

## Special Issue

## Constitutional Identity in the Age of Global Migration

### Game of Values: The Threat of Exclusive Constitutional Identity, the EU and Hungary

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#### Abstract

There is an increasing, or increasingly visible, societal trend in the EU and beyond—often followed by constitutional changes—that challenges inclusive constitutional values. The discourses underlying these changes emphasize the inviolability of national identity and redefine it with a strong reliance on exclusive constitutional values. This Article asserts that exclusive constitutional values—that are defined as values that question the moral equality of some members of the community—necessarily shrink the room for inclusive values, and a critical mass of exclusive values can lead to a hallowing out of a democratic order, both on the national and on the supranational level. The Article presents Hungary as a case where the populist-exclusivist elements of political rhetoric—that are also present elsewhere—became part of constitutional law and have transformed the political system. The case study shows how the redefinition of Member States' constitutional identities, along recent societal trends and exclusive constitutional values, could clash with the inclusive values of the European Union and relegate European institutions to the position of “the Other,” thereby endangering constitutional democracy. In particular, the Article shows how the rule praising and recognizing diverse Member State constitutional identities can work to embolden the already strong trend to challenge inclusive constitutional values.

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## A. Introduction

Constitutional identities are subject to the changing dynamics of globalization and are shaped by the general phenomenon of the migration, or “wandering,” of democratic<sup>1</sup> as well as of anti-democratic and anti-constitutionalist ideas.<sup>2</sup> Constitutional identity received increased scholarly interest in the recent years. Little is known, however, about how constitutional theory should respond to exclusive elements of a constitutional identity.

At the heart of our analysis lies the clash between inclusive and exclusive constitutional values. Our hypothesis is that there is a zero-sum game, game of values, between the constitutional recognition of exclusive values—for example, ethnicity, religion etc. of the dominant population—and inclusive constitutional values—for example, equality, human dignity, human rights: Every gain by the proponents of emergent authoritarianism translates to a loss on the side of constitutional democracy. The stake of the game is that a critical mass of exclusive values leads to the fall of a constitutional democracy, the critical mass argument. Although the theoretical framework used in this article can be used more widely, we will focus on the EU and apply the terminology used by the Treaty of the European Union (TEU).

Nowadays, Hungary presents the only case among the EU Member States where the exclusivist elements of political rhetoric that are present elsewhere, too, became part of constitutional law and where all inclusive elements of constitutional democracy—for example, the rule of law, fundamental rights and freedoms, dignity, equality—are threatened in a systematic manner.<sup>3</sup> While Hungary presents the first case of a full-fledged

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<sup>1</sup> Comparative constitutional law has long been fascinated by the question of how constitutional values migrate. See Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in *MIGRATION OF CONSTITUTIONAL IDEAS* (Sujit Choudhry ed., 2006); Anne Peters, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, 3 *VIENNA J. INT’L CONST. L.* 170 (2009); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 *VA. L. REV.* 771 (1997); Mark Tushnet, *The Inevitable Globalisation of Constitutional Law*, 49 *VA. L. J. INT’L L.* 985 (2009); GÁBOR HALMAI, *PERSPECTIVES ON GLOBAL CONSTITUTIONALISM: THE USE OF FOREIGN AND INTERNATIONAL LAW BY DOMESTIC COURTS* (2014); Gunter Frankenberg, *Constitutional Transfer: The IKEA Theory Revisited*, 8 *INT’L J. CONST. L.* 563 (2010).

<sup>2</sup> Only few in the literature focus on the migration of antidemocratic and anti-constitutionalist ideas. See, e.g., Kim Lane Scheppele, *The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency*, in *MIGRATION OF CONSTITUTIONAL IDEAS* (Sujit Choudhry ed., 2006). This Article focuses primarily on the influences of societal processes and does not deal with the democracy promotion by international organizations and constitutional democracies, for example the US, or with the autocracy promotion by authoritarian states, for example Russia. See Oisín Tansey, *The Problem with Autocracy Promotion*, 23 *DEMOCRATIZATION* 141 (2016).

<sup>3</sup> See, e.g., Miklós Bánkúti, Gábor Halmai & Kim Lane Scheppele, *From Separation of Powers to a Government Without Checks: Hungary’s Old and New Constitutions*, in *CONSTITUTION FOR A DISUNITED NATION: HUNGARY’S NEW FUNDAMENTAL LAW 268* (Gábor Attila Tóth ed., 2012); Kim Lane Scheppele, *Understanding Hungary’s Constitutional Revolution*, in *CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA* (Armin von Bogdandy & Pál Sonnevend eds., 2015); Miklós Bánkúti et al., *Opinion on Hungary’s New Constitutional Order: Amicus Brief to the Venice Commission on the Transitional Provisions of the Fundamental*

internal exclusive challenge to EU fundamental values, thus offers experiences to understand the nature of this phenomenon, the example can spread in the region: The recent Polish turn of events<sup>4</sup> shows that the Hungarian way might become a recipe to follow for other Central and Eastern European Member States and possibly for other Member States. The cases of Hungary and Poland demonstrate that EU Member States can define their national identity in ways that breach the European consensus built on inclusive values, while governing forces can gather majority support for their exclusivist definitions. The question arises whether the institutions of Western democracies and the EU are strong enough to ensure popular loyalty for inclusive constitutional values.

In line with the approach, the Article would like to challenge the use of terms like “migration” or “transplant” as, we believe, these do not capture the nature of these interrelations and the nature of the challenge. A more adequate description would be to talk about a tide that meets dams at places but no resistance at others; or the varying but global effects of climate change; or maybe the growth of mushrooms, dependent on both the local circumstances and the regional and global flow of clouds, carrying the rain of the anti-constitutionalist temptation that results in anti-constitutionalist measures mushrooming. This “climate change” makes it even more pressing to understand the nature of the anti-constitutionalist challenge. Note that here we are trying to capture forces behind constitutional choices, not only the “how” of constitutional transfers that Frankenberg describes with the following steps: The often hypothetical point of origin, decontextualization and arrival to the global constitutional reservoir, re-contextualization in the new host environment including acceptance and resistance.<sup>5</sup> The climate change metaphor seeks to expose why local actors accept and pick certain elements and why they resist and reject others. An anti-constitutionalist weather front brings a willingness to experiment with anti-constitutionalist solutions due to the underlying ideologies and political strategies.

We expose our arguments in four parts. First in Section B, we investigate the respect for national identity and the protection of inclusive values in EU law, highlighting an internal failure to consider the anti-constitutionalist challenge. Second in Section C, we clarify the game of values hypothesis and the critical mass argument: Why and how are exclusive values dangerous in constitutional law. Third in Section D, we look at societal trends strengthening exclusive constitutional values and discuss what these mean for the EU and European constitutional democracies. Finally, in Section E we discuss how Hungary shifted to an

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Law and the Key Cardinal Laws (Gábor Halmai & Kim Lane Scheppelle eds., 2012) (unpublished manuscript) (on file with author).

<sup>4</sup> See Piotr Radkiewicz, *The Axiological Clash as a Key Determinant of Expanded and Destructive Political Conflict in Poland*, 31 EAST EUR. POL. & SOCIETIES 382 (2017).

<sup>5</sup> See Frankenberg, *supra* note 1, at 563–79, 570–75.

exclusive national identity. The last section offers concluding remarks and argue that the anti-constitutionalist challenge can become an existential threat to the EU as we know it.

## B. Constitutional Identity and Constitutional Values and Their Protection in the TEU

All constitutional systems require the construction and definition of a constitutional ‘We’ in the name of whom the system talks and works, even where the term identity does not appear in the domestic constitutional discourse. *Constitutional identity* is a contested concept: Most conceptions focus on the specific identities and shared constitutional heritage of the states or the EU, or, in fact, of dominant groups of societies.<sup>6</sup> As part of these identities—often lying at their cores—we find values that seek differentiation from other identities.<sup>7</sup> Our analysis focuses on constitutional values. Constitutional identity and a constituted community are often too abstract to attract popular loyalty. The constitutional identities of states are partly determined by their relation to historical, cultural, religious, and ethnic identities to strengthen popular loyalty.<sup>8</sup>

This Article focuses on a broader use of the terms constitutional identity that takes into the political penumbra of the legal-constitutional term, which includes as specific terms: “constitutional Identity of states,” “national identity of states,” “European constitutional Identity,” and “Member State identity.”<sup>9</sup> As we engage in a constitutional analysis we will only consider the aspects of national or European identities that have an impact on public law. Through this filter all above terms will result in largely the same set of elements; for the sake of simplicity, we will mostly apply the term “national identity” as in TEU Article 4 (2) and understand it as Member State identity elements as construed in public law.

There are no European constitutional standards that can be directly applied to determine the limits of the national identities of EU Member States. This is particularly true with regard to each state’s concept of nationhood or the cultural references used in Member States’

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<sup>6</sup> Note that we are talking about majorities in this broader sense, majorities as construed by governing majorities, identifying dominant views and values in a society.

<sup>7</sup> See Michel Rosenfeld, *Constitutional Identity*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 756–57 (Michel Rosenfeld & Andrés Sajó eds., 2012).

<sup>8</sup> See Michel Rosenfeld, *Law and the Postmodern Mind: The Identity of the Constitutional Subject*, 16 CARDOZO L. REV. 1049 (1995); Rosenfeld, *supra* note 7.

<sup>9</sup> This is not meant to challenge attempts to distinguish these concepts in other contexts. For us here, however, it would not make a difference for the values we are interested in can be analyzed equally as part of constitutional or Member State or national identity of a country. The constitutional aspects of identity are but one dimension of the broader notion of “national identity.” In social sciences, the overuse and the ambiguity of the term “identity” has long led to the observation that the terminology leads to obfuscation rather than conceptual clarity. See Rogers Brubaker & Frederick Cooper, *Beyond “Identity”*, 29 THEORY & SOC’Y 1 (2000). As we will see, the ambiguity that is a liability for analytic thinking as well as for law is an asset for politicians.

constitutions. The legal implications of the constitutional concept of national identity, however, can raise legitimate concerns for European integration and for European human rights law. According to Article 4 (2) TEU, the EU is bound to respect the national identity of Member States, “inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.” This rule can cover not only the constitutional structures that express constitutional identity, but also the cultural and historical ties of national identity. What is more, the sixth recital of the Preamble of the TEU proclaims the respect for history, culture, and traditions of the Member States.

Constitutional value is, similarly to the national identity of states, a contested concept, which refers to binding abstract ethical norms and which as ultimate goals determine the interpretations of constitutional documents.<sup>10</sup> Identities and values are not identical, but specific values establish the core of shared national identities and “play a very significant role in organizing our normative universe.”<sup>11</sup> This Article does not distinguish between values and principles, in line of the Lisbon Treaty that talks about “values” when listing principles in Article 2 TEU.<sup>12</sup> Starting with constitutional values as “symbolic codes” allows one to go beyond the pure legalistic understanding of institutions<sup>13</sup> and to explore their social and cultural underpinnings.

Article 2 TEU lists inclusive constitutional values as follows:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

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<sup>10</sup> For defining values, see, e.g., Dennis Davis, Alan Richter & Cheryl Saunders, *Introduction*, in *AN INQUIRY INTO THE EXISTENCE OF GLOBAL VALUES: THROUGH THE LENS OF COMPARATIVE CONSTITUTIONAL LAW* 1 (Dennis Davis, Alan Richter & Cheryl Saunders eds., 2015); Pierre Schlag, *Values*, 6 *YALE J. L. & HUMAN.* 219 (1994).

<sup>11</sup> Schlag, *supra* note 11, at 221.

<sup>12</sup> “[W]hile the EU Treaty speaks in Article 2 TEU about the ‘values’ of the Union, it is absolutely clear that what is meant by ‘values’ in this context is actually ‘principles’—fundamental principles—of EU law.” Dimitry Kochenov, *The Acquis and its Principles: The Enforcement of the ‘Law’ vs. the Enforcement of ‘Values’ in the European Union*, in *THE ENFORCEMENT OF EU LAW AND VALUES* 10 (András Jakab & Dimitry Kochenov eds., 2017).

<sup>13</sup> See to this topic Tomasz Warczok & Hanna Dębska, *Sacred Law and Profane Politics: The Symbolic Construction of the Constitutional Tribunal*, 188 *POLISH SOC’ICAL REV.* 461 (2014).

Importantly, there is no established hierarchy between Article 2 that lists the core values of the Union and Article 4 (2) that protects the national identity of Member States. The assumption behind the two articles is the assumed peaceful coexistence of different identity elements of the Member States—ethnicity, religion etc. of the majority—and inclusive constitutional values—democracy, human rights, and the rule of law.

This Article's hypothesis is, however, that the fight over the inclusion of contradicting values is a zero-sum game in game theory terminology, which would challenge the background assumption of the Treaty on European Union. While Article 7 shows that the drafters were aware of the danger of systematic challenges to the core values, the references to the respect for Member State national identities do not consider the possibility of conflict between these and Article 2 values. This setup seems to allow for the misuse of the rule on respecting Member State constitutional identities. While the application of EU law and international human rights standards cannot depend on non-conflicting domestic constitutional rules, references to Member State constitutional identities can be (mis)used<sup>14</sup> to shield anti-constitutionalist, authoritarian, and anti-minority measures from outside scrutiny.

This Article does not claim that the institutional setup and the regulatory framework of the EU is responsible for the Hungarian developments. What we claim is that textual support for pluralism combined with institutional shortcomings—in addition to political unwillingness—contribute to the continuing crisis and embolden illiberal leaders, in Hungary and elsewhere. Article 4 (2) TEU is not the main source of the problem but is part of it.

### C. Game of Values and the Critical Mass Argument

Crucial for this discussion is the distinction between inclusive and exclusive values. Inclusive constitutional values can integrate the interests of all members of the political community as they treat all members as morally equal and, as a result, they strengthen constitutional democracy. Exclusive constitutional values, on the contrary, protect only the ethnic, cultural, political, religious, and other identity elements of the dominant groups of the society—usually the identity elements of the majority population—and question the equality of some members of the community and reaffirm existing and create new inequalities that can ultimately undermine a democratic order.<sup>15</sup> For the European Union, the dilemma is not so much present on the supranational level, considering that the organization clearly

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<sup>14</sup> Acknowledging that the difference, in use or misuse, is important, in this paper, we would like to remain agnostic as to whether applying the concept of constitutional identity for shielding illiberal practices is part of its "misuse"—for example, the concept itself cannot be blamed for undermining constitutionalism—or of its "use" for the concept is inherently problematic.

<sup>15</sup> For an account on how exclusive values can easily lead to a "disunited nation," see the volume *CONSTITUTION FOR A DISUNITED NATION: HUNGARY'S NEW FUNDAMENTAL LAW* (Gábor Attila Tóth ed., 2012).

committed itself on the side of inclusive values, as stated in the Treaties—prominently in Article 2 TEU, which only lists inclusive values. Yet, we have seen that Member States can and do question inclusive values, and the EU is faced with the dilemma of how far Member States can go in this while retaining their Union membership.

There is, arguably, some level of tolerance for exclusive values to ensure the loyalty of the majority population in a constitutional democracy where inclusive values form a clear majority. With the subsequent insertion of exclusive elements, however, a system of constitutional democracy might not only destabilize but can morph into a regime where exclusive elements become dominant. This can reach a tipping point where exclusive elements start overriding inclusive elements in an automatic fashion, without further input from the political leadership—the regime is switched to “exclusivist” mode. Hence exclusive ideological fragments, that might otherwise be corrected by an inclusive constitutional democratic framework, if present in a critical mass, can turn a country into an autocracy where no institutional-legal guarantees are available for those who find themselves excluded by the new values that form part of the governing national identity.

From an internal perspective, exclusive values can threaten the democratic character of a state, understood as the integrative frame of a political community composed of equal members. A democratic political community can be expected to be inclusive in the sense that it allows for minorities to consider themselves part of the given political community. Minority rights are inclusive to the extent that they seek to make all citizens, including minority members, equal by compensating for their disadvantaged position—protecting practices like FGM go against this and should be considered as exclusive in that they treat women as inferior, pushing them into a vulnerable position. If a constitution favors, in a one-sided fashion, the values and preferences of dominant groups, it does not fulfil the integrative function of democratic constitutions, because in this case the state does not promise that it will take into account the interests of all citizens equally. If inclusive values fade, the domestic and European democratic institutions become vulnerable.

Of course, it makes a difference whether a constitution with a strong exclusive religious reference was adopted 150, fifty or five years ago, and whether the adoption of the specific text marked a trend towards inclusiveness or a clear backlash. Context also matters: Religious references might serve to demarcate an oppressive past with atheist ideology. It is not so much the specific text that counts, but its meaning and effect in the domestic context. As Yakobson notes, “nobody feared that God’s supremacy would be invoked as a pretext for infringing Canadian citizens’ rights and freedoms on religious grounds. Not so in Poland.”<sup>16</sup> A strongly exclusive religious reference adopted recently by a majority that has also curtailed

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<sup>16</sup> Alexander Yakobson, *God and Religion in Modern Democratic Constitutions*, in *THE NATION STATE AND RELIGION: THE RESURGENCE OF FAITH 9* (Anita Shapira, Yedidia Z. Stern & Alexander Yakobson eds., 2013). Yakobson does not consider the Hungarian case.

the rights of various religious communities is obviously more problematic and can undermine the inclusive character of the legal system more than a reference from the nineteenth century largely surpassed by cultural changes and with no real contemporary threat from governing majorities against religious minorities. But it is also true that any exclusive value poses a risk for inclusive constitutional values. It is worth recalling the “Chekhov’s gun rule for the theatre:” “If in the first act you have hung a pistol on the wall, then in the following one it should be fired. Otherwise don’t put it there.”<sup>17</sup> And as Sajó mentioned in another public law context the pistol can wait “patiently and for a long time until the shot” rings out.<sup>18</sup> Exclusive values and references always carry such a threat, even if the general framework mitigates—in the case of strong inclusive elements—or strengthens—in the case of a critical mass of exclusive elements—this threat considerably.

The values of the dominant groups,<sup>19</sup> when they are exclusive, prevent the integration of minority interests and undermine the inclusiveness and integrative function of liberal constitutionalism while strengthening majoritarian politics to the detriment of minority interests. This can happen even if inclusive values are in fact recognized in the text of the constitution, in cases where a critical mass of exclusive values trump these commitments.

Without trying to reproduce the pluralism debate within liberalism,<sup>20</sup> the goal of supporting national identities of Member States on the EU level allows us to address the question of why variation, on the Member State level, of constitutional values would be a problem, rather than an asset, as long as this variation does not undermine the overall structure. Note that the claim behind this question, phrased in this way, is fully in line with our argument. As long as (1) this is variation of constitutional values, and even where the first condition is not met, where (2) the exclusive values do not upset the overall constitutional(ist) framework—the “critical mass” argument—this pluralism can be maintained at reasonable costs—that might be compensated for by the benefits. The Hungarian case shows, however, that the promise of pluralism and the strengthening of national variation, as in Article 4 (2) TEU, has taken place without a corresponding check on how far this recognition can go. It is

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<sup>17</sup> András Sajó, *The Social in the Private: A Genealogy of “Private Life”*, in *ESSAYS IN HONOUR OF DEAN SPIELMANN* 571 (Josep Casadevall et al. eds., 2017).

<sup>18</sup> *Id.* at 571.

<sup>19</sup> We use the term “dominant” here to indicate that numerical majorities are not always in a dominant position and what is termed “majority” is often a construction of those in power. “Majority” in this sense is a shorthand reference for the interests best represented by those in power. We do not see equivalence between minority rights and “majority rights” to protect one’s culture. See generally LIAV ORGAD, *THE CULTURAL DEFENSE OF NATIONS. A LIBERAL THEORY OF MAJORITY RIGHTS* (2015). If such a majority culture includes only inclusive elements, there seems to be no problem with protecting them constitutionally. If, however, this self-defense seeks to protect exclusive values, our argument applies, including the subversive potential of a critical mass of exclusivity. For the logical problem with the concept of “majority rights,” see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 194 (1978).

<sup>20</sup> For a recent and insightful reconstruction, see JACOB T. LEVY, *RATIONALISM, PLURALISM, AND FREEDOM* (2014).

not the recognition of variation that is problematic, *per se*—a variation that is anyway inherent to shared competences—but the lack of clear limits and corresponding enforcement mechanisms that is manifest in the EU’s weak response to the anti-constitutional developments.

#### D. Recent Societal Trends and Constitutional Values

Growing constituencies across the EU are coming to reject European human rights and EU core values as alien, appealing instead to values that they consider particular to their own political community,<sup>21</sup> or exclusive European values like Christianity. A tendency identified in the literature is the move to a different type of exclusionist thinking where the Other is not fellow European nation states any more, but Muslims inside and outside of Europe. More and more people across Europe prefer authority in the name of historical, religious, and ethnic collective identities and the shared heritage of the local societies in which they live;<sup>22</sup> they define their identity and community against more inclusively perceived values. The process of self-identification involves the separation from others, and “the Other” is typically a foreigner or belongs to a minority. In this process, Europe itself can become “the Other.”

Otherring in the formulation of national identity of the state follows the logic pointed out by Carl Schmitt:<sup>23</sup> it is partly based on the differentiation between we/the nation and they/others—European Union, Europe, human rights, migrants, minorities, etc. “Brussels” becomes an important negative point of reference for national identity when answering the question “Who are we?” This exclusivist logic rejects the Habermasian notions of “the inclusive meaning of self-legislation which involves all citizens equally,” and hinders the “integration of marginalized.”<sup>24</sup> This also limits the ability to create and maintain a functioning deliberative space—the communication between majority, us, and marginalized groups, they—and reinforces autocratic tendencies in societies. Various recent policy incentives, like the fear of losing sovereignty, the idea that rules for the given country should be made exclusively by domestic institutions—“taking back control” from the EU, that was central to both the Brexit campaign and Le Pen’s message in the 2017 French presidential elections—historical nostalgia and a revival of historic grievances, the idea of a state with

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<sup>21</sup> See, e.g., THE UK AND EUROPEAN HUMAN RIGHTS: A STRAINED RELATIONSHIP? (Katja S. Ziegler, Elisabeth Wicks & Loveday Hodson eds., 2015).

<sup>22</sup> See Margit Feischmidt & Balázs Majtényi, *Introduction*, in THE HUNGARIAN FUNDAMENTAL LAW AND THE ORIGINS OF NEW NATIONALISM (Margit Feischmidt & Balázs Majtényi eds., forthcoming 2018).

<sup>23</sup> See CARL SCHMITT, THE CONCEPT OF THE POLITICAL 28–29 (2007).

<sup>24</sup> JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER 139 (1998).

closed borders, or arguments against migration and discomfort with multiculturalism are variations of a common underlying frame.<sup>25</sup>

The vision of national identities in the various cases implies not merely intolerance, but also the need for identifying who “the Other” is—the EU, ethnic minorities, migrants, refugees. Some of the reasons for recently transforming national identities of Member States are rooted in global societal processes. There are global *economic* processes such as economic downturn and restructuring that can result in social conflicts.<sup>26</sup> Other reasons are *cultural*: A return to local communities, exclusive nationalistic values but also wider “civilizational”<sup>27</sup> thinking—like the idea of defending Christian Europe from Muslimization<sup>28</sup>—that go against the traditions of Enlightenment and against the principle of equality, are increasingly called for. We are witnessing changes in the *political* system, too: The advance of the far-right and the crisis of the left and liberalism.<sup>29</sup> Ideas previously considered extremist are moving into mainstream discourse, the radical right is gaining more and more influence in Europe and racism is on the rise.<sup>30</sup>

The considerable overlap between these processes suggests that it is not enough to see a Hungarian or a Polish constitutional backsliding, the attitude of the UK towards European human rights, the process of Brexit, the historical peak of support for the far-right candidate in the French presidential election, or similar processes outside the EU—for example, Turkey’s slide into hard dictatorship or the results of US presidential election—in isolation. Even if these cases were isolated, their interrelations and the challenge they pose for the

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<sup>25</sup> For a discussion on the topic of Brexit, see Ralf Michaels, *Does Brexit Spell the Death of Transnational Law?*, 17 GERMAN L.J. 51 (2016); Neil Walker, *The European Fallout*, 17 GERMAN L.J. 125 (2016). The British case combines, similarly to the Central and Eastern European cases, Euroscepticism with human rights skepticism. See Katja S. Ziegler, Elisabeth Wicks & Loveday Hodson, *The UK and Human Rights: Some Reflections*, in *THE UK AND EUROPEAN HUMAN RIGHTS: A STRAINED RELATIONSHIP?* 504–06 (Katja S. Ziegler, Elisabeth Wicks & Loveday Hodson eds., 2015).

<sup>26</sup> See Feischmidt & Majtényi, *supra* note 22.

<sup>27</sup> Brubaker talks about “civilizationism” as well as “nationalism” in the case of Northern and Western national populists. See Rogers Brubaker, *Between Nationalism and Civilizationism: The European Populist Moment in Comparative Perspective*, 40 ETHNIC & RACIAL STUD. 1191 (2017).

<sup>28</sup> See for example the interview of Hungarian Prime Minister Orbán to Bild: “The quota redraws the ethnic, cultural and religious face of Hungary and Europe. I decided [on the referendum against the quota] not against Europe but in defense of European democracy. For what is the fundamental principle of democracy? It is ultimately loyalty to the nation.” [“A kvóta pedig újrarajzolja Magyarország és Európa etnikai, kulturális és vallási arculatát. Nem Európa ellenében, hanem az európai demokrácia védelmében döntöttem így. Mert mi a demokrácia alapelve? Végző soron a nemzet iránti hűség.”] See Interview with Viktor Orbán to the German Newspaper Bild [Orbán Viktor interjúja a Bild című német napilapnak], MINISZTERELNOK.HU, 25 February 2016.

<sup>29</sup> See Feischmidt & Majtényi, *supra* note 22.

<sup>30</sup> See Margit Feischmidt & Peter Hervik, *Mainstreaming the Extreme: Intersecting Challenges from the Far Right in Europe*, 1 INTERSECTIONS 3–17 (2015).

constitutional democratic systems based on inclusive values mean that understanding and tackling them cannot happen without assessing what is common to these developments. Just like in the case of “the collapse of parliamentary democracy and the victory of totalitarian dictatorship in interwar Europe,”<sup>31</sup> taking national developments in isolation is misleading.

The emergence and strengthening of exclusive values works in the direction of undermining democracy by excluding certain citizens from enjoying equal citizenship or restricting the rights of migrants and refugees. Such exclusive turns, naturally supporting authoritarian and illiberal tendencies, reinforce the shift away from constitutional democracy and from the inclusive values that are fundamental for European institutions—above all, the Council of Europe and the EU. The often-used term “multispeed EU” means not only that some countries had a different starting point and/or move faster in the same direction, but—if we don’t forget the reverse gear—it can also refer to the fact that some Member States are moving in the opposite direction, where independent institutions, most importantly courts, stop working as meaningful checks on power.

When analyzing the national identity of states, the academic literature<sup>32</sup> focuses on the judicial review of Member States’ Constitutional Courts and the practice of the Court of Justice (CJEU), as well as on the issue of who the final arbiter is. This approach is misleading, however, because it shows us only the tip of the iceberg.<sup>33</sup> Although some of these cases are very interesting and well researched,<sup>34</sup> this approach has a limited potential to explain the current challenges of the EU and constitutional democracies. This approach fails to take into account the different constitutional structures of states, for instance the British model which is based on parliamentary supremacy with a weaker role for judicial review. The preceding discussion shows that our approach requires going beyond the litigation-based view.

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<sup>31</sup> Aristotle Kallis, *Far-Right “Contagion” or a Failing “Mainstream”? How Dangerous Ideas Cross Borders and Blur Boundaries*, in 2013 DEMOCRACY AND SECURITY 235. Kallis draws a parallel with the interwar situation, which we do not assess here, but note the resemblance in that xenophobic populism gained force following an international financial crisis and economic depression.

<sup>32</sup> See, e.g., NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION (Alejandro Sariz Arnaiz & Carina Alcoberto Llivina eds., 2013); Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417 (2011).

<sup>33</sup> This is not to question whether or not case law matters. Yet, court cases only show a small part of the changes on the constitutional terrain that might not even be representative—in this sense they might be worse than the “tip of the iceberg” from the size of which we can infer the size of the full iceberg.

<sup>34</sup> For example, the Sayn-Wittgenstein case is relevant and illuminating. See Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, 2010 E.C.R. I-13693. The plaintiff with Austrian nationality was adopted by a German national whose surname contained a nobility title of “Fürst” (Prince) and the Austrian authorities eventually modified her name by removing the title. According to the Court it should be taken into account that the Law on the abolition of the nobility is an element of Austrian national identity. See, e.g., Bogdandy & Schill, *supra* note 32, at 1423–25.

Furthermore, various areas of public law should be considered in combination. To understand better the factors influencing national identities, it is essential that we analyze a broader spectrum of constitutional law incorporating a focus on important issues such as citizenship, refugee, and migration legislations.

This Article proposes that in order to understand and respond to the recent challenges to inclusive constitutional values, the understanding of constitutional identity needs to focus on global, regional, and local societal processes that shape the national identities of Member States. To underline the importance of societal processes it is worth mentioning that before the Eastern enlargement, the EU had a fear of a nationalistic backsliding in the new democracies. Although former state-socialist countries became constitutional democracies and, according to the Commission, fulfilled the political conditions of the Copenhagen criteria of European accession—stability of institutions, democracy, the rule of law, respect for human rights, and the protection of minorities—the EU formed a more benign image of certain new Member States than it would have been warranted because it focused mainly on their formal legal systems, thus expecting Central and Eastern European Member States to “catch up” while in the EU. This expectation soon proved to be too optimistic, just like the opinion that democratic transition in the region is irreversible.

The premature conclusion appears in the literature that presupposes a “convergence between the principles of domestic constitutional law enjoying specific protection and the constitutional principles of the EU.”<sup>35</sup> Wojciech Sadurski once called it the best democracy dividend of accession that it “will reconfigure political and discursive assets and incentives in ways that help the liberal-democratic and hinder the authoritarian political forces in new member states.”<sup>36</sup> He also projected that “traditional loyalties and the ethnic and cultural sense of belonging will need to give way to something more akin to ‘constitutional patriotism’, under which the polity is bounded by common civic rights and duties rather than by tradition and ethnic identity.”<sup>37</sup> This is in line with what many saw as the likely impact of accession, based on how conditionality worked. It was not on the map that illiberal programs and anti-constitutionalist measures can also rely on transnational networks. The very measure designed to counter such tendencies within the EU, Article 7 TEU, is blocked by the “illiberal coalition” of Hungary and Poland.

We now have grasped the problem of lacking specific normative and institutional limits on the recognition of Member State identities. The Article has also discussed the challenge of exclusive values and the tendencies behind the trend that contribute to the strengthening

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<sup>35</sup> Von Bogdandy & Schill, *supra* note 32, at 1433.

<sup>36</sup> Wojciech Sadurski, *Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe*, 10 EUR. L.J. 401 (2004).

<sup>37</sup> *Id.* at 401.

of the latter, to the detriment of inclusive values. In the final section, the Article applies this framework to the case of post-2010 Hungary where the anti-constitutionalist turn induced fundamental constitutional changes.

### E. The Case of Hungary—Constitutional Othering with Exclusive Values

In May 2010, the Hungarian National Assembly accepted the government program of the FIDESZ-KDNP party alliance that obtained more than two-thirds of the seats in the parliamentary election, enough to amend the constitution and fill positions that normally require an agreement with the opposition. It was clear from the outset that Prime Minister Viktor Orbán sought to engage in rewriting the image of the present and the short recent past of Hungarian democracy.<sup>38</sup> In June 2010, the National Assembly approved the Declaration on National Cooperation as a political document, which begins with the following: “At the end of the first decade of the 21<sup>st</sup> century, after forty-six years of occupation and dictatorship and two turbulent decades of transition Hungary has regained the right and ability of self-determination.”<sup>39</sup> The declaration states that “a new social contract was laid down during the April general elections through which the Hungarians decided to create a new system: the National Cooperation System.”<sup>40</sup> This Declaration suggested that the real changes did not happen in 1989/90 but in 2010, with “the revolution in the voting booths,”<sup>41</sup> or even if there were important changes twenty years ago, they served only as a prelude to the real moment of regaining independence.

One year later, in 2011, the governing FIDESZ-KDNP party alliance adopted a new constitution called the Fundamental Law, which entered into force on 1 January 2012 and superseded the previous constitution, the Constitution of 1989. What makes the Fundamental Law particularly interesting is that it was the first EU Member State constitution adopted after the Lisbon Treaty and after the debt crisis of 2009. One would assume that this constitution was partly inspired by the constitutionalization of the EU—especially the strengthening of the European inclusive constitutional value system<sup>42</sup>—and

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<sup>38</sup> See Gábor Halmai, *An Illiberal Constitutional System in the Middle of Europe*, in EUROPEAN YEARBOOK OF HUMAN RIGHTS 512 (Wolfgang Benedek, Florence Benoît-Rohmer, Wolfram Karl, Matthias C. Kettemann & Manfred Nowak eds., 2014).

<sup>39</sup> Political Declaration 1 of 2010 (16 June 2010) of the Hungarian National Assembly on National Cooperation, [http://www.kulugyminiszterium.hu/NR/rdonlyres/1EC78EE5-8A4B-499C-9BE5-E5FD5DC2C0A1/0/Political\\_Declaration.pdf](http://www.kulugyminiszterium.hu/NR/rdonlyres/1EC78EE5-8A4B-499C-9BE5-E5FD5DC2C0A1/0/Political_Declaration.pdf). The controversial Declaration was ordered to be hung in all offices of state institutions available to the public.

<sup>40</sup> *Id.*

<sup>41</sup> “In the spring of 2010 the Hungarian nation once again summoned its vitality and brought about another revolution in the voting booths.” *Id.*

<sup>42</sup> According to the government, the Fundamental Law “determines fundamental human rights in the spirit of the EU Charter of Fundamental Rights.” The Hungarian Government, *The Fundamental Law*,

partly by the ongoing global, regional and local societal processes. How the insertion of elements undermining the constitutional structure led to the erosion and breakdown of constitutional institutions has been documented elsewhere,<sup>43</sup> and we will not address this process in detail. Here we mention the fact that global tendencies after the crisis did have an impact on the Hungarian developments: the post-Lisbon influence triggered a reaction countering European constitutionalization, rather than resulting in a constitution that fully embraces this supranational phenomenon.

Crucially, the constitutional turn was partly rooted in the failure of consecutive Hungarian governments between 1990 to 2010 to implement effective social and inclusion policies. The Fundamental Law, in a way, drew the wrong conclusions and dropped the unachieved egalitarian aims of the former constitutional system and relies on an anti-egalitarian and ethnic concept of the nation as a source of power. Its preamble, the “National Avowal of Faith” provides a pre-modern list of exclusive values such as belonging to a Christian church, belonging to the Hungarian ethnic nation and fidelity, faith and love, and redefines the national identity of Hungary along these values. This one-sided value preference is a statement on which worldview is correct and infringes on the “incorrect” worldview—for example, on the interests of those who don’t belong to Christianity or to the ethnic nation, and of those who refuse to commit fidelity to the government will, political opponents—and generally creates unequal status for marginalized groups.

Requiring loyalty to the fundamental values of a legal system is common, but in the Hungarian context, this translates to fidelity to exclusive values and blind commitment to government decisions in general. An example which we could cite here is that Article U (1) of the Fundamental Law read in conjunction with the value of fidelity can serve to identify political opponents betraying the nation. This Article states that the Hungarian Socialist Workers Party, the former state party, “and its legal predecessors . . . were criminal organisations . . . betraying the nation.” Love as a constitutional value has many interpretations; in the context of the Hungarian constitution, this translates to emotional commitment to the will of the ethnic nation—in practice to the will of the government—but even a personality cult of a political leader can be grounded on this value.

The Fundamental Law, in line with the redefined national identity of Hungary, follows a Schmittean logic of dividing the world into enemies and friends and a political ideal of

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<http://www.kormany.hu/en/hungary/the-hungarian-state/the-fundamental-law>. For an overview, see Nóra Chronowski, *The New Hungarian Fundamental Law in the Light of the European Union’s Normative Values*, 2012 REVUE EST EUROPA (SPECIAL ISSUE NO. 1) 111.

<sup>43</sup> See, e.g., CONSTITUTION FOR A DISUNITED NATION, *supra* note 15; *Amicus Briefs on the Hungarian Constitution*, AMICUS BRIEFS, <https://sites.google.com/site/amicusbrieffhungary/> (last visited Oct. 15, 2017); Halmai, *supra* note 38; Kim Lane Scheppelle, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559–62 (2013); Scheppelle, *supra* note 3.

centralization of power without autonomous institutions and divergent voices.<sup>44</sup> In practice, this translates to a regime where nobody and nothing, not even independent state institutions, could stand in the way of “the will of the majority”—which is of course the government’s will—serving national interests.<sup>45</sup> In the spirit of the Fundamental Law, governmental politics turn into a constant search for those who do not fit the redefined national identity, those who try to undermine it, turning them into opponents, perhaps enemies of the nation in the Schmittean sense.

Following the restriction of powers of independent state institutions—the Constitutional Court, ombudspersons, judiciary—from August 2013 on, steps were taken by the government and state bodies against independent NGOs—including tax inspections and criminal procedures, in a manner familiar in authoritarian states, including the disproportionate deployment of police forces and other means of intimidation.<sup>46</sup> The 2017 amendments to the law on—now: “national”—higher education targeting Central European University<sup>47</sup> and the bill against NGOs<sup>48</sup> fit the logic of looking for others threatening the ethnic nation. It does not appear directly in the legislation but another standard enemy in the governmental communication is the EU: Prime Minister Orbán proclaimed in one of his speech that “Hungary will not be a colony,” accused the EU of imperialism and drew a parallel between the EU and the Soviet Union.<sup>49</sup> While this might sound as political propaganda, such statements, according to commentators, serve both to legitimate earlier shifts of the regime as well as to signal and prepare the ground for further shifts. Given the extent to which the Hungarian public law framework depends on these shifts that follow the will of the Prime Minister, a legal analysis like ours would be incomplete without considering this context<sup>50</sup>—for example, the decision to tune government communication to the issue

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<sup>44</sup> See Schmitt, *supra* note 23, at 28–29.

<sup>45</sup> See Zoltán Miklósi, *Demokrácia: liberális, alkotmányos és egyéb* [Democracy: Liberal, Constitutional and Other] SZUVEREN.HU (July 31, 2014), <http://szuveren.hu/politika/demokracia-liberalis-alkotmanyos-es-egyeb>.

<sup>46</sup> Timeline of Governmental Attacks Against Hungarian NGO Sphere, [https://tasz.hu/files/tasz/imce/timeline\\_of\\_gov\\_attacks\\_against\\_hu\\_ngos\\_22022017\\_0.pdf](https://tasz.hu/files/tasz/imce/timeline_of_gov_attacks_against_hu_ngos_22022017_0.pdf).

<sup>47</sup> See Amendment of Act CCIV of 2011 on National Higher Education.

<sup>48</sup> Act LXXVI of 2017 on the Transparency of Organizations Financed from Abroad, adopted on 13 June 2017.

<sup>49</sup> Nem leszünk gyarmat! Orbán Viktor ünnepi beszéde, Budapest, 2012. március 15. [Hungary will not be a colony! Viktor Orbán’s commemoration speech in Budapest on 15 March 2012], [http://www.miniszterelnok.hu/beszed/nem\\_leszunk\\_gyarmat](http://www.miniszterelnok.hu/beszed/nem_leszunk_gyarmat); Kester Eddy, *Orbán Compares EU to Soviet Union*, FIN. TIMES (Mar. 15, 2012), <http://www.ft.com/cms/s/0/6feaca90-6ecb-11e1-afb8-00144feab49a.html>.

<sup>50</sup> It is in this sense that the anti-constitutionalist elements—implied in the self-label of the PM, “illiberal”—bring the Orbán regime to the point that the national identity identified by the government could be seen as an “anti-constitutional,” rather than constitutional, identity. For the understanding that by the insertion of anti-constitutionalist elements something ceases to be “constitutional” identity, see Pietro Faraguna’s chapter in this volume. 18 GERMAN L.J. (2017). On a formal level, the Hungarian constitutional document does not call itself a constitution, but the Fundamental Law of Hungary. What is more important is that it is not a “non-constitutional,”

of migration led, through various steps, to the constitutional shift in this area, from the quota referendum to the decision of the Constitutional Court on the topic.

The pattern that emerges from these political acts is a paternalistic and protective central power that provides strong, just, quick, and simple solutions to the challenges and a political force that is only able to counter the conspiracy against the nation that includes entities like “Brussels” or foreign funded or simply critical domestic NGOs and human rights watchdogs. An emblematic case for the type of legislation that this understanding of national identity produces is the response to the arriving refugees from 2015. When the number of asylum seekers suddenly increased by the summer in 2015, the Hungarian government began to politicize the situation and to promote a “clash of civilizations” narrative<sup>51</sup> treating all asylum seekers as migrants—practically erasing the word “refugees”—and, first, as threats to the culture of Hungary and a danger to Hungarians’ jobs, and later as potential terrorists threatening Europe as a whole. As Hungary is a transit country and apparently, also due to the government’s policy, no refugee wanted to stay, the government at points had to intervene to maintain the image of the threat to Hungary.<sup>52</sup> While refugees were initially identified as a threat, they were also projected to be similar to the Roma minority, the largest minority group in the country.<sup>53</sup> Prime Minister Viktor Orbán made a connection and

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but “anti-constitutional” constitution. Without lamenting whether there is a possible middle ground for “non-constitutional”—that is neither constitutional, nor anti-constitutional—the Hungarian case is example for an anti-constitutional regime in that it explicitly challenges basic tenets of constitutionalism, most importantly declaring a war on independent institutions that could serve as internal checks.

<sup>51</sup> See, e.g., Interview with Viktor Orbán

The question is whether the same spirit, civilization, culture, way of thinking will define the character of European countries than during the times of our parents and grand-parents, or something completely different. This is at stake with migration . . . We . . . want to conserve the foundations of Europe. We don’t want parallel societies, we don’t want to exchange populations and we don’t want to replace Christian civilization with a different one. This is why we build fences, we protect ourselves and we don’t allow migrants to flood us.

Ottó Gajdics, *Magyarországon most a kampány főpróbája zajlik* [We Witness Now the Rehearsal of the Campaign in Hungary], *MAGYAR IDŐK* (Apr. 15, 2017), <http://magyaridok.hu/belfold/magyarorszagon-kampany-foprobaja-zajlik-1584190/>.

<sup>52</sup> See the episode, from the many turns in the Hungarian government’s response to the arrival of asylum seekers, when people were not let board trains. See Anemona Hartocollis & Dan Bilefsky, *Train Station in Budapest Cuts Off Service to Migrants*, *N.Y. TIMES* (Sept. 1, 2015), <https://www.nytimes.com/2015/09/02/world/europe/keleti-train-station-budapest-migrant-crisis.html>.

<sup>53</sup> The Hungarian radical right extremists had labeled both groups—refugees and the Roma—as enemies even before the start of the hostile governmental policy against refugees. For instance, there were a series of murders targeting the Roma and refugees in 2008 and 2009; four men did an armed robbery in Besenyszög, fired shots on the refugee camp in Debrecen, and attacked Roma with arms and Molotov cocktails in nine settlements.

a sort of analogy between these two groups in a speech,<sup>54</sup> a typical case of othering, remaining ambiguous about the acceptance of the fact that Roma people live in Hungary.

It is not only the ethnic-religious-national-migrant “Other” that is excluded and stigmatized. Even individuals can become threatening Others, presented in government media campaigns as “shady networks” like former FIDESZ allied oligarch Lajos Simicska—now supporting extreme right wing Jobbik—and George Soros who has long been supporting civil society in the region. Orbán and other prominent government officials keep repeating the claim, phrased in militaristic terms, that connects terrorism, migrants and asylum seekers, NGOs, and CEU with national self-defense. They speak about a Soros network that seeks to undermine the cultural integrity of Hungary through supporting asylum seekers by linking “economic migrants” to the threat of terrorism or gender studies Master of Arts courses at Hungarian universities as “undermining family values.”<sup>55</sup> In this sense, political propaganda and legislative measures cannot be separated; while the measures like those adopted against CEU or NGOs can be analyzed separately and technically as containing unconstitutional elements, it is the overall trend of these moves and the direction these take Hungary to that show the extent to which they are undermining Article 2 values.

First, when the legislature, in its capacity to amend the constitution, could not act—the governing party alliance fell short of the two-thirds majority as a result of interim elections in early 2015 and did not obtain supporting votes from the opposition—the Constitutional

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<sup>54</sup> The relevant quote:

Likewise, it is a historical feature of Hungary and a given—regardless of what anyone may think about it, whether one likes it or not – that it is home to hundreds of thousands of Roma. Someone, at some point in time, decided on this, and this is a situation which we have inherited.

Viktor Orbán, Speech at a Meeting of the Heads of Hungary’s Diplomatic Missions Abroad (Sept. 9, 2015), <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/viktor-orban-s-speech-at-a-meeting-of-the-heads-of-hungary-s-diplomatic-missions-abroad>.

<sup>55</sup> As an example:

We are not talking about non-governmental organisations fighting to promote an important cause, but about paid activists from international organisations and their branch offices in Hungary. [...] This is the transnational empire of George Soros, with its international heavy artillery and huge sums of money. [...] the organisations of George Soros are working tirelessly to bring hundreds of thousands of migrants into Europe.

Prime Minister Viktor Orbán, State of the Nation Address (Febr. 10, 2017), <http://www.miniszterelnok.hu/prime-minister-viktor-orbans-state-of-the-nation-address-2/>.

Court sought to fill in the void, with the complete confusion of its role.<sup>56</sup> After the referendum invalidated the European asylum quota,<sup>57</sup> the Constitutional Court—filled uniquely with one-party nominees of FIDESZ—jumped in and read into the Fundamental Law what the parliamentary majority would have liked to insert there, the protection of the constitutional identity of Hungary.<sup>58</sup> According to the Constitutional Court, the constitutional identity of Hungary is a preexisting fundamental value above the written constitution as well as international and European law:

The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood.<sup>59</sup>

Second, the new exclusivist identity politics, based on the redefined national/constitutional identity of Hungary, proved to be effective on the societal level as well.<sup>60</sup> It does not simply mean supporting the governing forces, but also the growing xenophobia—from a level that was not particularly low in the first place—that is inherent to the exclusivist national identity. Surveys show that “[s]ince 2012 the level of xenophobia has been rising at the expense of the ‘thinker’ attitude [those hesitant to jump to easy conclusions and prefer options like ‘it depends . . .’<sup>61</sup>], but lately (since 2015) the xenophile attitude has also been shrinking. In January 2016, the level of xenophobia reached an all-time high, and xenophilia practically disappeared.”<sup>62</sup> The level of xenophobia rose rapidly under the refugee crises due to the

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<sup>56</sup> See Kriszta Kovács’s chapter in this volume. 18 German L.J. (2017).

<sup>57</sup> See, e.g., Gábor Halmai, *The Invalid Anti-Migrant Referendum in Hungary*, VERFASSUNGSBLOG (Oct. 4, 2016), <http://verfassungsblog.de/hungarys-anti-european-immigration-laws/>.

<sup>58</sup> Resolution 22/2016 (XII. 5.) of the Constitutional Court of Hungary, [http://hunconcourt.hu/letoltesek/en\\_22\\_2016.pdf](http://hunconcourt.hu/letoltesek/en_22_2016.pdf).

<sup>59</sup> *Id.* at para. 67.

<sup>60</sup> It is common to underline that the Hungarian populist turn is successful at least partly because the political moves are trying to predict what will work given the social preferences of dominant voting groups, most importantly (some would say, exclusively) the electorate that keeps FIDESZ in power. In the case of the anti-refugee campaign, the communication and the measures of the government seemed to meet with existing social sentiments.

<sup>61</sup> Endre Sik, *The Socio-Demographic Basis of Xenophobia in Contemporary Hungary*, in *THE SOCIAL ASPECTS OF THE 2015 MIGRATION CRISIS IN HUNGARY* 41 (Bori Simonovits and Anikó Bernát eds., 2016).

<sup>62</sup> *Id.*

anti-migrant governmental propaganda. This case also shows how government decisions can have deeper societal consequences with potentially more lasting effects than policies that can be revoked by later majorities.

Value survey maps place Hungarian society largely in line with its geographic location: East to the West and West to the East, not quite on the Balkans, but also not too far from it. The rate of closed mindset brings the country closer to countries to the East—for example, Ukraine and Russia.<sup>63</sup> Value surveys show a constantly low level of trust, both interpersonal and institutional, an ambiguous stance to norms (anomia), a suspicion that success and achievements are not based on fair competition and a high level of reliance on state support. Another striking feature is the volatility of opinions based on party preferences, resulting in a shift of perceptions on institutional legitimacy and corruption when the power shifts from one party to the other.<sup>64</sup> Two deviations could be mentioned from the general, and regional, trend of moving towards an open and secular-rationalist thinking in Hungary from 2009 to 2013—the years where value surveys were conducted: The growing acceptance of respect for authority and a bit of backsliding in the case of “open thinking” among people with university degrees.<sup>65</sup> The current political climate seems to favor politicians who go with the flow and accept the anomia as a given, and instead of starting slow but steady changes, seek to reinforce closed thinking, suspicions, and distrust that undermine political activism that could be a crucial driving force for change and a growing support for inclusive values, democracy, human rights, and the rule of law.

The shifting policies and values result in more and more people being pushed outside of the new national “We”—the loyal community of Hungarians—after 2010. As our goal is to see how the vision of the current Hungarian government clashes with inclusive European values, the description would not be complete without a discussion of what fuels the shift(s), what is the driving ideal behind these moves.

After the Fourth Amendment of the Fundamental Law, the turn away from European constitutionalism became even more tangible and a virtual consensus emerged among commentators that the Hungarian case is not a “conservative” turn in constitutionalism, or

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<sup>63</sup> TÁRKI [Social Research Institute Inc.], *Bizalomhiány, normazavarok, igazságtalanságérzet és paternalizmus a magyar társadalom értékstruktúrájában* [Lack of trust, norm disorder, sense of injustices and paternalism in the structure of Hungarian society], 2009, [http://www.tarki.hu/hu/research/gazdkult/osszefoglalo\\_kepviselok\\_091026.pdf](http://www.tarki.hu/hu/research/gazdkult/osszefoglalo_kepviselok_091026.pdf).

<sup>64</sup> István György Tóth, *Turánbánya—Értékválasztások, beidegződések és az illiberalizmusra való fogadókészség Magyarországon* [Turan Mine – Value Choices, Habits and Receptivity to Illiberalism in Hungary], INDEX (June 12, 2017), <http://index.hu/gazdasag/penzbeszel/2017/06/12/turanbanya/> (contribution to the volume HEGYMENET—TÁRSADALMI ÉS POLITIKAI KIHÍVÁSOK MAGYARORSZÁGON [UPHILL – SOCIAL AND POLITICAL CHALLENGES IN HUNGARY] (András Jakab & László Urbán eds., 2017)). For the original report, see TÁRKI [Social Research Institute Inc.], *Értékek 2013* [Values 2013] (2013), [http://www.tarki.hu/hu/research/gazdkult/2013/2013\\_zarotanutmany\\_gazd\\_kultura.pdf](http://www.tarki.hu/hu/research/gazdkult/2013/2013_zarotanutmany_gazd_kultura.pdf).

<sup>65</sup> *Id.* at 55, 61.

a move towards “political constitutionalism.”<sup>66</sup> Considering the attempts to move closer to Putin’s Russia and a long-term energy policy commitment,<sup>67</sup> it is hard to see how the ultimate goal is to secure the independence of the country from foreign influence, in line with the sovereigntist rhetoric of defending the country’s identity, be it from the West or the East. The attempts to exclude non-European, non-Christian immigrants by physical force can be contrasted to the government program to sell visas in foreign, including Arab countries—in a way that benefits loyal oligarchs.<sup>68</sup>

One reading is to see constitutional changes as a means to party politics.<sup>69</sup> Indeed, the instrumentalist use of law, including constitutional law, has been a feature of the Orbán regime.<sup>70</sup> This would be nothing new considering that law is exactly that: An instrument of policy-making. And even where instrumentalism prevails to the detriment of constitutionalism, that might only happen in the hasty days of campaigning. Instrumentalism in the Hungarian case means something different as it shows a deep lack of meaningful commitment to the underlying values of democracy, human rights and the rule of law, in the sense that it might occasionally trump the interest to hold on to power. This instrumentalism is sold to constituencies either as a welcome turn after liberal hypocrisy and self-defeating idealism or as something inherent to politics that is futile to resist. Again, this is not specific to Hungary, only in that it is here that these changes triggered fundamental constitutional changes. The direct effect is the further erosion of popular commitment to democracy, with some potential for an indirect effect of activating citizens who realize where this leads to. The civic solidarity with refugees in Hungary in the summer of 2015, the demonstrations in Poland for judicial independence in 2016 and 2017, or the 2015 and 2017 protests for

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<sup>66</sup> See, e.g., Kim Lane Scheppelle, *Understanding Hungary’s Constitutional Revolution*, in CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA (Armin von Bogdandy & Pál Sonnevend eds., 2015); and the thematic issue of the Hungarian human rights quarterly, 19 FUNDAMENTUM No. 2–3 (2015).

<sup>67</sup> Dániel Hegedűs, *The Kremlin’s Influence in Hungary: Are Russian Vested Interests Wearing Hungarian National Colors?*, DGAPKOMPAKT No. 8 (Feb. 2016).

<sup>68</sup> For the list of countries based on the registry of the Government Debt Management Agency, see Bálint Szalai, *Bődületeset kaszáltnak Rogán ötletén* [Making awful sums on Rogán’s idea], INDEX (Jan. 29, 2015), [http://index.hu/gazdasag/2015/01/29/valaki\\_boduleset\\_kaszal\\_rogan\\_otleten/](http://index.hu/gazdasag/2015/01/29/valaki_boduleset_kaszal_rogan_otleten/). For the English account, see Harry Cooper, *Hungarian Hole in the Schengen Fence*, POLITICO (Sept. 9, 2016), <http://www.politico.eu/article/hungary-residence-permits-schengen-visa-free-viktor-orban/>.

<sup>69</sup> Pál Sonnevend, András Jakab & Lóránt Csink, *The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary*, in CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA. THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA 46 (Armin von Bogdandy & Pál Sonnevend eds., 2015).

<sup>70</sup> Orbán acknowledged this when he talked about what he learned from Sándor Demjén, one of the richest men in Hungary, namely that in times of crisis, there is no normativity. *Orbán Viktor beszéde* [The Speech of Viktor Orbán], 17/5 VOSZ HÍREK 29 [NEWS OF THE NATIONAL ALLIANCE OF ENTREPRENEURS AND EMPLOYERS] (Aug.–Sept. 2012), [http://www.vosz.hu/rovat/file?id=j1Tm738STKVpXFA3\\_vn9wAC7RY7xjqApJ9eT2rkphNwLU8NcV1RoRVAq59wJYQX7iwQDu0n7LTF2EEOw4cuSrJ](http://www.vosz.hu/rovat/file?id=j1Tm738STKVpXFA3_vn9wAC7RY7xjqApJ9eT2rkphNwLU8NcV1RoRVAq59wJYQX7iwQDu0n7LTF2EEOw4cuSrJ).

academic freedom in Hungary demonstrate that constitutional values such as protection of human rights or the rule of law are not only slogans and rhetorical devices in the shallow business of politics, but genuine ideas people identify with and are ready to fight for.

Orbán has, in the past, raised the possibility to reintroduce the death penalty,<sup>71</sup> the perspective that a crisis could lead him to transition to a non-democratic system,<sup>72</sup> the possibility to live outside the EU.<sup>73</sup> The FIDESZ majority leader in the Parliament raised the possibility, in 2017, to “cease the legal force of the European Convention on Human Rights as applied to Hungary.”<sup>74</sup> Orbán referred to “all that rarified claptrap about human rights” that he contrasted to “reality.”<sup>75</sup> While all this is linked to national self-defense—“[n]owhere do human rights prescribe national suicide”<sup>76</sup>—the logic that unites the cited proposals is the wish to get rid of hurdles. It is sovereignty, but in the sense of the unlimited power of the sovereign, the party leader whose decisions cannot be challenged by his party, his government or any other state institutions—and, in fact, no other domestic or international entities. Apparently, the two remaining domestic checks are mass demonstrations and referendum initiatives, at least where these latter can pass the politicized filter mechanism.<sup>77</sup> This made Hungary effectively a country run by executive orders, internally, with a government that presents itself as “at war” with outside forces.

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<sup>71</sup> Ian Traynor, *Hungary PM: Bring Back Death Penalty and Build Work Camps for Immigrants*, THE GUARDIAN (Apr. 29, 2015), <https://www.theguardian.com/world/2015/apr/29/hungary-pm-death-penalty-work-camps-for-immigrants-viktor-orban>.

<sup>72</sup> See The Speech of Viktor Orbán, *supra* note 70, at 21.

<sup>73</sup> Referring to the Swiss as a freedom-loving people that never gave up their independence and to Switzerland as an example that there is life outside the EU, “so nobody should be frightened.” *Orbán Viktor miniszterelnök avatta fel a Stadler új szolnoki üzemeit* [Prime Minister Viktor Orbán inaugurates the new factory blocks of Stadler in Szolnok], KORMANYHIVATAL.HU (Apr. 18, 2013), <http://www.kormanyhivatal.hu/hu/jasz-nagykunszolnok/hirek/orban-viktor-miniszterelnok-avatta-fel-a-stadler-uj-szolnoki-uzemreszeit>.

<sup>74</sup> *180 perc: Ki kell-e lépni az Emberi Jogok Európai Egyezményéből?* [180 minutes: Should We Leave the European Convention on Human Rights?], MEDIÁKLIKK.HU (Mar. 23, 2017), <http://www.mediaklikk.hu/2017/03/23/180-perc-ki-kell-e-lepni-az-emberi-jogok-europai-egyezmenyebol/>.

<sup>75</sup> *Orbán Viktor beszéde a határvadászok eskütételén* [Viktor Orbán’s Speech at the Swearing-in of “Border Hunters”], MINISZTERELNOK.HU (Mar. 7, 2017), <http://www.miniszterelnok.hu/orban-viktor-beszede-a-hatarvadaszok-eskutetelen-2/> (“This [i.e. that laws apply to those who “illegally” enter the country] is reality which cannot be overwritten by all that rarified claptrap about human rights.”). For the source of the translation, see *The Hungarian Government’s Shameful Treatment of Asylum Seekers*, HUNGARIAN SPECTRUM (Mar. 9, 2017), <http://hungarianspectrum.org/2017/03/09/the-hungarian-governments-shameful-treatment-of-asylum-seekers/>.

<sup>76</sup> *Orbán to New Border Guards—“Nowhere Do Human Rights Prescribe National Suicide”*, BUDAPEST BEACON (Jan. 12, 2017), <http://budapestbeacon.com/news-in-brief/orban-new-border-guards-nowhere-human-rights-prescribe-national-suicide/43718>.

<sup>77</sup> For an insightful commentary on the legal inconsistency and political context of the decisions filtering referendum initiatives, see, e.g., Zoltán Szenté, *The Controversial Anti-Migrant Referendum in Hungary Is Invalid*, CONST. MAKING

In the first part of the article, we claimed that there is a zero-sum game between inclusive and exclusive values and that a critical mass of exclusive values can undermine constitutional democracy, and we consider the rejection of fundamental norms of constitutionalism—or ‘anti-constitutionalism’—exclusivist. The 2016 decision of the Constitutional Court on Hungary’s constitutional identity is illustrative in that an institution crucial for providing constitutional checks on the government not only failed to serve as a check, but stepped in to compensate the government for its failure to secure a supermajority for what should be seen as one in the series of unconstitutional constitutional amendments.<sup>78</sup> Substantively, the decision creates a point of reference for further deviations from constitutional obligations, including international and European asylum-related state responsibilities. Constitutional xenophobia reached a point where old inclusive values cannot counterbalance the introduction of new exclusive elements.

We also problematized the recognition of national identities in the EU legal framework. We have documented some of the “illiberal mushrooms” that grow in the illiberal climate and showed how the Orbán regime uses law in an extremely instrumental way, challenging crucial tenets of the rule of law. From this angle, the clause allowing for national variation under the label of Member State constitutional identity comes as a welcome possibility to extend the maneuvering space for the national government. While the Treaties provide a detailed framework for cooperation, at their core they rely on a *bona fide* approach to cooperation. They are not prepared to deal with cases like two states simultaneously infringing Article 2 values in a way that should give way to an Article 7 procedure; or to deal with cases where genuine commitment and the element of good faith cooperation is missing. It seems that the EU has to learn the hard way that good lawmaking is about getting ready for the worst. Considering the substantial support the EU is providing to these regimes—especially in financial terms, allowing economic growth, continuous investments that do not burden the national budget, and feeding national oligarchs, but also in wider political support by recognition through European party membership<sup>79</sup>—the Union has special responsibility in establishing the limits to implement anti-constitutionalist measures.

At first glance, the use of Member State identity in legal reasoning could be placed in the pluralism debate. It should by now be apparent why framing the discussion as a debate about pluralism might be misleading. In a value community where membership entails normative obligations like respect for democracy, human rights, and the rule of law,

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& CONST. CHANGE (Oct. 10, 2016), <http://constitutional-change.com/the-controversial-anti-migrant-referendum-in-hungary-is-invalid/>.

<sup>78</sup> For the term and the start of the trend, see Gábor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?*, 19 CONSTELLATIONS 182 (2012).

<sup>79</sup> FIDESZ is still member of the European People’s Party and has a member in its presidency and a vice-chair in its EP group.

pluralism can only be relative, and the question is whether the EU should and can deal with a lack of commitments to the core values, or value nihilism. What contributes to this threat is that, as the Hungarian case demonstrates, anything can be framed as part of constitutional identity,<sup>80</sup> protected under Article 4 (2) TEU: from attacking a university or NGOs—as “foreign agents” and “threat to the nation”—to mistreating asylum-seekers.

## F. Conclusions

We started with the problem of mushrooming exclusive constitutional values and anti-constitutionalist practices and noted the collapse of the assumption that democratization is a one-way street in the EU. Adopting exclusivist elements and making them part of the national identity of a country undermines constitutional democracy and can have a detrimental effect on inclusive constitutional values.

In the European Union, the breakdown of a constitutional democracy poses a particular challenge in that the supranational structure is built on the assumption that Member States are functioning constitutional democracies, with an independent judiciary applying the law including EU norms, with free and fair elections that result in democratically legitimate participants in EU institutions etc. The mechanism meant to deal with such systematic challenges can be easily blocked by the unholy alliance of illiberal regimes, Hungary and Poland. The EU framework is currently ill-prepared to pass this test, and the Treaty norm to respect Member State identities can end up exacerbating the problem. It makes sense to defend pluralism and diversity to counterbalance uniformization as a result of ever deepening integration. But where convergence is not taking place and, arguably, only took place on a superficial level, the danger is not too much uniformity but a divergence that threatens the foundations of integration.

Just like the Hungarian government’s measures make sense from the point of view of getting rid of limitations on political power, the use of the terms national and constitutional identity provides fertile ground for framing nationalist-sovereigntist arguments in a way that they sound as fitting the existing European framework. This makes it possible to present illiberal measures and those violating human rights as mere variations to the theme of European national identities. We conclude with a couple of examples to illustrate this danger.

It is clear how migration can be linked to identity arguments for defending illiberal measures. The same applies to future measures that might pop up in the future, potentially everywhere. If the illiberal character that the government might label “national” can be

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<sup>80</sup> See Jack M. Balkin’s argument that anything can become constitutionalized: “What is constitutional in one era becomes deconstitutionalized in another, and vice versa. Much depends on political entrepreneurs and how they express grievances.” For his summary on an exchange on his book, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011) see Jack Balkin, *Constitutional Televangelizing*, *CONCURRING OPINIONS* (Aug. 3, 2011), <https://concurringopinions.com/archives/2011/08/constitutional-televangelizing.html>.

defended as part of national identity, it might seem natural to fight critical “disloyal” forces internally, most importantly NGOs and academic institutions, for example, CEU. If the “Regime of National Cooperation” is a national achievement, even such mundane elements like setting lower commodity prices by law and a series of other measures—especially where they are “confirmed” by “national consultations,”<sup>81</sup> politically motivated questionnaires sent to all citizens but compiled with a complete disregard for professional minimum standards—will be part of the country’s “national identity.” The fight against “Soros agents,” including NGOs and CEU can be justified on the basis of the protection of national identity, as a way to fight cosmopolitan liberals who seek to defeat the ethnic purity<sup>82</sup> of the nation through supporting immigration against government efforts to shut borders down and defend Christian Europe.

Ultimately, the EU’s handling of the Hungarian challenge to European values, including arguments about Hungary’s national/constitutional identity, also ends up defining the EU’s own identity. A lack of response can erode values like democracy, human rights and the rule of law, while defending these values contribute to the solidification of basic values that the European community is built upon.

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<sup>81</sup> These are rounds of manipulative questionnaires, often combined with political campaigns, sent out to all citizens who then can decide to send them back marking their preferences for lower commodity prices or to defend the country from terrorists. For a detailed description of the ways in which the questionnaires violate the basic principles of polling, specifically the open letter of social scientists, including leading Hungarian polling experts, see *Social Scientists About the National Consultation* (Apr. 30, 2015), [https://www.peticiok.com/tarsadalomkutatok\\_a\\_nemzeti\\_konzultaciorol](https://www.peticiok.com/tarsadalomkutatok_a_nemzeti_konzultaciorol).

<sup>82</sup> For the “troubles” that intermixing cause and the need for “ethnic homogeneity” for economic success, from Orbán, see *Hungary’s Orbán: “Ethnic Homogeneity” Vital for Economic Success*, DW (Mar. 1, 2017), <http://www.dw.com/en/hungarys-orban-ethnic-homogeneity-vital-for-economic-success/a-37755766>; *Orbán Calls “Ethnic Homogeneity” a Key to Success*, EURACTIV.COM (Mar. 1, 2017), <https://www.euractiv.com/section/justice-home-affairs/news/orban-calls-ethnic-homogeneity-a-key-to-success/> (stating that the government “cannot risk changing the fundamental ethnic character of the country”).