Venice Commission 2011a: 5, 2011b: 4).

The Fundamental Law and the new Act on the Constitutional Court, as well as the subsequent fourth amendment to the Fundamental Law, introduced additional constitutional changes regarding the competences of the Court enriching the actions of abusive constitutionalism.

The Fundamental Law eliminated the so-called actio popularis which enabled anyone to apply to the Court with norm-control initiatives without personal interest, significantly limiting the possibility of challenging laws before the Constitutional Court (Chronowski et al. 2022: 13), and constrained again the deliberation about constitutional issues. At the same time, the constitutional complaint was reformed by the Act on Constitutional Court, therefore not only

legislative, but judicial decisions can be challenged if they violate rights guaranteed by the Fundamental Law, and the petitioner is personally, directly and effectively concerned (Article 26, 27 of Act CLI of 2011).

In retaliation to the annulment of some articles of the Act on Transitional Provisions to the Fundamental Law adopted in December 2011, the fourth amendment to the Fundamental Law, adopted in April 2013, incorporated several annulled provisions of the act raising the question of unconstitutional constitution amendment, and furthermore introduced additional constraints on the Constitutional Court. The amendment limited the competences of the Constitutional Court to review the Fundamental Law or the amendment to the Fundamental Law only on formal, procedural grounds excluding the possibility of substantial constitutional review. Furthermore, decisions of the Constitutional Court, adopted before the Fundamental Law, were repealed, disrupting the continuity with the former jurisdiction of the court, and giving a finishing stroke to legal constitutionalism (Chronowski et al. 2022: 16–17; Antal 2013: 64).

As a result of the above-mentioned formal mechanism of abusive constitutionalism, by the end of 2013, the Constitutional Court had been packed, weakened and politically captured. However, the elimination of the Constitutional Court as an element of checks and balances wasn't enough for the government to abolish all of the elements of legal constitutionalism, since Hungary as an EU member state is under the jurisdiction of the Court of Justice of the European Union (CJEU) and EU law has primacy over member states' legislation. Therefore, the Orbán government, with the support of the packed Constitutional Court, started to use, in an abusive way, the concepts of constitutional pluralism and constitutional identity to undermine further the rule of law and the remains of legal constitutionalism, additionally to protect itself against potential EU interventions and to circumvent EU law (Kelemen – Pech 2018: 3).

Formal and informal abusive constitutional mechanisms to eliminate the EU's legislation and intervention

The concept of constitutional pluralism has emerged out of the constitutional dimension of EU law with the aim to challenge the idea of constitutional monism that derives from the Westphalian age, emphasising that the sole centres of constitutional authority are states. Constitutional pluralism, by contrast, recognises that the European legal order, as a result of its development, makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of states. The relationship between the national and European constitutional orders is rather horizontal than vertical, and heterarchical rather than hierarchical (Walker 2002: 27).

Constitutional pluralism became popular in the shadow of the Kompetenz-Kompetenz debate between the Court of Justice of the European Union (CJEU)

and national constitutional courts, revolving around the central question of which court had the competence to rule on the boundaries between the EU's legal competences and a national system's competences. Since the CJEU and national constitutional courts each asserted that they possessed the Kompetenz-Kompetenz, there was a great risk of legal conflict. The concept of constitutional pluralism was developed basically to avoid this kind of conflict, suggesting that questions of Kompetenz-Kompetenz should be left unresolved in favour of a 'heterarchical' (i.e. non-hierarchical) system in which neither the CJEU nor national constitutional courts could claim definitive primacy on the question. Instead, they should engage in ongoing dialogue, self-restraint and mutual accommodation (Kelemen – Pech 2018: 5–6).

The Kompetenz-Kompetenz debate related closely to the concept of constitutional identity, a claim made by some national constitutional courts that they must retain authority to safeguard their states' sacrosanct area of national sovereignty (Kelemen – Pech 2018: 5). The concept's legal basis is Article 4 (2) of the Treaty on the European Union (TEU) stating, 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.'

Nevertheless, the concept of constitutional plurality and identity became the target of many critiques recently as a result of the emergence and consolidation of hybrid regimes within the EU, namely Hungary and Poland, and considering that the political leadership of these regimes has been using these concepts to undermine rule of law which is supposed to be the precondition of EU membership, and one of the elements of the member states' common constitutional tradition.

While there is a wide consensus in the literature over the abuse of these concepts by member states with authoritarian tendencies, there is a debate over their future. Some scholars call for the elimination of the concept of constitutional pluralism, such as Laurent Pech, Danel R. Kelemen (2018) and Gábor Halmai (2017). At the same time, we can find defenders of the concepts as well, like Tom Flynn who suggests introducing a 'legitimacy test… by which we can determine whether a given instance of national judicial disagreement with the CJEU is loyal, principled opposition, or disloyal, abusive opposition' (Flynn 2021: 241).

In the following part of the study, I intend to show how the Orbán governments, with the support of the packed Hungarian Constitutional Court, have been abusing systematically the concepts of constitutional identity and pluralism intending to undermine rule of law and to defend themselves in the rule of law debate with the EU. Basically, the concepts have been being used to legitimise Hungary's unilateral derogation and non-compliance with the EU asylum and migration acquis.

Securitisation of migration and asylum policy and the failed seventh amendment of the Fundamental Law.

Migration and asylum became a hot topic in Hungary in 2015 and the issue played a central role in the conceptualisation of constitutional plurality and identity. Securitisation of the issues of migration and asylum, or in the words of Gábor Halmai 'psychological preparation' of the Hungarian public (2017), started with a communication campaign in the Spring of 2015. On one hand, an anti-migrant billboard campaign began with openly hostile and exclusionary messages in Hungarian such as 'If you come to Hungary, you must respect our culture'; 'If you come to Hungary, you must abide by our laws'; 'If you come to Hungary, you cannot take our jobs'. On the other hand, the so-called national consultation on migration and terrorism was launched by the government. Nearly 8 million constituents received a consultation paper along with a letter from PM Viktor Orbán in which he drew a direct causal link between immigration and terrorism, and noted that Brussels had failed to appropriately tackle illegal immigration and terrorism. Since European responses to immigration had proven ineffective, PM Orbán stated that Hungary had to do things its own way (National Consultation on Immigration and Terrorism/Letter of Prime Minister Viktor Orbán 9 May 2016). Approximately 1.25 million consultation papers were sent back and the vast majority of the respondents concurred that the threat of terrorism was on the rise, and that Brussels' immigration policy had failed, consequently a stricter immigration policy was needed. However, the national consultation wasn't representative due to the low number of responses, nevertheless the Hungarian government used the results to legitimise its subsequent legislative actions and non-implementation of the EU relocation decisions (Juhász 2017: 40).

As the next step of securitisation of asylum policy, the government and the parliamentary majority started restrictive legislation, including government decrees on building a barbed-wire border fence on the Hungarian border with Serbia, Romania and Croatia; several amendments of the Asylum Act; amendment of the Criminal Code; and the amendment of the Criminal Procedure Act. Certain provisions of these acts, alongside the non-implementation of the relocation decisions of the EU (Council Decision (EU) 2015/1523 and 2015/1601), have resulted in infringement procedures and a rule of law debate between the EU and Hungary. In this debate, since 2016, the Hungarian government has been referring to constitutional identity and pluralism basically to legitimise its non-compliance policy.

Besides the restrictive legislation on asylum, the government started a dual attack, with a political and a legal character, on the EU's plan to relocate refugees. While the legal pillar meant that the government launched a lawsuit against the relocation decisions at the CJEU, the political pillar was a refer-

endum initiated by the government with the 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?' The referendum was held on 2 October 2016, and although 98% of all the valid votes agreed with the government, answering 'no', the referendum was invalid because the turnout was only around 40%, instead of the required 50%.

In October 2016, as an attempt to formalise abusive constitutional change, Prime Minister Orbán introduced the seventh amendment to the Fundamental Law to defend Hungarian constitutional identity and to get an exemption from EU law in the area of asylum, namely the relocation decisions. Since the governing coalition had previously lost its two-thirds majority, even though all of its representatives voted in favour of the proposed amendment, it fell two votes short of the required majority.

Strong abusive judicial review and interpretation No 1.

After the failure of the referendum and the constitution amendment, the packed Constitutional Court came to the rescue of the government in its battle to defend Hungary's constitutional identity (Halmai 2017: 12) with the decision of 22/2016 (XII.5.) exerting strong abusive judicial review with the conceptualisation of constitutional pluralism and identity.

It is worthy to note that the Constitutional Court dredged up the petition of the government-loyal Commissioner for Fundamental Rights, filed a year earlier, so even before the referendum was initiated. The ombudsman asked for abstract constitutional interpretation in connection with one of the relocation decisions, the European Council decision 2015/1601 (Halmai 2017: 12). As Ágoston, Mohay and Norbert Tóth pointed out 'presumably due to the importance of the case, the president of the CCH appointed himself the judge rapporteur' (2017: 470–471).

In this decision the Hungarian Constitutional Court ruled that the Court itself can examine upon a relevant motion whether the joint exercise of powers under Article E) (2) of the Fundamental Law would violate (a) human dignity or any other fundamental right, (b) the sovereignty of Hungary or (c) the identity of Hungary based on its historical constitution (Decision 22/2016. (XII. 5.) AB).

In this case, the Constitutional Court faced a number of issues that constitutional courts of other EU member states and the CJEU have already addressed, such as the relationship between national constitutional courts and the CJEU, the question of the treatment of ultra vires acts of the EU and the definition and protection of national constitutional identity (Ágoston and Tóth 2017: 472). Consequently, the Constitutional Court referred to the relevant case law of other EU member states' constitutional courts (Decision 22/2016 (XII. 5.) AB, Reasoning [34]–[44]) and the related case law of the CJEU as well (Reasoning [45]). Special attention was paid to the relevant case law of the German Federal

Constitutional Court based on what the Hungarian Constitutional Court introduced as the new aspects of constitutional review: fundamental rights reservation, sovereignty control (ultra vires review) and identity control.

Regarding the fundamental rights reservation, the Constitutional Court pinned it down 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 rights. As it is set in Article I (1) of the Fundamental Law, it is the primary obligation of the State to protect the inviolable and inalienable fundamental rights of man. Furthermore, the Constitutional Court echoed the so-called Matthews judgment of the European Court of Human Rights,[3] according to which member state's liability cannot be exempted at the European Court of Human Rights either, by referring to implementing the law of the EU. Consequently, the Constitutional Court must grant that the joint exercise of competences under Article E) (2) of the Fundamental Law would not result in violating human dignity or the essential content of fundamental rights (Decision 22/2016 (XII. 5.) AB, Reasoning [47]–[49]).

As regards sovereignty control, the Constitutional Court's starting point was Article B) of the Fundamental Law according to which the source of public power shall be the people, and power shall be exercised by the people through elected representatives or, in exceptional cases, directly. According to the Constitutional Court, provisions of Article B of the Fundamental Law should not be emptied by the so-called EU clause in Article E). Therefore, the Constitutional Court formulated the principle of maintained sovereignty means that 'since by joining the European Union, Hungary has not surrendered its sovereignty, it rather allowed for the joint exercising of certain competences, the maintenance of Hungary's sovereignty should be presumed when judging upon the joint exercising of further competences additional to the rights and obligations provided in the Founding Treaties of the European Union' (Decision 22/2016 (XII. 5.) AB, Reasoning [58]–[60]).

In connection with constitutional identity, the Constitutional Court noted that constitutional identity is equal to the self-identity of Hungary, which is not a list of static and closed values, but its content is to be determined by the Constitutional Court on a case-by-case basis, based on the interpretation of the Fundamental Law in accordance with the National Avowal and the achievements of the historical constitution of Hungary. However, the Constitutional Court gave a non-exhausted list of the elements of the constitutional identity of Hungary, such as freedom, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, the equality of rights, acknowledging judicial power or the protection of the nationalities. These are the achievements of the Hungarian

3 Matthews v. United Kingdom, App. No. 24833/94, 28 €. H.R. Rep. 361 (1999).

historical constitution on which the whole legal system rests (Decision 22/2016 (XII. 5.) AB, Reasoning [64]–[65]).

The Constitutional Court highlighted that the constitutional self-identity of Hungary is a fundamental value not created but only acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty, Hungary can only be deprived of it through the final termination of its sovereignty and its independent statehood. According to the decision, protection of constitutional identity shall be the duty of the Constitutional Court as long as Hungary is a sovereign State (Decision 22/2016 (XII. 5.) AB, Reasoning [67].

The Constitutional Court, taking essentially word for word from the Lisbon Decision of the German Federal Constitutional Court,[4] named those cases when the protection of constitutional self-identity may be raised, such as in the instances of 'having an influence on the living conditions of the individuals, in particular their privacy protected by fundamental rights, on their personal and social security, and on their decision-making responsibility, and when Hungary's linguistic, historical and cultural traditions are affected' (Decision 22/2016 (XII. 5.) AB, Reasoning [66]).

Many concerns and critiques have arisen in connection with the decision and its reasoning, not only by academics but even by some of the constitutional judges. Although the decision was adopted almost unanimously (one judge dissented), five members of the Court submitted concurring opinions, although these are quite divergent.

Focusing on identity control, one of the most crucial problems is the vagueness of the notion of constitutional identity. The elements thereof, which are mentioned in the decision, are just some examples without any clarification of their content and boundaries. The fact that the exact content of constitutional identity is to be determined by the packed Constitutional Court on a case-by-case basis is raising concerns about arbitrary interpretation, especially regarding the vagueness of the interpretation framework, namely the Fundamental Law with its National Avowal and the achievements of the historical constitution. The historical constitution itself is a highly contested notion both regarding its existence and possible elements. It's meaningful that though the decision and its reasoning, such as the Fundamental Law, are silent regarding the elements of the historical constitution, they appear only in the concurring opinion by András Varga Zs. (Decision 22/2016 (XII. 5.) AB, Reasoning [110]). He mentions, based on the academic dispute, the Golden Bull (1222), the Tripartitum (1514), the Pragmatica Sanctio (1723), the Laws of April 1848 and the Laws of Compromise (1867) as the components of the Hungarian historical constitution. At the same time, with the exception of the Laws of April 1848, these

4 BVerfGE 123, 267 – Lisbon Decision (Lissabon-Urteil).

legal acts have an authoritarian nature (Halmai 2017: 16), mostly guaranteeing the privileges of the nobles, and 'as such inappropriate for displaying the national unit' (Bárd – Chronowski – Fleck, 2022: 28). Consequently, as Petra Bárd, Nóra Chronowski and Zoltán Fleck (2022: 19) put it, the decision means a 'carte-blanche type of derogation to the executive and the legislative from Hungary's obligation under EU law'. In Gábor Halmai's (2018).interpretation, the conceptualisation of constitutional identity was 'nothing but national constitutional parochialism, which attempts to abandon the common European constitutional whole'.

The statement of the decision, that constitutional identity is a fundamental value not created, but only acknowledged by the Fundamental Law, is completely contrary to the concept of political constitutionalism, since, as István Stumpf stresses in his concurring opinion, 'this approach would actually tear apart Hungary's constitutional identity from the text of the Fundamental Law, creating a kind of invisible Fundamental Law to be protected by the Constitutional Court' (Decision 22/2016 (XII. 5.) AB, Reasoning [107]).

The Constitutional Court has referred to the constitutional court decisions of other member states in a cherry-picking and arbitrary way, ignoring the differences of the Hungarian constitutional order. The concept of constitutional identity control derives from the German Federal Constitutional Court's so-called Lisbon judgment, nevertheless the facts that the German Basic Law constitutes an eternity clause [Art. 79(3)], which was a reference point for the German Federal Constitutional Court, but the Fundamental Law of Hungary doesn't contain such a clause, and was not considered by the Hungarian Constitutional Court. Similarly, István Stumpf in his concurring opinion dissents from the majority reasoning regarding the cases when the protection of constitutional self-identity may be raised, arguing that these cases have been taken from the Lisbon decision of the German Federal Constitutional Court without any examination, in the absence of any argument based on the Fundamental Law of Hungary (Decision 22/2016 (XII. 5.) AB, Reasoning [106]).

Last but not least, we have to mention the general problem in connection with the decision, namely that it's not clear exactly via what competence and procedure the Constitutional Court can exercise the above-mentioned triple control. Both Egon Dienes-Ohm and István Stumpf examined this core question in their concurring opinion. As the former points out: any legal debate, including the interpretation of the piece of EU legislation, falls exclusively into the competence of the CJEU in accordance with Article 244 of the TFEU. In practice, constitutional courts can either take part in the so-called preliminary ruling procedure or – again in a preliminary way – attempt to solve problems of an ultra vires nature in the framework of the constitutional dialogue with the CJEU (Decision 22/2016 (XII. 5.) AB, Reasoning [76]).

Rightly, the decision's majority reasoning itself pins it down 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, invalidity or the primacy of application of such Union acts' (Reasoning [56]). Taking into consideration the competences of the Constitutional Court and the possible subjects of the related procedures, and furthermore the fact that sources of EU law directly enforceable in the member states without any measure taken by the Member States are not 'legal regulations' according to Article 24 (2) of the Fundamental Law and Sections 23–31 of Act on Constitutional Court, they cannot be the subjects of preliminary or posterior constitutional review, constitutional complaint or the examination of conflicts with international treaties. Egon Dienes-Ohm comes to the conclusion that the only possible procedure is the interpretation of the Fundamental Law (Article 38 (1) of the Act on Constitutional Court); however, he warns that as a particularity of this kind of procedure, no legal consequences will be applicable (Decision 22/2016 (XII. 5.) AB, Reasoning [80]). István Stumpf dismisses the procedure of interpretation of the Fundamental Law, conceiving sovereignty and identity control only as opportunities of the future, emphasising that 'the Constitutional Court can perform the protection of Hungary's sovereignty and constitutional identity when – for example at the time of amending a Founding Treaty – the empowered bodies of the Hungarian State request a review about the level of competence transfer to the bodies of the Union that could be in conformity with the Fundamental Law' (Decision 22/2016 (XII. 5.) AB, Reasoning [99]).

As we could see above, with Decision 22/2016 (XII. 5.) AB, the Hungarian Constitutional Court established the theoretical possibility of a triple control of the joint exercise of powers, although both the notion of constitutional identity and partially the interpretation framework thereof (the National Avowal and the historical constitution) are highly vague; furthermore, the exact competences and procedures via the Constitutional Court could exercise this control were undefined, the only possibilities have appeared in some of the concurring opinions, which were divergent.

However, the government wasn't concerned by the above-mentioned circumstances; the prime minister's jubilant reaction to the decision was expressed in an interview given to Hungarian Public Radio: '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' (Halmai 2017: 14)

Formal abusive constitutional change: the seventh amendment of the Fundamental Law.

In 2018, after the government had regained its two-third majority in the parliament, László Trócsányi, minister for justice at that time, submitted again the

seventh amendment of the Fundamental Law, which by its adoption had realised the previous attempt. As a result, the so-called National Avowal was supplemented with the following text: 'We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State.' The amended Article R declares that: 'The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.' The EU-clause, Article (E) Section (2) of the Fundamental Law, pins it down that 'Based on an international treaty, Hungary may exercise its certain powers jointly with the other Member States via the institutions of the European Union to the extent necessary for the exercise of its rights deriving from the founding treaties and for the performance of its obligations, in order to take part in the European Union as a Member State.' However, the provision was supplemented with the following sentence: 'The exercise of its powers pursuant to this Section shall be consistent with the fundamental rights and freedoms laid down in the Fundamental Law, and shall not limit Hungary's inalienable right of disposal related to its territorial integrity, population, the form of government and governmental organisation.' And last but not least, Article XIV (1) prescribes now that 'No foreign population shall be settled in Hungary'.

Strong abusive judicial review and interpretation No 2.

The second decision of the Hungarian Constitutional Court concerning the constitutional identity of Hungary is closely related to the decision C-808/08 of the CJEU adopted in December 2020, in which the CJEU found that Hungary had breached the EU asylum acquis by requiring that asylum applications should be lodged exclusively in transit zones, a practice which allows only a small number of persons to enter, and by requiring that applicants must remain in detention throughout the asylum procedure in the facilities of transit zones, not coupling that detention with the safeguards laid down in Directive 2013/33, furthermore by the removal of all third-country nationals staying illegally in Hungary's territory without observing the procedures and safeguards laid down in the Qualification Directive (CJEU Case C-808/18).

As a response, in February 2021, Judit Varga, minister for justice requested the interpretation of the Fundamental Law in connection with the CJEU decision, suggesting that the decision conflicted with Hungary's constitutional identity. She claimed that, by requiring Hungary to provide the guarantees laid down in the Qualification Directive, Hungary loses control over its population, which was, in her interpretation, a serious violation of the constitutional identity of the state.

In other words, almost exactly five years after creating the constitutional identity as a shield against EU law in the field of asylum, the Constitutional Court was expected to use that shield and declare the CJEU Judgement C-808/08

to be contrary to Hungary's constitutional identity. There was a widespread fear that the Constitutional Court would follow the Polish Constitutional Tribunal founding the CJEU ruling and even some parts of the primary law to be unconstitutional, especially since PM Viktor Orbán said in his regular Friday morning radio interview: 'Today's decision by the Constitutional Court could mean that – in addition to the physical border barrier – it will also erect a very strong legal border barrier: a legal fence' (Orbán 2021).

The Constitutional Court adopted its decision 32/2021. (XII. 20.) AB on 7 December 2021, in which, with the strong abusive interpretation of Article E (2), Article I (1), as well as Article XIV (1) and (4) of the Fundamental Law, it came to the conclusions that (a) where the joint exercise of competences is incomplete Hungary shall be entitled, in accordance with the presumption of reserved sovereignty, to exercise the relevant non-exclusive field of competence of the EU, until the institutions of the European Union take the measures necessary to ensure the effectiveness of the joint exercise of competences; (b) Where the incomplete effectiveness of the joint exercise of competences leads to consequences that raise the issue of the violation of the right to identity of persons living in the territory of Hungary, the Hungarian state shall be obliged to ensure the protection of this right within the framework of its obligation of institutional protection; (c) The protection of the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure shall be part of its constitutional identity (Decision 32/2021. (XII. 20.) AB).

Nevertheless, the Constitutional Court, contrary to the expectations of the government, avoided conflicting directly with the CJEU when it drew the limits of abstract constitutional interpretation, stating: 'An abstract constitutional interpretation cannot become a position applicable to the specific case giving rise to the petition' (Decision 32/2021. (XII. 20.) 8). In other words, the Constitutional Court wasn't willing to examine whether in the specific case the joint exercise of powers has shortcomings, nor did it take a position on the question of whether the minister's argument about a de facto change of the Hungarian population due to immigration was correct (Chronowski – Vincze 2021: 4). According to the reasoning of the decision, these are matters to be judged by the body applying the law was adopted based on the joint exercise of powers (Decision 32/2021. (XII. 20.) AB, 9). Later in the decisions, the Constitutional Court defined this more precisely, stating that the assessment of the above-mentioned questions is primarily the task of the petitioner and other organs of the Hungarian State (17). The Constitutional Court examined hypothetically whether the incomplete effectiveness of the joint exercise of competences could lead to a violation of Hungary's sovereignty, constitutional identity or fundamental rights (especially human dignity) and freedoms enshrined in the Fundamental Law.

In the course of the hypothetical fundamental rights control, the Constitutional Court stressed that if, as a result of the incomplete effectiveness of the

joint exercise of competences, foreign populations permanently and massively remain in the territory of Hungary without democratic authorisation, this may violate the right to identity and self-determination of the people living in the country, because their traditional social environment may change without democratic mandate or any influence by the persons concerned, or without any state control mechanisms. Because of the state's obligation of institutional protection, the prevention of such uncontrolled processes is the obligation of the state under Article I of the Fundamental Law (Decision 32/2021. (XII. 20.) AB,18).

Regarding hypothetical sovereignty control, the Constitutional Court assessed the consequences of the shortcomings in the effectiveness of joint competences on Hungary's sovereignty and came to the conclusion that the presumption of reserved sovereignty applies 'unquestionably' to all competences that don't fall within the exclusive competence of the Union (Decision 32/2021. (XII. 20.) AB, 22). The Constitutional Court refers to the conditionality of conferring the exercise of competence laid down in Article E (2) of the Fundamental Law itself: the conferral of the exercise of the competence takes place 'to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties'.

According to the Constitutional Court's argumentation, the European Union and its institutions exercise these competences, not only when they create secondary sources of EU law, but 'exercise of the competence is also conditional upon ensuring the effectiveness of the secondary legislation created' (Decision 32/2021. (XII. 20.) AB, 26). Only in this case does the exercise of competence comply with the condition laid down in the enabling provision of Article E (2). Consequently, 'the presumption of reserved sovereignty is enforced not only in the case of the joint exercise of additional competences but also covers the exceptional case where, due to the deficiency of jointly exercising the competences, securing the fundamental rights affected by the relevant competence or competences as well as the performance of the obligations of the State are impaired' (26). The Constitutional Court emphasised that application of the presumption of reserved sovereignty may be used exceptionally and that Hungary is only entitled to exercise the competence in question until the European Union or its institutions create the guarantees for the effectiveness of EU law, and only in a manner which is consistent with and aimed at promoting the founding and amending treaties of the European Union (26–27).

In the course of hypothetical identity control, the Constitutional Court defined the relation between sovereignty and constitutional identity, emphasising that these concepts are not complementary, but interrelated in several respects. First of all, the protection of Hungary's constitutional identity is possible through its sovereignty and the safeguarding thereof. Second of all, constitutional identity manifests itself primarily through a sovereign act, first and foremost adopting the constitution. Thirdly, taking into account Hun-

gary's historical struggles, the aspiration to safeguard the country's sovereign decision-making powers is itself part of the country's constitutional identity. Fourthly, the main features of state sovereignty (permanent population, defined territory, government and capacity to enter into relations with the other States) recognised in international law, namely the 1933 Montevideo Convention, are closely linked to the issues (territorial integrity, population, form of government and governmental organisation) retained by Article E (2) of the Fundamental Law within the scope of Hungary's inalienable right of determination (Decision 32/2021. (XII. 20.) AB, 31). As a consequence, the Constitutional Court established that 'the protection of Hungary's inalienable right to determine its territorial unity, population, form of government and state structure is part of its constitutional identity' (34). Furthermore, the Constitutional Court identified values that make up Hungary's constitutional identity as legal facts that cannot be waived either by way of an international treaty or with the amendment of the Fundamental Law, because legal facts cannot be changed through legislation. (Decision 32/2021. (XII. 20.) AB, 32)

Although the Constitutional Court decided to dodge the direct conflict with the CJEU (Chronowski – Vincze 2021: 1), the decision raises many questions and concerns. Regarding fundamental rights control, the Constitutional Court followed an activist approach in the course of the interpretation of human dignity departing from its own case-law, even though according to which human dignity is related exclusively to the individual. The decision broadened the concept with a community dimension when it defined the right to the 'traditional social environment' as part of the right to identity and self-determination, the two main pillars of human dignity. This interpretation of human dignity was questioned in the dissenting opinion of Ildikó Marosi Hörcherné, and the concurring opinions of Ágnes Czine, and Balázs Schanda as well.

Hypothetic sovereignty control, which is the focus of the decision, raises the most concerns. Since the Constitutional Court examines and refers to several principles of the EU law such as the principle of effectiveness (effet utile), precedence of community law, the principle of pre-emption, the principle of the transfer of competences, subsidiary, the principle of sincere cooperation and the principle of equality between member states, it would have been highly recommended to suspend the case and ask for a preliminary ruling from the CJEU. This is especially so because the Constitutional Court not only refers to these principles but gives restrictive interpretations in connection with the principles of pre-emption and effectiveness, which led to the core of the decision, namely the theoretical possibility of taking back a jointly exercised competence by the member state in case of the ineffectiveness thereof (Orbán – Szabó 2022).

Basically in its reasoning, the Constitutional Court turned effet utile against the EU institution; at the same time, this approach forgets the circumstance that the vast majority of EU policies, including asylum and migration, are supposed

to be implemented by the member states. The Hungarian Helsinki Committee, as an intervener in the procedure, pointed out how the Hungarian government fails to implement the EU asylum acquis, including executing expulsion decisions (Hungarian Helsinki Committee 2021: 20–21). The argumentation of the Constitutional Court legitimises the already existing policy of the Hungarian government which first systematically undermines the implementation of EU law, then refers to the ineffectiveness thereof[5] that may result in the taking back of the joint competence by the member state due to the twisted logic of the Constitutional Court.

Furthermore, authorising the government or other 'organs of the Hungarian State' (Decision 32/2021. (XII. 20.) AB, 17) to decide on the efficiency of an EU policy with the above-mentioned legal consequences is legal nonsense. Under the EU law, the European Commission is entitled, only with a few exceptions such as the common security and foreign policy, to evaluate the effectiveness of EU policies and if it's necessary to make proposals for the reforms. That's exactly what is happening in the case of the common European asylum system. The member states can have an impact on the formation of such reforms since the Council is an inevitable actor in EU legislation.

The fact that the Constitutional Court circumvented preliminary ruling or any other form of constitutional dialogue with the CJEU underpins the hypothesis that the Constitutional Court has abused the concepts of constitutional pluralism and identity in this decision as well.

Endre Orbán and Patrik Szabó (2022) highlighted that the Constitutional Court made the relationship between sovereignty and constitutional identity very close, which indicates that the core elements of sovereignty (self-determination and the elementary state functions) compose the parts of constitutional identity, and consequently protection of sovereignty and constitutional identity are interrelated. This raises the question: can we still talk about separate sovereignty and identity control in the conception of the Constitutional Court at all? The question is crucial since in EU law sovereignty protection is applicable in cases of ultra vires decisions of the EU, which concern the member states equally, while identity protection applies to acts that may violate the constitutional requirements of an individual member state.

The decision identifies the values of the constitutional identity, developed based on the historical constitution, as legal facts that cannot be waived either by way of an international treaty or with the amendment of the Fundamental Law because legal facts cannot be changed through legislation (Decision 32/2021. (XII. 20.) AB, 32). This argument, which was taken word for word from the concurring opinion of András Varga Zs attached to Decision 22/2016 (XII. 5.) AB on one hand is dogmatically not appropriate, since these values do not

5 This was exactly the situation in the case of the EU relocation decisions.

result in the creation, change or termination of any legal relationship, nor can legal consequences arise directly from them (Orbán – Szabó 2022), and on the other hand, it conceives values of constitutional identity as an eternity clause which the Fundamental Law doesn't contain.

Weak abusive judicial review and interpretation

The Constitutional Court supported the Orbán government not only via strong abusive judicial review and interpretation, but by exercising weak form too, as the Decision 3/2019. (III. 7.) AB shows. In this decision, the Court dismissed the petition of a constitutional complaint seeking a finding of Section 353/A of Act C of 2012 on the Criminal Code conflicting with the Fundamental Law. The Section of the Criminal Code in question was adopted as part of the Orbán government's restrictive legislation regarding asylum, establishing the offence of 'Facilitating, supporting illegal immigration'. According to Section 353/A, anyone who conducts organising activities (a) to allow the initiation of an asylum procedure in Hungary by persons who, in their country of origin or in the country of their habitual residence or another country via which they had arrived, were not subjected to persecution or their fear of indirect persecution is not well-founded, or (b) to make the person entering Hungary illegally or residing in Hungary illegally obtain a residence permit, is punishable by incarceration for a misdemeanour (Article (1)).

According to the reasoning of the Constitutional Court, the seventh amendment of the Fundamental Law modified Article XIV of the Fundamental Law, according to which 'a non-Hungarian national shall not be entitled to asylum if he or she arrived to the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution', and the new section of the Criminal Code connects to this new provision of the Fundamental Law. Furthermore, the Constitutional Court referred to the Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, stating that 'the effect of the Directive covers, in principle, the obligation of establishing sanctions applicable to the wilful facilitation of unauthorised entry or transit manifested under the umbrella of humanitarian action' (Decision 3/2019. (III. 7.) AB, Reasoning [51]–[60]), and in the Court opinion, Section 353/A implements the Directive indirectly offering further protection against illegal migration, while direct implementation is via Section 354 'facilitation of unauthorised residence' and Section 353 'illegal immigrant smuggling' ([58] and [61]).

At the same time, Article 1 of the Directive prescribes adopting appropriate sanctions on persons who (a) either intentionally assist a person who is not a national of a member state to enter or transit across the territory of a member state or (b) for financial gain, intentionally assists into residing within the

territory of a member state in breach of the laws of the state concerned on the entry, the transit and the residence of aliens.

If the Constitutional Court would have taken seriously the constitutional dialogue, they could have suspended the case asking for a preliminary ruling from the CJEU about the interpretation of the Directive. This is especially since the CJEU found in November 2021 in Case C–821/19 that Hungary infringed EU law by criminalising organising activities in relation to the initiation of a procedure for international protection by persons not fulfilling the national criteria for granting that protection, since 'the provision of assistance with a view to making or lodging an application for asylum in a Member State cannot be regarded as an activity which encourages the unlawful entry or residence of a third-country national in that Member State' (Court of Justice of the European Union 2021).

IV. Concluding remarks

Hybridisation of the Hungarian political system went hand in hand with the dismantling of the previous constitutional order rested on the concept of legal constitutionalism and the rule of law. The Orbán governments have been referring to the approach of political constitutionalism, and the concepts of constitutional pluralism and identity to legitimise their actions.

At the same time, as we could see above, constitutional changes in Hungary cannot be interpreted as the elements of political constitutionalism, instead, the concept of abusive constitutionalism provides the appropriate analytic framework. The government, with the support of its two-thirds majority in the parliament, first dismantled the checks and balances, foremost the Constitutional Court via formal abusive constitutional changes. As a next step, with the contribution of the weakened and packed Constitutional Court, the government aimed to eliminate the EU's legislation and intervention based on the concepts of constitutional pluralism and identity elaborated via formal and informal abusive constitutional changes. The phenomenon appeared in the area of asylum and migration policy, but since there are other highly disputed issues between Hungary and the EU, such as public utility prices, or the rights of the members of the LMBTQ community, the concepts of constitutional pluralism and identity can serve as a shield in these cases as well in the future.

Basically, the packed Constitutional Court proved to be a partner in this process, but for now, unlike the Polish Constitutional Tribunal, has decided on one hand to dodge the direct conflict with the CJEU, and on the other hand not to question explicitly the primacy of EU law.

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Krisztina Juhász *is senior lecturer at the Department of Political Science, University of Szeged. Her research interest covers the issues of rule of law backsliding in the EU, EU migration and asylum policy, furthermore Common Security and Defence Policy. E-mail: juhaszk@polit.u-szeged.hu*