JUSTIN

Working Paper Series

No. 2/2022

Constitutional Dynamics of Multi-Level Governance of Hungary

Attila Vincze

JUSTIN Working Paper Series
David Kosař & Katarína Šipulová, Co-Editors in Chief
ISSN 2336-4785 (online)
Copy Editor: Lukáš Hamřík

2022

MUNI

Masaryk University, Faculty of Law
Veveří 70, Brno 611 70
Czech Republic

Forthcoming in CONSTITUTIONAL DYNAMICS OF MULTI-LEVEL GOVERNANCE (*Patricia Popelier, Peter Bursens and Alberto Nicòtina* eds.).

Abstract
The present paper is part of an edited book exploring the interconnectedness of the law and politics of the EU membership, and attempts to explain how constitutional case-law shaped politics and vice-versa. The paper is divided into five sections. The first describes the constitutional framework of treaty ratification in general and the special conditions of EU membership, including the constitutional limitations of it like the constitutional identity. The second part focuses on the political debate on membership and shows how the mainstream political attitude towards the EU has been shifted during the last three decades from a rather Europhile towards a very skeptical even hostile governmental attitude. The third section is devoted to the role of the Constitutional Court, which for long rather formed the political framework and stressed the national sovereignty as a limitation of international co-operation. This approach also remained after the institution was packed during the 2010ies but it is rather a reflection of the general politics than independently pursued constitutional politics. The fourth section is devoted to the rather weak parliamentary scrutiny of EU politics and the position of the government in EU lawmaking. The last section – for the sake of completeness – addresses the role of local government in multi-level government in the EU.

Keywords
EU membership, Hungary, constitutional identity, constitutional review of EU acts, parliamentary scrutiny of EU policy

Suggested citation:
Vincze, Attila. Constitutional Dynamics of Multi-Level Governance of Hungary (29 June 2022). *JUSTIN Working Paper Series*, No. 2/2022. Available at: https://justin.law.muni.cz/en/publications/justin-working-papers-series.

Constitutional Dynamics of Multi-Level Governance of Hungary

Attila Vincze*

1. Introduction

Legal rules often deliver only a very limited perspective of a problematic. This is also true for the membership in the EU: the constitutional provisions regarding the treaty ratification deliver only a fragmented picture of the relationship between a member state and the EU, and many nuances rely on political consensus, conventions and everyday political practice.

The following paper intends to illustrate the intersections between law and politics of the EU membership in Hungary. For this purpose, it sets out the constitutional rules of treaty ratification in their historical embeddedness (2.), and explores how the shifts of the political reality influenced the application of these rules (3). Furthermore, it also attempts to clarify the role of the constitutional and political scrutiny in this development, how far the constitutional court could shape politics and how far politics shaped the functioning of the constitutional court (4). Moreover, it also explores the political scrutiny of EU legislation and tries to illustrate how effective political control mechanisms are in Hungary.

2. Treaty ratification

Hungary had been an enthusiastic supporter of Euro-Atlantic integration since the transitory years of 1989/1990. Interestingly, this backing eroded after the accession, dissatisfaction spread, scepticism arose and – at the time of writing of these lines – the Hungarian government became the least integration friendly among all member states of the EU and the NATO. This development is not only worrying but also perplexing taking into account how Hungary's economy and security relies on the benefits of the different forms of integration. The country became a dead weight and in many respect a real security risk, and this shift of the Hungarian position is also reflected in the ratification process which became more and more burdensome, fiendish and in many cases openly challenging the values of the European integration.

1.1 The constitutional system in a nutshell

Ratification of international treaties is governed by the Fundamental Law of 2011 (abbr.: FLH), which replaced the former transitory constitution of 1989. Although the Fundamental Law has been subject to heavy (inter)national critique,[1] the substantial and procedural rules relating

* Senior lecturer, Judicial Studies Institute, Masaryk University, Brno. The research leading to this article has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (INFINITY, grant agreement no. 101002660).

[1] For more details on these debates, see Pál Sonnevend, András Jakab and Lóránt Csink. 'The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary'. In CONSTITUTIONAL CRISIS IN THE EUROPEAN

to international law and adoption of international treaties followed by and large the language of the former constitution (similarly to most rules of the Fundamental Law in time of its adoption).[2]

Due to permanent and politically instrumentalized constitution-making the substantial rules of EU membership and mechanisms have been amended, especially since 2016. This was possible thanks to a two-thirds majority of the governing coalition in the Parliament since 2010 (besides a short period of 2015-2018) which enabled to tailor-make the Fundamental law and any further piece of legislation to current needs. Due to this two-thirds majority also enabled to elect every key constitutional functionaries according to the priorities of the governing party including the members of the Constitutional Court as the ultimate guardian of the constitutionality, which resulted in a court-packing eliminating any counterbalance of the governmental power.[3]

Hungary is a unitary state, in which subnational entities play only a marginal role, and hence the unicameral national parliament (*Országgyűlés*) is the main player in ratification of international treaties. Due to party discipline, the governing majority is dominated by the PM, who is basically in the position to whip through any bill through the parliament. The Head of State is fundamentally a ceremonial figurehead with rather formal than substantial powers, and plays only an insignificant role in ratifying international treaties.[4]

1.2 Treaty ratification

The relationship of international law to national one governs Article Q FLH as lex generalis and there is lex specialis relating to EU law, Article E FLH.[5]

According to Article Q, the generally recognized rules of international law are part of the law of the land, other sources of international law shall be incorporated into Hungarian law upon their promulgation by laws adopted of the Parliament. Hungary essentially follows the doctrine of dualism in international law, which similarly to several other European countries, was challenged by the primacy and direct applicability of EU law. Remarkably, this happened before the actual accession to the EU by the conclusion of the Europe Agreements which deemed to pave the way to the accession.[6]

CONSTITUTIONAL AREA 33 (Armin von Bogdandy and Pál Sonnevend eds, 2015); Gábor Attila Tóth (ed). CONSTITUTION FOR A DISUNITED NATION. ON HUNGARY'S 2011 FUNDAMENTAL LAW (2012).

[2] András Jakab and Pál Sonnevend. 'Continuity with Deficiencies: The New Basic Law of Hungary'. 9 EUROPEAN CONSTITUTIONAL LAW REVIEW 102 (2013); Attila Vincze. 'The New Hungarian Constitution: Redrafting, Rebranding or Revolution?'. 6 VIENNA JOURNAL ON INTERNATIONAL CONSTITUTIONAL LAW 88 (2012).

[3] Attila Vincze. 'Wrestling with Constitutionalism: The Supermajority and the Hungarian Constitutional Court'. 8 VIENNA JOURNAL ON INTERNATIONAL CONSTITUTIONAL LAW 86 (2014); András Sajó. RULING BY CHEATING 69 (2021).

[4] Critical account of the role of president: Attila Vincze. 'Shaping Presidential Powers in Hungary: Convention, Tradition and Informal Constitutional Amendments'. 46 REVIEW OF CENTRAL AND EAST EUROPEAN LAW 307 (2021).

[5] Attila Vincze and Nóra Chronowski. MAGYAR ALKOTMÁNYOSSÁG AZ EURÓPAI INTEGRÁCIÓBAN 31-118 (2018).

[6] Curiously enough the Treaty of Lisbon was challenged later before the Constitutional Court only after the actual ratification, which politically narrowed any maeningful review of the treaties, nonetheless the motion was declared to be admissible, decison of the Constitutional Court 143/2010. (VII. 14.) AB. (English press realease available at: https://hunconcourt.hu/uploads/sites/3/2017/11/en_0143_2010.pdf).

Some provisions of the Europe Agreement required namely to have some direct effect, which was challenged before the Constitutional Court and the adopted decision[7] framed the legal debate on EU law for the upcoming decades including a special constitutional arrangement for EU matters and its interpretation.

The Constitutional Court highlighted that direct applicability of foreign legal provisions were not allowed under the Constitution, and the EU, precisely because Hungary was no member of it, was deemed to be a foreign legal organization. Hence, the direct applicability of EU legal norms without proper constitutional underpinning was not allowed. From this decision was construed that the membership in the EU requires an explicit legal basis. This became the integration clause of the constitution (now Article E of the Fundamental Law) setting out procedural and substantive conditions of a membership and in doing so reflecting the bi-dimensional character of the supremacy of EU law.[8]

The decision of the Constitutional Court was a peculiar one for several reasons. First, although, it explicitly stated that the EU – because Hungary was no member of it - lacked the necessary democratic legitimacy to enact directly applicable law, it did not specify as to whether an actual membership would change the outcome.[9] Although the regained sovereignty and independence in post-communist countries after the collapse of the Soviet system was surely important factor,[10] and the influence of the German jurisprudence cannot be underestimated, the constitutional hypersensitivity regarding the EU-membership[11] is somewhat idiosyncratic, because no similar questions were raised regarding other international organizations, like the NATO, the Council of Europe or the International Criminal Court.[12] The membership in any other international organization, and their secondary legislation, is based on Art Q which only enables to conclude international treaties.

Second, the decision was inspired by the case-law of the German Constitutional Court, and hence it also imported all the German debates, expressions, fears and topics around the EU membership shaping and framing the constitutional discussion for the future. For good or bad, the German case-law and scholarship became the main inspiration in EU matters, irrespectively of very important differences between the two constitutional systems.

---

[7] Decision of the Constitutional Court 30/1998. (VI. 25.) AB, for an English summary see Allan Tatham. 'Constititional Judiciary in Central Europe and the Europe Agreement: Decision 30/1998 (VI.25) AB of the Hungarian Constitutional Court'. 48 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 913 (1999).

[8] Joseph Weiler. 'The Community System: The Dual Character of Supranationalism'. 1 YEARBOOK OF EUROPEAN LAW 275 (1981).

[9] Vincze and Chronowski, *supra* note 5, at 37-42.

[10] András Sajó. 'Becoming "Europeans": The Impact of EU "Constitutionalism" on Post-Communist Pre-Modernity'. In SPREADING DEMOCRACY AND THE RULE OF LAW? at p. 179 (Wojciech Sadurski, Adam Czarnota and Martin Krygier eds, 2006): "The population in nation states with newly recognized or regained sovereignty is understandably sensitive to issues of independence. Opposition politicians are ready to bring up the issue hoping for increased popularity in a society where popular culture traditionally honours (unsuccessful) heroes of independence. Moreover, the cultural and the legal elite are often keen to emphasize independence as a fundamental constitutional principle (because of the constitutional wording and independence dreams in their legal traditions)".

[11] László Kecskés. 'Az EU-csatlakozás magyar alkotmányjogi problémái'. 6(9) MAGYAR TUDOMÁNY 1081 (2006).

[12] Vincze and Chronowski, *supra* note 5, at 40-42.

Third, the main effect of the heavily criticized decision was that all political parties and the mainstream scholarship agreed on the necessity of amending the constitution in order to enable the membership.[13] Nonetheless, the amendment itself was rather a minimalist one, leaving many questions open.[14]

The language of the current membership clause, which o the one hand opens the Hungarian legal order for the EU law but, on the other also contains some (rather fuzzily formulated) reservations to the supremacy of EU law, was subject to several amendments after 2016 narrowing the ambit of the primacy of EU law.

Moreover, there are several further provisions in the Fundamental Law of Hungary either limiting further integration process (like joining the EMU by declaring the Hungarian Forint to be the currency of Hungary (Art K FLH) or were introduced in order to use as a further substantial shield against the EU law (like the national constitutional identity) or to provoke conflict in some culturally sensitive areas (especially in LGBTQ rights).[15]

1.3 Procedural requirements

Joining (or leaving) the EU and any further modifications of the founding treaties require the votes of two-thirds of all Members of the Hungarian Parliament. This procedural hurdle is the same as for constitutional amendments and most probably signals the constitutional importance of the EU membership.[16]

The former Constitution required a referendum for the accession, as a one-off event, but not for later amendments. The fact that the ratification of the Treaty establishing a Constitution for Europe was not subject to a referendum was complained before the Constitutional Court but denied showing that Treaty ratifications do not require further democratic backing.[17] It is not clear, as to whether it was inspired by the accession of Austria (which was regarded to be an overall amendment of the Austrian Federal Constitution[18]) or simply served to enhance legitimacy of the membership. Later amendments were not subject to a referendum,[19] it was

---

[13] László Kecskés. 'Magyarország EU-csatlakozásának alkotmányossági problémái és a szükségessé vált alkotmánymódosítás folyamata, Part I'. EURÓPAI JOG 21 (2003); and 'Part II'. EURÓPAI JOG 22 (2003).
After losing the elections in 2002, the then moderate conservative FIDESZ threated to veto the amendment if the then ruling socialist party (MSZP) does not adopt some laws, but this turned out to be a bluff: Zoltán Lakner. 'A magyar pártok és az Európai Unió. Az EU mint belpolitikai kérdés 1990–2004 között'. 13(1-2) POLITIKATUDOMÁNYI SZEMLE 139, 145-146 (2004).

[14] Nóra Chronowski and József Petrétei. 'EU-csatlakozás és alkotmánymódosítás: minimális konszenzus helyett politikai kompromisszum'. 28(8) MAGYAR JOG 449 (2003)..

[15] Article XVI Fundamental Law as amended by the Ninth Amendement of the Fundamentl Law.

[16] Vincze and Chronowski, *supra* note 5, at 62-64.

[17] 58/2004. (XII. 14.) AB határozat; Nóra Chronowski and Attila Vincze. 'Népszavazások uniós ügyekben és a magyar gyakorlat'. 12(1) KÖZJOGI SZEMLE 18 (2019).

[18] Theo Öhlinger. 'Die österreichische Bundesverfassung unter den Einwirkungen der EU-Mitgliedschaft'. In WIRSCHAFTSVERFASSUNG UND BINNENMARKT: FESTSCHRIFT FÜR HEINZ-PETER RILL ZUM 70. GEBURTSTAG 49 (Stefan Griller, Benjamin Kneihs, Verena Madner and Michael Potacs eds, 2010).

[19] 58/2004. (XII. 14) AB határozat denied the constitutional complaint which was lodged beacuse no referendum was held on the Constituional Treaty of the EU.

however suggested that an *actus contrarius* (leaving the EU) would also require a referendum in order to meet the same procedural requirements.[20]

1.4 Substantial requirements

1.4.1 General limitations

The language of Article E(2) contains three limitations regarding the membership in the EU, which are (to some extent) not unknown in other European countries.[21]

The first limitation follows from the scope of the transferable/conferrable powers limiting those of the EU as well. The second is the protection of fundamental rights as guaranteed by the Hungarian Constitution. The third limitation is the national constitutional identity, first identified by the Constitutional Court in its Decision 22/2016. (XII. 5.) without any textual basis in the Fundamental Law,[22] and later included in the language of Article E(2) by the Seventh Amendment to the Fundamental Law in 2018.

The scope of transferable powers, i.e. the constitutional limitations of further integration, are quite fuzzy: the Fiscal Compact, the sixpack and the two-pack were found not to belong to the constitutional core powers,[23] but the ratification of the Unified Patent Court[24] was denied 2018 because of the transfer of inalienable judicial competences to the Unified Patent Court, which surely correlates with the court-packing and also probably excludes joining the European Prosecution Service.

Because the protection of fundamental rights was stipulated as a primary duty of the state (Art I Fundamental Law), every other duties and responsibilities are deemed to be secondary ones (including the contribution to the European unity according to Art E(1) Fundamental Law).[25] Form this follows that the constitutional barriers of the fundamental rights are also applicable to the powers transferred to the EU.[26] This logical connection was made explicit by the seventh amendment to the Basic Law stating that exercise of transferred powers "*shall comply with the fundamental rights and freedoms*".

---

[20] Attila Vincze. 'Az uniós jog alkotmányos érvényességi alapja – viták, dilemmák és az újabb gyakorlat'. In TISZTELGÉS A 70 ÉVES DEZSŐ MÁRTA ELŐTT 235 (Eszter Bodnár, Zoltán Pozsár-Szentmiklósy and Bernadette Somody eds, 2020).

[21] Attila Vincze, Pál Sonnevend and András Jakab. 'Hungary'. In EMU INTEGRATION AND MEMBER STATES' CONSTITUTIONS 433, 436-439 (Stefan Griller and Elisabeth Lentsch eds, 2021).

[22] Decision oft he HCC 22/2016. (XII. 5.) AB, Attila Vincze. 'Ist die Rechtsübernahme gefährlich?' 73 ZÖR 193 (2018); Attila Vincze and Nóra Chronowski. 'Önazonosság és európai integráció – az Alkotmánybíróság az identitáskeresés útján'. 72 JOGTUDOMÁNYI KÖZLÖNY 117 (2017). For an English translation by the Constitutional Court see https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf.

[23] Decision of the HCC 22/2012. (V. 11.) AB.

[24] Decision of the HCC 9/2018 (VII. 9.) AB, critically Nóra Chronowski and Attila Vincze. 'Az Alkotmánybíróság az Egységes Szabadalmi Bíróságról – zavar az erőben'. JOGTUDOMÁNYI KÖZLÖNY 477 (2018).

[25] Vincze and Chronowski, *supra* note 5, at 74-81.

[26] For a deeper analysis see: Pál Sonnevend. '§ 25 -- Offene Staatlichkeit: Ungarn'. In IUS PUBLICUM EUROPAEUM: BAND II: OFFENE STAATLICHKEIT – WISSENSCHAFT VOM VERFASSUNGSRECHT 393 (Armin von Bogdandy, Cruz Villalón and Peter M. Huber eds, 2008).

The third limb of limitations, the constitutional identity, was added by the Seventh amendment of the Fundamental Law. The new sentence included in Article E(2) reads as follows:

> 'Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government (államforma) and state structure (állami berendezkedés)'.

The population as part of the constitutional identity was interconnected with the protection of the human dignity in a recent decision of the Hungarian Constitutional Court stating that the de facto change of the population would change one of the constitutive elements of statehood[27] and also the traditional way of living and therefore would affect the human dignity of the denizens of Hungary.[28] The decision shows how far that limitations can be stretched and eventually what kind of policies might be found to be contrary to the constitutional core of Hungary, which may limit the scope of further treaty ratifications drastically or joining enhanced co-operation (like European prosecutor Office).

1.4.2 Specific limitations

Since the enacting of the new Fundamental Law, a number of conflicts and collusions with the European constitutional order have materialised, and it seems that several constitutional obstacles were enacted to hinder further European integration.[29]

One of the hurdles to enter EMU is surely Article K of the Basic Law, which prescribes that the official currency of Hungary is the forint and requires a constitutional amendment of the Parliament to abolish or amend this provision if the common European currency will be eventually introduced.[30]

There are further constitutional provisions regarding sexual and identity issues which were adopted in order to provoke a clash of cultures with the EU. To the Article L – protecting the institution of marriage as the union of one man and one woman – was added a further sentence stating that a mother shall be a woman, and the father shall be a man, which *e contrario* excludes homosexual couples from a right to have children. Moreover, Article XVI of the Fundamental Law was also amended and reads as follows: *"Every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development. Hungary shall protect the right of children to a self-identity corresponding to their sex at birth and shall ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country."* According to the reasoning, "*the amendment was necessary since the new, modern ideological processes in the western world are raising doubts about the determination of male and female, which threatens the right of children to a self-identity corresponding to their birth sex, which the Constitution assumes as an immutable characteristic*." Furthermore, it built a bridge between

---

[27] In sense of Georg Jellinek. ALLGEMEINE STAATSLEHRE 394-434 (1914).

[28] Decision of the HCC, 32/2021. (XII. 20.) AB; critically Attila Vincze. 'Unsere Gedanken sind Sprengstoff – Zum Vorrang des Europarechts in der Rechtsprechung des ungarischen Verfassungsgerichts'. 48 EUGRZ 13 (2022).

[29] Attila Vincze. 'Ungarns euroatlantische Integration'. In UNGARN 1989–2014 EINE BILANZ NACH 25 JAHREN 37 (Herbert Küpper, Zsolt K. Lengyel and Hermann Scheuringer eds, 2015).

[30] Vincze et al., *supra* note 21, at 440.

the constitutional identity and Christian culture of Hungary, the self-identity of the Fundamental Law and the individual rights of the children.[31] The ideological opposition to Western values, the narrative of the "Downfall of the Occident" and the motivation to provoke ideology driven conflicts (a culture war on gender issues) are hard to overlook. Incorporating them into a national constitutional identity meant also to instrumentalize constitutional values and to include their guardian, the Constitutional Court into this battle. Moreover, it is also clear that they also serve to control further integration over constitutionally sensitive issues, or - to put it in words of Prof. Sajó – "to defend sovereignty against the alleged excesses of EU law".

2. The political debate on membership - from Europhile consensus to dirty membership

The political debate is a marked by a slow but remarkable shift from mainstream Europhile consensus towards a rather Eurosceptic dirty membership. This can be divided into three phases: the one before the accession full of hopes, optimism and without actual knowledge of the pros and cons of an actual membership (1990-2004), the second following the accession marked by disappointments and rising Euroscepticism (2004-2010), and the third is the illiberal order after 2010 openly challenging the European status quo (2010-2022).

2.1 The phase of consensus: from Transition to Accession (1990-2004)

Although the freshly regained sovereignty was highly esteemed, there was a long-standing consensus among the political parties and within the elite groups generally that European integration is the main political aim of the country.[32] Only after 2002, as the very conditions of the accession were decided and became publicly known, they provoked some discussions, especially the financing of the Hungarian agriculture from the Common Agricultural Policy or the protection of the then rather cheap Hungarian arable lands from foreign takeover, but these disputes were fought without meaningful civic participation.[33] Generally, the citizens were rather underinformed about the EU which also limited their participation.[34] The support of the accession heavily correlated to the economic status, and the better-offs favoured the accession more.[35] The Government carried out an exaggeratedly optimistic advertisement campaign before the national referendum on the accession 2003, which pointed out all the benefits of the EU membership in an easily understandable language in order to motivate the electorate for participation fearing that an invalid referendum could undermine the accession process. The mainstream parties supported the effort and campaigned for the accession.[36]

After losing the elections in 2002, the then moderate conservative FIDESZ threated to veto the necessary constitutional amendment for the EU accession if the then ruling socialist party (MSZP) does not adopt some specific legal guarantees important for the voters of FIDESZ and

[31] Governmental explanatory notes for the Ninth Amendment of the Fundamental Law.
[32] Lakner, *supra* note 13, at 140.
[33] Ibid., at 141-142.
[34] Ibid., at 143.
[35] Ibid., at 143-145.
[36] József Dúró. Ellenzők, Kritikusok, kétkedők 166 (2017).

its allies. Nonetheless, this turned out to be a bluff,[37] and the accession (similarly to the NATO membership) was regarded as part of the national minimum. This consensus has gradually been faded away later.

2.2. The phase of disappointments and rising scepticism (2004-2010)

Even if there were some Eurosceptic groups and smaller parties since 1990, their influence was negligible, and the mainstream parties held a *cordon sanitaire* around them. This has changed after 2002, as it became clear that the conservative parties will not be able to aspire for a parliamentary majority without addressing some concerns of the eurosceptic minorities.[38] Opening towards these electoral groups and listening to their concerns was politically logical and also opened a critical debate on the costs and benefits of the membership which was also fuelled by some observable negative effects of the accession especially in agriculture.[39] The argument of a second-rate membership was already aired after the accession, but became very potent later, as Jobbik (then an radical nationalist party) made it a topic for the EU parliamentary elections in 2009[40] and pocketed a great success (third place)[41] paving the way to the national parliament as well 2010.[42]

Moreover, the socialist-liberal government was corrupt and rather unprepared for effectively and rationally managing the resources made available from the Cohesion Fund deemed to cushion the hardships of the first years of the membership. The governing socialist and liberal parties were very Europhiles on the paper but they had no coherent vision how to make the best use of the accession for the whole country and how to exploit the new possibilities. This resulted in tragic economic performance and much slower growth than the competing neighbouring countries, like the Czech Republic, Poland, Slovakia or Slovenia. Due to the financial and economic crisis of 2008/09, the Hungarian currency collapsed, and those families which earlier took out credits denominated in Euro and Swiss Franc suffered severe economic hardship, leading to acceleration of emigration of skilled workers, doctors, nurses etc. from Hungary to Western countries.

Disappointing was also the half-hearted and lukewarm reaction of the EU to the revelation that the socialist PM Ferenc Gyurcsány secretly admitted to his fellow party members that he knowingly lied during the election campaign and falsified data of the state budget in order to win the elections. This shattered the belief that the EU is a value driven community. Although, the Commission could hardly allow an open conflict with a Member State during the ratification process of the very delicate Lisbon Treaty after the failure of the Treaty establishing a Constitution for Europe, it was also clear that the then Hungarian PM tried to capitalize on the necessity of his support for the success of the ratification process. Hence, he managed to ratify the Treaty firstly only a few days after the text was concluded in December 2007 (and not even properly translated into Hungarian), and in doing so he also achieved that

---

[37] Lakner, *supra* note 13, at 145-146.

[38] Like the electorate of the agrarian oriented Smallholders Party (Független Kisgazdapárt) and the radically right Party of the Hungarian Justice and Life (Magyar Igazság és Élet Pártja).

[39] Lakner, *supra* note 13, at 148-154; Dúró, *supra* note 36, at 166.

[40] József Dúró. 'Euroszkepticizmus ma'. 19(4) POLITIKATUDOMÁNYI SZEMLE 53, 68 (2010).

[41] Dúró, *supra* note 36, at 168.

[42] It is telling that Jobbik party achieved only around 2% of the votes in 2006, got 15% in 2009 at the elections to the European Parliament, and almost 17 % at the national elections in 2010.

the EU turned rather a blind eye to the mischiefs he made earlier. The EU officials indeed seemed to be indifferent regarding the flagrant violations of the basic values of the EU in Hungary during the protest against the government of Mr. Gyurcsány, which not only undermined public confidence but also gave ground for different conspiration theories that the Socialist PM of Hungary enjoys a privileged treatment by the Socialist Barroso.

The economic and political downturn of Hungary between 2004-2010 explain the rise of Euroscepticism in Hungary: the benefits of the membership did not enjoy the majority, a large chunk of the work force emigrated due to economic mismanagement, which caused further troubles, and the more abstract values of the EU like democracy or the rule of law also did not seem to be observed.

2.3 The phase of ever sharpening conflicts (2010-2022)

Although the FIDESZ and Viktor Orbán himself showed a rather Europhile profile during the election campaign in 2010, and criticized the then Socialist government for having too cosy relations with Russia, the period since 2010 can be described as one of rising governmental Euroscepticism, deepening conflicts with the EU and instrumentalising these conflicts for keeping power.

The most probable cause of the conflict was, that Mr. Orbán wanted to stimulate the economy in 2010 by deficit spending would have resulted in higher budget deficit than allowed by EU law. This would have required the consent of the European Commission, which was not given and therefore "unorthodox" economic measures were adopted.[43] After this incident, the Government was keen to reduce the budget deficit under the 3% limit required by the EU law, which was strategically also needed to regain room for manoeuvring politically and economically.[44] Nonetheless, in other areas the Government was more reluctant to observe the EU law and its core values resulting in several conflicts. The nature of the conflicts have been nonetheless changed over the time.

Between 2010-2014, the Orbán government tried to frame the conflicts as purely technical ones and not as violations of the core values of the EU. The Government was keen to keep on the dialogue regarding the critiques, like the media legislation, and to make some amendments or concessions, and in doing so to make the impression of constructively solving the misunderstandings. This rather technical tone of the dialogue was partly necessary, because Hungary exercised the EU Presidency in 2011, and it was in interest of all involved actors (Member States, EU institutions, Hungarian Government) to deescalate the conflict.[45] Moreover, in several issues the FIDESZ showed a somewhat EU friendly attitude, especially in the EMU matters. In order to demonstrate that the new right-wing government is more reliable than the former Socialist one was, excessive budget deficit was reduced, the Fiscal Compact was adopted[46] and several constitutional safeguards required by it had been

[43] Dúró, *supra* note 36, at 168.
[44] Vincze et al., *supra* note 21, at 441.
[45] The Commission is basically interested in structured dialogue in every case; see Carlos Closa. 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance'. 26 JOURNAL OF EUROPEAN PUBLIC POLICY 696 (2019).
[46] Decision of the HCC 22/2012. (V. 11.) AB.

introduced at the constitutional level, such as an explicit constitutional rule requiring balanced budget (Article N and Article 37 of the Basic Law) and the Budget Council (Article 44 of the Basic Law). On the contrary, the national currency became part of the constitution (Article K), which is a constitutional safeguard against joining the Eurozone, and, political much more importantly, against transferring monetary and banking supervisory powers towards the EU.[47] The cases dealt with before the ECJ, like the forced retirement of judges[48] or the dismissal of the data protection ombudsman,[49] were also framed in technical terms, without any mentioning of the underlying issues of the rule of law.[50] This became a habit and later issues, like the case of the CEU[51] or the NGOs[52] were also framed similarly without mentioning illiberal excesses.

The then radical eurosceptism of the then radically nationalist Jobbik party helped a lot for the Government to depict itself as a less radical alternative, and could also show to the leftish LMP party which was at that time also "globcrit" (critical of globalisation) movement sceptical of deepening European integration.

All in all, the Government was trying to demonstrate that the critiques are exaggerated, and it is open for a thorough and objective debate without unnecessary emotional excesses. This tone also helped to avoid harsh interventions of the Commission, and enabled to gradually capture the state.

The period of between 2014-2018 is marked by an escalation of the struggle between Hungary and the EU, as the governing party realized the political potential of the deepening conflicts with the European institutions. The migration crisis opened up this opportunity in many ways. First, a huge mass of migrants or refugees appeared at the border of Hungary, which was an absolutely new and for the majority a disturbing event, which could been exploited for an ideologically driven campaign between supporters and opponents of migration: the opposition being the first the government the latter one. Moreover, the unexpected wave of migrants justified extraordinary measures and the introduction of a state of emergency, which widened the powers of the executive.

Second, the refuge relocation plan of the Commission opened up an ideological battlefield against the EU which, according to the narrative of the Government, intended to settle migrants into Hungary, and to outlaw the defensive mechanisms (legal or physical) introduced by the Government.

---

[47] Katalin Mérő and Dóra Piroska. 'Bankunió és banknacionalizmus – A magyar eset kelet-közép-európai kontextusban'. 26(1) POLITIKATUDOMÁNYI SZEMLE 135 (2017).

[48] ECJ Case C-286/12, Commission v Hungary (ECLI:EU:C:2012:687); Attila Vincze. 'The ECJ as Guardian of the Hungarian Constitution'. 19 EUROPEAN PUBLIC LAW 489 (2013).

[49] ECJ Case C-288/12, Commission v. Hungary (ECLI:EU:C:2014:237).

[50] The Commission was also rather satisfied with rather creative compliance; Agnes Batory. 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU'. 94 PUBLIC ADMINISTRATION 685 (2016).

[51] ECJ Case C-66/18, Commission v. Hungary; Nóra Chronowski and Attila Vincze. 'The Hungarian Constitutional Court and the Central European University Case: Justice Delayed is Justice Denied: Decision of the Hungarian Constitutional Court of 6 July 2021 and the Judgment of the ECJ of 6 October 2020, Case C-66/18'. 17 EUROPEAN CONSTITUTIONAL LAW REVIEW 688 (2021).

[52] ECJ Case C-78/18, Commission v. Hungary [2020] EU:C:2020:476; Sajó, *supra* note 3, at 228-229.

Third, the Government came up with a bogus narrative that the EU supports Mr. George Soros, who according to the account of the Government allegedly intends – in the name of the ideology open society – break up the frontiers, open Europe for migration and to replace the European society. This idea paved the way the measures against the Central European University or foreign funded NGOs, which were portrayed as propagators of the ideas of Mr. Soros.

In 2016, the Government orchestrated a nationwide referendum on migration in order to approve the governmental policy. Although this was legally invalid, the Constitutional Court lent a helping hand and, by transplanting the idea of constitutional identity, forged a shield against the primacy of EU law.[53]

The migration and the role of Mr. Soros became the *leitmotif* of the elections of 2018, suggesting that the EU is influenced by the Hungarian born financer, and only a strong national government can protect the country against those machinations. The strategy was successful, and the Government regained the two-thirds majority in the Parliament enabling it to formally introduce a national constitutional identity which every governmental body (including the courts) has to defend.

The period between 2018-2022 was about to find a further polarizing topic which could also be framed as a battle between a cosmopolitan elite and traditional values represented by a national government. This topic became the rights of the sexual minorities. The ninth amendment of the Fundamental Law, which declared that a mother shall be a woman, and the father shall be a man, which by the same token excluded homosexual couples from a right to have children. The same amendment introduced a right of every children "to the protection and care necessary for his or her proper physical, mental and moral development. Hungary shall protect the right of children to a self-identity corresponding to their sex at birth and shall ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country." Also this topic was made subject to a nationwide (and again invalid) referendum on the 3rd April 2022, and several pieces of legislation were issued among others an omnibus legislation restricting advertisements *displaying gender identity different from the biological sex, gender transitioning or homosexuality"*.[54] The topic and language of the provisions were carefully selected to target international broadcasting and advertising, and in doing so to raise the awareness of the Commission.

It is hard to decide how much cynical instrumentalism and how much principled conviction drives the euroscepctiscim of the Hungarian government, but it is clear that it became the mainstream and Hungary probably the most problematic member of the EU and the NATO. Although some opposition parties depicture themselves as federalist Europhiles others are also critical towards globalization, whereby more than 60 % of the population supports the EU

[53] In detail Nóra Chronowski, Boldizsár Szentgáli-Tóth and Attila Vincze. 'Decision 22/2016. (XII. 5.) AB – Constitutional Self-identity of Hungary'. In THE MAIN LINES OF THE JURISPRUDENCE OF THE HUNGARIAN CONSTITUTIONAL COURT 441 (Fruzsina Gárdos-Orosz and Kinga Zakariás eds, 2022).

[54] Act LXXIX of 2021 on More Stringent Action Against Pedophile Offenders and Amending Certain Acts to Improve Child Protection.

membership of Hungary.[55] There is an open contradiction between the support of the membership on the one side and the support of the rather Eurosceptic government on the other.

3. Judicial Review of EU law.

3.1 Constitutional review in general

The Constitutional Court is without any historical archetype in Hungary.[56] It was established in 1989 during the trilateral political roundtable negotiations preparing the democratic transformation of the country. Officially, the institution was set up to promote the rule of law and to protect the constitutional order and fundamental rights, but the real purpose was to secure the deal of the democratic transition, because neither the ruling communist party nor the opposition trusted their counterparts, and this distrust was the main driving force for establishing the Constitutional Court.[57] This was the first democratic institution created before the first free elections and the first five justices were also elected proportionally among the nominees of the government and the democratic opposition (two and two) with a fifth justice whom both sides trusted (a sitting judge). The next five were elected after the first free election and in 1994 should have been elected five further ones, although this has not happened, and due to a constitutional amendment in 1994 the number of judges of the Constitutional Court was reduced to eleven. The main duty was the abstract review of legislation (*actio popularis*) whereby an individual protection of fundamental rights was very limited.[58] After the landslide victory of FIDESZ in 2010, the number of justices was elevated to fifteen again, and slowly occupied with government friendly justices seriously impairing its independence.[59] The whole institution was in 2011 reorganized, and a German type constitutional complaint was introduced but the abstract review has been drastically reduced and the former *actio popularis* has been abolished.

The Constitutional Court has a wide catalogue of competences; however, its main business is the review of statutes. This review can happen before or after the promulgation of a given act of parliament, and the review might be requested with or without an actual individual concerns. The abstract review can be initiated by on fourth of the members of the parliament, the affected individual can lodge a constitutional complaint, or the court itself may request a review if it questions the constitutionality of the provision. Since 2012, a constitutional complaint may also be lodged against concrete judicial decisions, earlier it was possible only

---

[55] Rita Pálfi. 'Eurobarometer: 15 éves csúcson az uniós tagság támogatottsága az EU-ban'. EURONEWS (8 February 2022), https://hu.euronews.com/my-europe/2022/02/08/eurobarometer-15-eves-csucson-az-unios-tagsag-tamogatottsaga-az-eu-ban.

[56] Even if in 1985 a Constitutional Council has been established, it was only nominally a Constitutional Court. Substantially it had no real competences; see. Attila Vincze, András Jakab and Gábor Schweitzer. 'The Austrian Influence on Hungarian Constitutional and Administrative Law and Scholarly Literature (1920-2020)'. 76 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 469, 478 (2021).

[57] For theoretical underpinning see Ulrich R. Haltern. MISSTRAUEN UND DEMOKRATIE (1998).

[58] Attila Vincze, Herbert Küpper and Claudia Fuchs. 'Die Beziehungen zwischen der Verfassungsgerichtsbarkeit und den Obergerichten in Mitteleuropa: eine vergleichende Analyse'. 67 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 601, 616 (2019).

[59] Zoltán Szente. 'The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014'. 1 CONSTITUTIONAL STUDIES 123 (2016).

against applied provisions and a judicial decision could only be pronounced to be unconstitutional if it applied an unconstitutional legal provision.[60] Since 2018, the constitutional complaint can be also lodged by governmental bodies,[61] enabling them to seek an ultimate remedy from a court filled with judges carefully selected by the governmental supermajority.[62]

Moreover, an abstract interpretation of the constitution may be also requested from the Constitutional Court. Although these procedures are scarce in number (under one per cent of all motions), they are of utmost importance because predetermine the application of the law for the future. This procedure served during the first two decades of modern constitutional democracy (1990-2010) as a substitute for litigation between governmental bodies, but since the successful court packing (2010-2016) it was reinvented as a means to back the government with constitutional arguments during the migration crisis. The first major decision of this kind was of 5th December 2016, which invented the constitutional identity of Hungary, and included further limitation of the powers transferable to the EU.

The Constitutional Court considers itself to be the final and authentic arbitrator of constitutional, which must be respected by all other government bodies,[63] which has a far reaching consequence also to the application of EU law. The signals of indecisiveness, outspoken scepticism towards EU law or narrow construction and interpretation of domestic law spill over the whole judiciary.

3.2. The Doctrine of Supremacy in the case law of the Constitutional Court

As it was mentioned earlier, the doctrine on the supremacy of the EU law has been determined by German jurisprudence and case law. Nonetheless, the transplant has never been complete but arguments were cherry-picked without proper understanding of them and their context. Especially little attention was paid to the circumstance that the Hungarian constitution (contrary to the German Basic Law) did not contain any rules on membership in international organization or an unamendable core of the Constitution (*Ewigkeitsklausel*).

There are basically three phases in the case-law: the pre-accession phase until 2004, the phase of directionlessness between 2004-2015, and the phase of open governmental subservience after 2015.

The most prominent decision of the pre-accession phase was the review of the Europe-Agreement raising the question of direct applicability of EU treaties, which, as it was described earlier, resulted in a hypersensitivity regarding EU law even if other forms of international co-operation raise similar issues. The residues of this decision was also to be perceived in the second phase, as the Constitutional Court actually could not decide what to do with the EU

[60] Vincze et al., *supra* note 58, at 617.
[61] Nóra Chronowski and Attila Vincze. 'Az Alkotmánybíróság határozata a Magyar Nemzeti Bank kiadmányozási joga ügyében: A közjogi személyek alkotmányjogi panasza'. 10(1) JOGESETEK MAGYARÁZATA 3 (2019); Ágnes Kovács. 'Tájkép sötét kerettel: az Alkotmánybíróság „MNB-határozata" – szkeptikus olvasat'. 23(1-2) FUNDAMENTUM 109 (2019).
[62] Sajó, *supra* note 3, at.70.
[63] HCC Decision 2/2019 (III. 5) AB.

law. It was stated that it is not international law, meaning that the powers of the Constitutional Court regarding the international law are not applicable to the EU law, but by the same token it was also said that it is not internal law either.[64] The Constitutional Court refused to review the content of the European legislation, but also refused to enforce its content in internal issues.[65] This strategy often lead to contradictory results and sometimes to sabotaging EU law.[66] Vivid examples are the implementation of the working time directive,[67] or the mutual assistance in criminal matters with Norway or Iceland.[68] In the first case, the Constitutional Court refused to rule on the proper implementation of the Directive, stating that is no question of constitutionality, and did so despite the fact that at that time the ordinary courts (including the Supreme Court) declared the directive to be implanted incorrectly and ordered compensations. The effect of the decision of the Constitutional Court was that also the ordinary courts changed their attitude afterwards and refused to compensate overtime works. Regarding the Agreement with Norway and Island on criminal cooperation, the Constitutional Court annulled the national legislation implementing the agreement concluded by the EU and its Member States without requesting a preliminary decision, stating that it the review of the implementation itself was a purely internal matter irrespectively of the fact that it effectively sabotaged the ratification.[69] The decisions were rather confusing, and they had only one *leitmotif* or hidden pattern: the Constitutional Court was not ready to be engaged in EU matters and tried to find ways and arguments not to have to decide on it, which was partly motivated by intellectual laziness and partly by shying away from political conflicts.[70] This indecisiveness rather hindered proper implementation of EU law and also communication of national concerns towards the CJEU. Nonetheless, it has also left open wide range of possibilities to improve or to further undermine relations.

The politics of indecisiveness lingered also after the landslide victory of FIDESZ in 2010. The forced retirement of judges, which induced a first harsh critique towards the illiberalism of Hungary,[71] was although condemned by the Constitutional Court, it happened only in a very lukewarm manner, without improving the status of the judges, and without submitting a preliminary question which could have offered some backing against governmental encroachment.[72] On the other side, the Constitutional Court was not too sceptic against the Fiscal Pact and let it ratify under the same conditions as any other elements of primary law. A drastic change was to perceive as the court packing was completed in 2015 with the election

[64] Vincze and Chronowski, *supra* note 5, at 314-317.
[65] Ibid., at 314-317.
[66] Decision of the HCC 72/2006 (XII. 15) AB; Vincze and Chronowski, *supra* note 5, at 269-274.
[67] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.
[68] Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 may 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union.
[69] Attila Vincze. 'Az Alkotmánybíróság esete az Unió által kötött nemzetközi szerződésekkel'. 4 EURÓPAI JOG 27 (2008).
[70] Vincze and Chronowski, *supra* note 5, at 318-319.
[71] ECJ Case C-286/12, Commission v Hungary (ECLI:EU:C:2012:687)
[72] ECJ Case C-286/12, Commission v Hungary (ECLI:EU:C:2012:687); Vincze, *supra* note 48; Tamás Gyulavári and Nikolett Hős. 'Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts'. 42 INDUSTRIAL LAW JOURNAL 289 (2013); Gábor Halmai. 'The Early Retirement Age of the Hungarian Judges'. In EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE 471 (Fernanda Nicola and Bill Davies eds, 2017).

of five further judges and the president of the court himself. Since that time the Constitutional Court became more and more reluctant towards acknowledging the supremacy of the EU law. In this respect, again the case-law of the German Constitutional Court lent a helping hand.[73]

At the zenith of the migration crisis, the ombudsman submitted a requested a motion in order to interpret the Fundamental Law, as to whether it allows the implementation of the resolution of the European Council enacted on the reallocation of asylum seekers according to quotas in the various Member States of the European Union.[74] The questions raised in the internal constitutional context were basically the same which Hungary and Slovakia submitted to the CJEU against the contested reallocation mechanism.[75] Under these condition the government orchestrated a referendum in Hungary about the quota-system on 2 October 2016, which the government considered it as politically effective although it was legally invalid because of too low participation.[76] Based upon the outcome of the referendum, a motion was submitted to amend the Fundamental Law[77] with the aim of prohibiting "resettlement of a foreign population in Hungary" and to protect "our constitutional identity rooted in the historical constitution", and to restrict further the transfer of powers to the EU. According to this amendment, the joint exercise of powers "must be in accordance with the fundamental rights and freedoms enshrined in the Fundamental Law, it may not restrict the inalienable right of disposition on Hungary's territorial unit, population, form of government and state system". Due to a lacking two-thirds parliamentary majority, the amendment was not adopted. Nonetheless, a few weeks later, the Constitutional Court picked up the arguments and considerations of the planned amendment of the Fundamental Law and declared that there is a constitutional identity of Hungary which might set limits for European integration process.[78] This was a dramatic change in several respect: the Constitutional Court dealt with EU law in depth contrary to its earlier dodging strategy; moreover, the essence of the decision equalled an informal constitutional amendment.[79] Moreover, the decision introduced a constitutional review of EU legislation on grounds of violating human rights and human dignity [80] and on grounds of restricting the sovereignty, as well.[81] The scholarly debate had earlier suggested that some kind of control mechanisms can be construed for clear violations of essential human rights standards or for an eventual emptying out of essential public powers,

---

[73] Torben Ellerbrok and Robert Pracht. 'Das Bundesverfassungsgericht als Taktgeber im horizontalen Verfassungsgerichtsverbund – Ausstrahlungswirkungen der Rechtsprechung zum Integrationsverfassungsrecht in Europa'. 56 EUROPARECHT 188 (2021). Building a front against the supremacy of the EU law seems to be an intentional cooperation, cf. Christoph Grabenwarter, Peter M. Huber, Rajko Knez and Ineta Ziemele. 'The Role of the Constitutional Courts in the European Judicial Network'. 27 EUROPEAN PUBLIC LAW 43 (2021).

[74] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

[75] ECJ Cases C-643/15. Council v Slovakia; C-647/15. Council v. Hungary, Judgment of 6 September 2017, ECLI:EU:C:2017:631.

[76] Zoltán Szente. 'The Controversial Anti-Migrant Referendum in Hungary is Invalid'. CONSTITUTION MAKING & CONSTITUTIONAL CHANGE (11 October 2016), https://www.constitutional-change.com/the-controversial-anti-migrant-referendum-in-hungary-is-invalid/.

[77] Document no. T/12458 (10 October 2016), https://www.parlament.hu/irom40/12458/12458.pdf.

[78] Decision 22/2016 (XII. 5.) seems to embrace this interpretation.

[79] The later successful seventh amendment of the Fundamental Law implemented the decision into the text of the constitution making it obvious that the decision must have been an informal amendment, otherwise it would not have required a formal procedure.

[80] Decision 22/2016 (XII. 5) AB para [49].

[81] Ibid. para [54].

requiring some kind of ultra vires control of secondary EU legislation, but the Constitutional Court has never made this claim explicit before 2016.

The constitutional identity is a vague concept indeed, which the Constitutional Court unfolds 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".[82] Because of the vagueness, the Constitutional Court uses it sometimes for window-dressing without any meaningful added value to a case,[83] but it can also have severe consequences. By evoking the constitutional identity the government managed to unbound itself form the Unified Patent Court[84] and also tried to shield itself against unpleasant CJEU Decisions.[85]

In order to legitimize its attitude, the Constitutional Court sells it as a rational horizontal dialogue[86] and borrows from other national constitutional courts especially from the German one. The adoption and transplant mean also a borrowing of the prestige of source,[87] but also increases the prestige and recognition of the donor court because it suggests that the legal idea or institution is proper, adequate and progressive not only domestically but also abroad. Putting in other terms: borrowing and transplants make the impression of appropriateness irrespectively of the territorial borders of the given legal system[88] creating legitimacy by the fact of the cross border consensus.[89] Hence, both the donor and the adopting courts are generally interested in similarities[90] because similarities show the consensus and the consensus creates legitimacy which is necessary to counter-balance the ECJ. So, the cosmopolitan open-mindedness of comparative reasoning in the decisions of the Constitutional Court is a façade for narrowminded focus on sovereignty.

Besides the fluid concept of constitutional identity, the *topos* of the "European constitutional dialogue" has been also borrowed from the Federal Constitutional Court of Germany, which connected the evocation of the constitutional identity with the requirement of a preliminary ruling procedure. This dialogue means, in the reading of the HCC, on the one hand, that the HCC examines the approach and the constitutional practice of other EU member states[91]; on the other hand, it implies a cooperation with the CJEU based on collegiality, equality, and mutual respect. Although, quite often was made use of the first one, and German decisions were often copied to legitimize some interpretations of the Hungarian Fundamental Law, the

---

[82] Decision 22/2016 (XII. 5) AB para [64].

[83] Attila Vincze. 'Die Interpretationsregeln des ungarischen Grundgesetzes: zwischen Konvention, Tradition und Voluntarismus'. 80 ZAÖRV 973 (2020).

[84] 9/2018. (VII. 9.) AB határozat; Chronowski and Vincze, *supra* note 24.

[85] For example, an abstract interpretation of the Fundamental Law was requested against the ECJ Case C-808/18 – Commission vs. Hungary, c.f.. HCC Decision 32/2021. (XII. 20.) AB.

[86] Mattias Wendel. 'Richterliche Rechtsvergleichung als Dialogform'. 52 DER STAAT 339 (2013).

[87] To prestige in legal transplants, see Michele Graziadei. 'The functionalist heritage'. In COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 120 (Pierre Legrand and Roderick Munday eds, 2003); Michele Graziadei. 'Comparative Law as the Study of Transplants and Receptions'. In THE OXFORD HANDBOOK OF COMPARATIVE LAW 442, 457-458 (Mathias Reimann and Reinhard Zimmermann eds, 2006).

[88] Wendel, *supra* note 86, at 367; similarly the transplant of the German jurisprudence in Czechia: Ondrej Hamuľák. NATIONAL SOVEREIGNTY IN THE EUROPEAN UNION (2016).

[89] BVerfGE 142, 123.

[90] C.f. Gerhard Danneman. 'Comparative Law: Study of Similarities or Differences?' In THE OXFORD HANDBOOK OF COMPARATIVE LAW 384 (Mathias Reimann and Reinhard Zimmermann eds, 2006)..

[91] Decision 22/2016 (XII. 5) AB paras [33]-[43].

second one, the institutional dialogue with the CJEU (preliminary decisions) has never been undertaken. In cases, in which the Commission initiated an infringement procedure and parallel to it also a constitutional complaint was submitted, the HCC rather suspended its procedures instead of requesting a preliminary ruling.[92] The reason for the suspension was that constitutional review by the Constitutional Court should be applied "in the light of the duty to cooperate, with a view to enforcing European law as far as possible". Therefore, the obligation to cooperate within the European Union requires to await the completion of the proceedings pending before the CJEU.[93] In 2020, the CJEU ruled in these proceedings that EU law including the Charter of Fundamental Rights, had been violated.[94] However, the "dialogue" did not appear to continue on the side of the Constitutional Court because it did not continue with the proceedings in line judgement of the CJEU leading rather to parallel monologues instead of dialogues.[95] So, the Hungarian Constitutional Court – contrary to its German counterpart[96] – did not engage in a direct co-operation with the CJEU, and only obiter dictum stated that "the Constitutional Court's right to initiate a preliminary ruling procedure may also be deduced from the Fundamental Law, thus, in particular, if in the case before it there would be a threat to compliance with fundamental rights and freedoms under Article E (2) of the Fundamental Law or to the restriction of Hungary's inalienable right to dispose of its territorial unit, population, form of state and state system."[97] Moreover, the HCC - contrary to the German *Bundesverfassungsgericht*[98] - has not been keen to enforce the acknowledge the CJEU as a lawful judge and a neglected request for preliminary decisions as a violation of the requirements of *fair trial*.[99] It took up until 2020 to acknowledge that the CJEU might be a lawful judge but only to a very limited extent, and the omitted preliminary ruling violates fair trial if no substantial reasons were given (the quality of the reasoning seems to be less important).[100] Both elements (the limited direct cooperation with the CJEU and the up to the point of illusoriness limited enforcement of the requests for preliminary decision-making) shows how the court tries to shield the domestic legal order from European influences.

The Hungarian Constitutional Court is rather a guardian of the sovereignty than a promoter of the European integration. This was quite obvious before the accession as it overtook the German attitude and forced to amend the constitution for sake of integration, although it is not quite clear as to whether it was obsessed with sovereignty and therefore overtook the

[92] Order of the HCC 3198/2018. (VI. 21.) - Act LXXVI of 2017 on the transparency of foreign-supported organizations; Order of the HCC 3199/2018. (VI. 21.) – Act CCIV of 2011 on the National Higher Education (lex CEU); Order of the HCC 3200/2018. (VI. 21.) Act CCIV of 2011 on the National Higher Education (lex CEU).
[93] Order of the HCC 3199/2018. (VI. 21.), Reasoning [5].
[94] C-78/18, Commission v Hungary, Judgment of the Court of 18 June 2020, ECLI: EU: C: 2020: 476 (foreign-supported NGOs), C-66/18, Commission v Hungary, Judgment of the Court of 18 June 2020. Judgment of 6 October 2006, ECLI: EU: C: 2020: 792 (CEU case).
[95] In case of the CEU it gave time for the Government to amend the internal legal provisions, and after that the Constitutional Court noticed the substantive change of the regulation cncerning which the applicants did not submit any supplementary petition, thus the Constitutional Court terminated its proceedings without any further 'European judicial dialogue', because the subject matter had become obsolete and there was no need to adjudicate it; see Chronowski and Vincze, *supra* note 51.
[96] ECJ Case C-62/14 Gauweiler and others (ECLI:EU:C:2015:400); C-493//17, Weiss ea (ECLI:EU:C:2018:1000).
[97] 26/2020. (XII. 2.) CC decision, Reasoning [25].
[98] BVerfGE 126, 286 <315 f.>; 128, 157 <187>; 129, 78 <106>; 135, 155 <232 Rn. 180>.
[99] Order of the HCC 3110/2014. (IV. 17.); Order of the HCC 3165/2014. (V. 23.); Order of the HCC 3038/2015. (II. 20.) Attila Vincze. 'Előzetes döntéshozatal és alkotmánybíráskodás'. ALKOTMÁNYBÍRÓSÁGI SZEMLE 22 (2018).
[100] HCC decision 26/2020. (XII. 2.).

German perspective or it overtook the German perspective for reasons of "fitting in" or "belongingness" which oriented the case-law towards sovereignty and statehood.[101]

After the accession it seems to have lost the direction, it did not find a solution to copy (like the Solange and Maastricht decisions earlier) but it also did not want to give up any control and narrow the scope of constitutional review, which resulted in an idiosyncratic ignorance of the European integration. After the successful court-packing, the court seems to have revitalized its role as a guardian of the sovereignty but rather subservient to the government and not as an independent an autonomous actor and mainly in the slipstream of the German FCC.

4. Parliamentary scrutiny

The overall parliamentary scrutiny of EU membership and European politics is and was rather limited, and during the last decade it has become almost meaningless.

Before the accession, the parliament had too much on its plate and experts on European integration were very few in number which made an effective control over the accession mechanism ineffective. The transition, the establishment of the new democratic institutions and the market economy were demanding enough and the effective knowledge of the functioning of the integration was scarce that government dominated the area. Also the enactment of the very minimalistic and Delphic membership-clause of the then constitution[102] shows that the Parliament had no clear priorities and role perception regarding the membership.

In 2004 an Act was enacted to set out the relationship between Parliament and Government in EU matters.[103] On the paper, it balances out duties of the government and rights of the parliament to be consulted and to effectively exercise control over the government. This proved to be nonetheless rather a paper tiger, due to sloppy drafting and lacking enforcement.[104] The parliamentary guidance does not have any binding effect, and many duties to inform the parliament were not observed to the extent that they become in effect never applied zombie provisions.[105] The constitutional atrophy[106] or desuetude[107] of the provision reinforced the fact that after 15 years of non-application it was also formally declared to be inoperable,[108] admitting the fact that parliamentary oversight does not really matter.

The ratification of the Lisbon Treaty is a further telling example of missing parliamentary control, which was whipped through parliament within three days and only week after it was

[101] Christoph Möllers. DER STAAT ALS ARGUMENT (2011).
[102] Chronowski and Petrétei, *supra* note 14.
[103] 2004 LIII. The overwhelming majority of these rules were taken over in the new Act on Parliament of 2012.
[104] Vincze and Chronowski, *supra* note 5, at 358-362.
[105] Became „zombie provisions": David S. Law. 'The Myth of the Imposed Constitution'. In SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 239, 248-250 (Denis J. Galligan and Mila Versteeg eds, 2013).
[106] Adrian Vermeule. 'The Atrophy of Constitutional Powers'. 32 OXFORD JOURNAL OF LEGAL STUDIES 421 (2012).
[107] Richard Albert. 'Constitutional Amendment by Constitutional Desuetude' 62 THE AMERICAN JOURNAL OF COMPARATIVE LAW 641 (2014).
[108] Attila Vincze. 'Szokás, szokásjog és konvenció az alkotmányjogban'. 14(1) KÖZJOGI SZEMLE 1 (2021).

signed. As it was mentioned earlier the then PM, Ferenc Gyurcsány, needed to score a point at the EU and the historic deed of the speedy ratification, as he himself called it, was easily achieved with support of the opposition.[109] This manoeuvre helped the government to refurbish its image as pro-European and progressive but also showed how little actual influence the parliament had over the most crucial issues of integration.

After 2010, the parliamentary control faded away. The ruling party is dominated by the party chief and PM, Viktor Orbán, and commands a two-third majority in the parliament, which marginalizes the influence of the fragmented opposition, which itself is divided on several issues of the integration, the role of nation state in it, the extent of federalization, like the introduction of the euro.

The very loose parliamentary control over the integration made the judicial review and the constitutional court a key player. The Constitutional Court required a constitutional amendment for the accession but the political parties were uncapable or unwilling to formulate priorities, boundaries and mandates for the judiciary, and in doing so to politically steer the legal construction of the membership. After the illiberal turn and the successful court packing, the Constitutional Court became rather subservient towards the governmental aims to take back control over the integration process. The process is however governmental driven, and the Parliament only rubberstamps (by constitutional amendment if its necessary) the governmental measures, but exercise very limited control if any.

5. The role of subnational entities

Subnational entities – due the unitary structure of Hungary – do not play a crucial role in foreign or European policy. The priorities, needs or wishes of the counties (19 plus the capital city, Budapest) must be canalized into national politics through the government, which is also responsible for the allocation of EU funds. The constitutional architecture is based on respect and responsiveness, but the regional entities have at the end of the day no leverage over the governmental policy. Nonetheless, the local and regional entities enjoyed also some constitutionally guaranteed autonomy in local issues like healthcare, education and their financing, which partially conflicted with national priorities (e.g. the budgetary consequences of local mismanagement and the need for bailing out had influence on the deficit).

Since 2010, an intensive centralization is to be perceived, most of the former local competences are emptied out and local healthcare or education is under firm central control,[110] and the government often uses sticks and carrots to achieve submission. Therefore, several local governments, and especially the capital city are in conflict with the government and claims that the EU fundings are allocated politically biased. So, the former the Representation of Budapest in Brussels, which was established in 2003, was revitalized since 2019 in order to lobby for direct funding of local governments. The initiative was

[109] 'Elsőként ratifikáltuk az EU-szerződést'. 24.HU (17 December 2007), https://24.hu/kulfold/2007/12/17/elsokent_ratifikaltuk_eu_szerzodest/.

[110] Centralisation as a leitmotif was already identified by Attila Vincze. 'Die neue Verfassung Ungarns'. 10 ZEITSCHRIFT FÜR STAATS- UND EUROPAWISSENSCHAFTEN (ZSE) / JOURNAL FOR COMPARATIVE GOVERNMENT AND EUROPEAN POLICY 110 (2012).

supported by the Mayor of Warsaw and the Mayor of Prague who also had similar discrepancies with their own government.

6. Conclusion

The domestic conditions of the membership in the EU were driven by the Constitutional Court for a long time. Politics was either intellectually not prepared or not interested or did not have the courage to counterbalance the judiciary. The Constitutional Court itself was under a strong German influence which resulted in focus on legitimacy and control over the integration process, the efficient implementation of European law or agenda was not a priority.

After the illiberal turn of Hungary, politics took over initiative and the control over the membership. Due to a two-thirds majority the Fundamental Law was amended in order to limit the ambit of the membership (esp. EMU) and to reserve powers over migration and identity issues. The main objective of the Government is to regain as much sovereignty as it can, the partial and creative compliance with EU rules can also be explained part of that policy. The limitations regarding the EMU is necessary to control monetary policy, the other restrictions serve also to provoke conflicts in order to upkeep the image of the Government as a guardian of the traditional Hungarian way of living, and to control the scope of the responsibilities resulting from EU membership. This of course corresponds to a transactional account of the membership.

The Constitutional Court – due to a successful court packing – is subservient towards the government and its policies, delivers constitutional arguments for defending the constitutional identity.