National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades

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On November 8, 2016 the Hungarian Parliament did *not* adopt the Seventh Amendment of the Fundamental Law seeking to protect Hungarian constitutional identity in the face of European imposition. The Seventh Amendment fell 2 votes short of the 2/3 majority required for a constitutional amendment (Article S(2)). [1]

The Seventh Amendment was meant to cover up the minor scratch on the Government's pride caused by lack of popular support for its relentless fight against the EU. The constitutional amendment was a desperate move to salvage an unexpected defeat in a referendum of October 2, 2016 on the "imposed settlement of migrants," to give effect to the will of 3.3 million Hungarians who voted in favor of the Government's project. While 3.3 million sounds like a lot of votes, the said referendum itself was not successful as the turnout was below 50 per cent. To be clear: at the time of the referendum on migration the idea of the constitutional amendment to defend Hungarian constitutional identity was not on the table.

Although the Seventh Amendment to defend Hungarian constitutional identity did not pass, supporters of European constitutional projects cannot afford to sit back and relax. It may well be that what we are witnessing is a moment of calm before stronger than ever national constitutional identity claims take the European constitutional project by a storm to shatter its very foundations. Extended political negotiations in the EU leading to legal measures on technical issues (such as the refugee crises) are a most suitable format for cultivating the seeds of previously unseen constitutional identity arguments in a new setting. The hubris of the post-Brexit reality will make the scene ever more chaotic, and thus suitable for testing new ideas (as if to see if they gain traction by accident).

This setting, however, may also serve as an opportunity to contain disingenuous attempts at nurturing national constitutional identity as a counter-concept to European constitutional identity. This post will reflect on some pieces of this puzzle on account of the failed Seventh Amendment in Hungary.

The not-so-modest beginning: contesting the "imposed settlement of migrants"

Since the summer of 2015, the Orbán Government has been intent on resorting to special measures to address increased migration. To be fair, the overwhelming majority of migrants and refugees do not seek to settle in Hungary. They simply mean to cross Hungary in the hope of better lives in Western or Northern Europe. Nonetheless, the Hungarian Government' publicity campaign against immigration in the summer of 2015 has been part of a strategic communication effort to ramp up a sense of fear and insecurity in the Hungarian population, thus generating popular demand (or at least support) for special executive measures.

In the summer of 2015 the Hungarian Parliament amended several statutes, including the law on migration, to enable the Government to declare a "state of crisis caused by mass migration" (*tömeges bevándorlás okozta válsághelyzet*) with a cabinet decree (and without prior parliamentary assessment or authorization). A migration crisis enables the Government to deploy the army for migration management tasks, and to authorize the building of facilities and structures irre-

spective of generally applicable legal rules and without observing rules of public procurement.

Without mass migration there is no legal basis for flashy anti-migration measures, a problem for a Government in need of a project to mobilize the electorate in the slow season between two elections. And fear and prejudice against migrants do mobilize even without thousands of refugees at the borders. With some luck and improvisation, the migration issue fortified with anti-European flavors was put back on the political agenda in the shape of a referendum. The question formulated in early 2016 was "Do you want the European Union to impose the mandatory settlement of non-Hungarian citizens in Hungary without the support of the Hungarian Parliament?" Once the question was certified and the necessary signatures were collected for putting the question on a national vote, in May 2016 Parliament gave the go-ahead to the referendum.

That the question is a constitutional non-sense both under Hungarian law and EU law goes without saying. What mattered was that the proposed referendum created an opportunity for the Government to launch a propaganda campaign marked by deep prejudice against migrants and refugees and a strong anti-EU tone. TV spots and large posters flooded the public square in a governmental campaign entitled "referendum 2016 against mandatory settlement." Posters ranged from messages as "We call on Brussels so that they understand!" to "One million migrants wish to come to Europe from Libya alone" and "The attacks in Paris were perpetrated by migrants."

The Government appeared to have endless resources and with its overwhelming presence in essentially all segments of the public discourse space, the message was unmatchable – at least in quantity. The scattered political opposition took weeks to devise a communication strategy concerning the referendum in search for a solution to oppose the Government. In the end, civil society organizations and a concept party (the Two-Tailed Dog Party) launched into a campaign encouraging voters to cast invalid votes at the referendum. The campaign was built on highly sarcastic and at times bizarre massages mocking the Government's posters (e.g. "At the Olympics foreigners are the greatest threat to Hungarian athletes.") This crowd-funded poster campaign was at least somewhat visible in the scarce alternative fora, although in some areas efforts were made to destroy the posters and stickers.

On October 2, 2016 on the day of the referendum 44 per cent of the eligible voters showed up. Of all the votes cast 6.17 per cent were invalid. As for the valid votes: 3.3 million (98.4 per cent) supported the Government's initiative with 56.000 votes against (1.6 per cent). The Orbán Government communicated the result as a major victory from the start, concentrating on the largest number: the 98 per cent support those 3.3 million votes cast in favor of the initiative meant.

In terms of other numbers, according to the Government's own accounts, the publicity campaign alone cost about 26 million EUR (8.6 billion HUF) (excluding the costs of organizing the referendum itself). As a follow up measure the Hungarian Government is committed to spending about 3 million EUR (1 billion HUF) on a publicity campaign so that "Brussels shall learn: 98 per cent "no"."

The Seventh Amendment that did not happen

Although towards the end of the referendum campaign there were signs that despite the Government's best efforts the voters will stay away from the booths, the idea of a constitutional amendment did not emerge until after the result had become known. The referendum was not (and could not be) a consultative vote on the constitutional amendment to defend constitutional identity, as the amendment had not been mentioned in the campaign leading to the referendum.

The idea of passing a constitutional amendment may seem like an unlikely strike of genius, especially for a government which does not have constitutional majority in Parliament anymore. In light of the recent Hungarian record on constitutional amendments, nonetheless, a constitutional amendment built on fear-mongering was not at all beyond the realm of political possibilities. All a constitutional amendment takes is building an alliance in Parliament (or simply luring the lacking votes to the Government's side) for a crucial vote. In fact, the Fundamental Law was already

amended in April 2016 when a multi-party alliance of governing and opposition parties agreed to introduce a new emergency regime specifically for threats of terror. Building the anti-terror alliance came at a cost to the Orbán Government: they had to concede to the 'state of terror' to be declared by Parliament instead of a unilateral declaration by the Government.

To lend it the necessary gravitas, the constitutional amendment bill was tabled by Prime Minister Orbán himself on October 10, 2016. The bill proposed four changes to the Fundamental Law:

- the preamble (National Avowal) was to be expanded to announce that Hungary's constitutional identity is rooted in the historic constitution the duty of the state;
- the Europe clause (Article E(2)) was meant to be expanded to include a separate sentence qualifying the transfer of powers to the EU in order to ensure that it respects fundamental rights and limiting it by ensuring that the transfer of sovereignty does not violate the territorial unity, population, form of state and constitutional institutions of Hungary;
- Article R was meant to be expanded to prescribe that it is the duty of all state institutions to defend Hungary's constitutional identity (thus reinforcing the declaration in the preamble), and lastly;
- Article XIV was to be expanded with a clause expressly prohibiting the settlement of foreign population in Hungary. Furthermore, a new rule was to provide specifically that a foreign citizen – including citizens of the European Economic Area – may live in Hungary only in accordance with Hungarian law, as applied upon an individual petition in a concrete case.

It is clear from the outset that the proposed constitutional amendment was concerned much less with migrants' rights and much more with defying the EU in clear terms. The Government clearly used the momentum to add such qualifications of the Europe clause and its broader vicinity which it did not find necessary in 2011 when the Fundamental Law was drafted. This is certainly a display of lessons learnt from participation in the European constitutional project.

The Seventh Amendment failed simply because the Government alone did not have the votes to pass it and it did not find political support from across the aisle in the end. A potential ally, the far right party, Jobbik, became greedy and apparently asked for too much for its support for the bill. The objection of Jobbik was not principled and it was not driven by an attempt to take the anti-EU edge of the amendment away.

Had the clauses on constitutional identity been inserted into the Fundamental Law, the new constitutional text would have introduced some tension into the Hungarian constitutional regime. According to the consistent jurisprudence of the Constitutional Court the unalterable core of the Hungarian constitution may be derived from *ius cogens* and general principles of international law expressed in such multilateral treaties as the ICCPR, the European Convention of Human Rights, and those fundamental rights and constitutional principles which are part of the shared European constitutional tradition and are reflected in the documents of the EU and the Council of Europe.[2]

Subsequently, in its decision on the constitutionality of the Fourth Amendment of the Fundamental Law[3] the Constitutional Court promised that it would define limits on constitution-making and legislative powers in light of Articles Q and E of the Fundamental Law, with reference to the obligations stemming from Hungary's EU membership. According to the Constitutional Court these sources give effect to a coherent system of constitutional values which cannot be disregarded by the constitution-making or the legislative power.[4] In its decision on the constitutionality of the assignment of trial judges the Constitutional Court said that national and European constitutional development by necessity influenced the interpretation of the Fundamental Law.[5] While the Constitutional Court showed great willingness to define the unalterable core of the constitution with reference to international and European obligations, the Court is unlikely to protect this core from invasions of domestic consti-

tutional actors, in part due to limitations on its jurisdiction.

On the surface it seems that after a lost vote in Parliament all Prime Minister Orbán is left with is 3.3 million votes cast for a failed referendum, followed by a failed constitutional amendment which he did not have the parliamentary majority to push through to begin with. Sadly, there may well be more to the story. Despite the defeats which the cold numbers confirm, Prime Minister Orbán managed to recast his fight against EU oppression into a crusade to defend Hungary's constitutional identity. While the referendum question may have been a little too thick for the fine tastes of European constitutionalists, the terms chosen for the failed Seventh Amendment were carefully crafted to fit into the most refined European discourse about constitutional identity. The delicate language is likely to appeal to political leaders way beyond the borders of Hungary. With some (bad) luck, like similar previous inventions of Prime Minister Orbán, this idea may also become popular with like-minded politicians.

To be fair, Hungary is not the only country to defend its constitutional identity aggressively against European invasion. In 2015, in response to a judgment of the ECtHR on prisoners' voting rights in which the Court found Russia in violation, [6] Russia amended the Act on the Constitutional Court to permit the Constitutional Court to refuse to comply with international human rights obligations. This is what the Constitutional Court did when it found the ECtHR's judgment in the prisoners' voting rights case "impossible to implement." In the case the Russian Constitutional Court expressed that „the interaction of the European conventional and the Russian constitutional legal orders is impossible in the conditions of subordination, so far as only a dialogue between different legal systems is a basis of their appropriate balance, and the effectiveness of norms of the Convention."[7]

Note that the ECtHR attributed no weight to the fact that the challenged ban was prescribed in the Russian Constitution. This is not new for the ECtHR: when it found that Hungary's restrictions on right to vote for persons with mental disabilities violated the Convention,[8] or when it found that the ethnicity based eligibility rules for elected office in Bosnia Herzegovina violated the Convention,[9] it made no difference that these rules were contained in national constitutions.

A recipe against disaster? The ECtHR's Grand Chamber in Baka v. Hungary

So long as antagonism towards European constitutional values and commitments in a member state can be cast in the seemingly docile terms of a constitutional identity discourse the European constitutional project is defenseless in the face of challenges directed at its very foundations. Importantly, in the summer of 2016 the Grand Chamber of the European Court of Human Rights (ECtHR) in *Baka v Hungary* offered an approach which is worth a lot more attention than it has received so far.

Baka concerns the dismissal of the former Chief Justice of the Hungarian Supreme Court through constitutional reform. In the case the Grand Chamber of the ECtHR took to a remarkable step in containing the spread of the constitutional identity discourse and reinforced European minimum standards on judicial independence and their protection via access to court and freedom of expression. All this, in the face of the Hungarian government's strong assertion of national sovereignty and constitutional uniqueness underscoring its constitutional transformation project. In its judgment the ECtHR made sure to outline the European minimum standards on judicial independence in light of UN instruments, opinions of the Venice Commission, the European Charter on the Statute of Judges, adding some snippets from the case law of the Inter-American Court of Human Rights to the mix.

To be fair, this is not the first such judgment where the ECtHR stood up for a European minimum standard in a case of some significance for the European constitutional project. *Baka* is significant because of the clarity of the ECtHR's voice and its lack of willingness to be held hostage by national constitutional considerations on minor matters such as tweaking the rules on qualifications for high judicial office or the failure to provide a remedy against a highly individual

decision in the course of constitutional overhaul. The willingness to consider the facts of the case in its broader (Hungarian and European) constitutional and political context is what puts the ECtHR's *Baka* judgment in sharp contrast with the approach of the EU Commission and the judgments of the CJEU in similar Hungarian cases.

It is not a complete accident that the ECtHR used another instance from Hungary's recent constitutional transformation to take such a strong stance in defense of the European constitutional project. After all, before Poland embarked on a similar journey, Hungary had been a laboratory of ideas on undermining the European constitutional project in pursuit of political and economic power-maximization for years. The ECtHR's *Baka* judgment should not be read in isolation and dismissed as yet another one of those judgments on Hungary's constitutional self-destruction. Rather, it is best seen as a recipe to reinforce the foundations of the European constitutional project in the face of national constitutional mischief.

[1] 131 votes were cast in favor and 3 against in a Parliament of 200 seats.

[2] 61/2011 (VII. 14.) AB decision on the constitutionality of certain constitutional amendments. In the case the Constitutional Court found that it did not have jurisdiction to declare constitutional amendments unconstitutional.

[3] 12/2013 (V. 24.) AB decision

[4] 12/2013 (V. 24.) AB decision, [46] and [48].

[5] 36/ 2013 (XII. 15) AB decision, [24]. This reference does not point to EU law directly, only to European constitutional developments more generally.

[6] *Anchugov and Gladkov v. Russia*, Application nos. 11157/04, 15162/05, Judgment of 4 July 2013.

[7] Constitutional Court decision of 19 April 2016, in English translation at http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf.

[8] *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment of 20 May 2010

[9] *Sejdic and Finci v Bosnia-Herzegovina*, Application nos. 27996/06 and 34836/06, Judgment of 22 December 2009.

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