The Responsibility of Courts in Maintaining the Rule of Law: Two Tales of Consequential Judicial Self-Restraint

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Abstract Modern constitutionalism is based on the paradigm that courts are inherently entitled and obliged to enforce the constitution of the respective polity. This responsibility of courts also applies in the context of the European Union to both the CJEU and national constitutional courts. The present chapter argues that in the face of constitutional crises the CJEU and the Hungarian Constitutional Court shy away from applying the law as it is to the full. The reasons behind this unwarranted judicial self-restraint are most different: the CJEU aims to avoid conflicts with national

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constitutional courts whereas the Hungarian Constitutional Court has been facing a legislative power also acting as constitution making power willing to amend the constitution to achieve specific legislative purposes or to undo previous constitutional court decisions. Yet both courts respond to expediencies that do not follow from the law they are called upon to apply. It is argued that rule of law backsliding requires these courts to abandon the unnecessary self-restraint and exploit the means already available.

1 Introduction

In the past several years, the European Union has been struggling with ensuring respect for the rule of law in all member states. The political mechanism envisaged by Article 7 TEU has thus far proved to be ineffective, there being only two instances of triggering this procedure, on 20 December 2017, by the Commission in respect of Poland,[1] and on 12 September 2018, by the European Parliament in respect of Hungary.[2] No visible progress can be detected in any of these cases. Equally, the Rule of Law Framework set out by the European Commission in 2014 has been activated only once, and even the European Commission acknowledges that 'it did not solve the detected rule of law deficiencies' in Poland.[3] The recent communication of the European Commission on further strengthening the Rule of Law within the Union[4] tries to move forward the debate, but fails to provide any specifics on how the system on enforcing the rule of law may become more effective.

It occurs that the political enforcement mechanisms have failed to deliver a sensible result.[5] This inevitably shifts the focus to the courts that are entrusted with the task of ensuring respect for foundational constitutional values. In the European Union context, this court is most importantly the CJEU which is called upon by virtue of Article 19 (1) TEU to 'ensure that in the interpretation and application of the Treaties the law is observed.' Besides, national constitutional courts also bear responsibility for maintaining the values common to the Member States of the EU, including the rule of law, respect for human rights and democracy. This common responsibility—which is of legal and constitutional nature—applies irrespective of political pressures or eventual repercussions.

[1]Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017) 835 final, 20.12.2017).

[2]European Parliament resolution of 12 September 2018 calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

[3]Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union, State of play and possible next steps, Brussels, 3.4.2019, (COM(2019) 163 final) p. 3.

[4]Id.

[5]Kochenov and Bárd (2018).

That courts are at the centre of maintaining the rule of law is also recognised by the recent case law of the CJEU on the independence of the national judiciary. Starting with the seminal ASJP judgment on the Portuguese judges association[6] and leading up to the ruling on the Polish law on the Supreme Court[7] the CJEU made it clear that an independent and effective judiciary is indispensable for ensuring the application of EU law in the Member States and ultimately for maintaining the membership of the respective Member States in the EU. Judicial independence, is, however, just a bare minimum which does not on its own guarantee a proper interpretation and application of the law.[8] What if judges respond to unspoken expectations and political realities and fail to exhaust their full capacity to protect the fundamental values they shall maintain in their respective constitutional order? What if courts exercise self-restraint that does not follow from the language and the context of the constitutional document they are supposed to enforce? What if this self-restraint ultimately undermines the coherence of the polity these courts are supposed to serve?

This chapter tells the tale of two courts in utterly different positions yet demonstrating a certain similarity in self-restraint in exploiting the means at their hands. These two courts are, on the one hand, the CJEU, and, on the other, the Hungarian Constitutional Court. It is not submitted that these two courts would have a comparable mandate or an even a vaguely similar political environment. What is common is their reluctance to take the risk inherent in applying the law to the fullest extent. This reluctance has far reaching consequences for both the legal system of the EU and of Hungary.

In the following I shall first outline the interpretation of Article 51 (1) CFR by the CJEU and the consequences of this restrictive interpretation to Hungary in such important areas as the freedom of the press, the independence of the judiciary and of the data protection commissioner (Sect. 2). In the second part of the chapter, I will argue that the Hungarian Constitutional Court still has powerful and mostly unused opportunities at disposal to control the legislative power, even if this legislative power acts most of the time as constitution making power, and frequently amends the Basic Law in order to achieve specific policy objectives or to counter decisions of the Constitutional Court (Sect. 3). In conclusion I submit that rule of law crises call for a more robust and courageous approach by both the CJEU and constitutional courts.

[6]CJEU Case C-264/16, *Associação Sindical dos Juízes Portugueses*, Judgment of the Court of 27 February 2018.

[7]CJEU Case C-619/18, *European Commission v. Poland*, Judgment of the Court of 24 June 2019.

[8]Cf. from the perspective of the internal independence of judges Avbelj (2019).

2 Narrowing the Charter's Applicability: Article 51 (1) CFR

2.1 Siragusa, Hernández: Context and Consequences

The evolution of the case law of the CJEU on Article 51 (1) CFR need not be retold here. It is, however, necessary to recall the context and consequences of the shift from the *Åkerberg Fransson* judgment[9] to the *Siragusa and Hernandez* case law in order to assess the implications of this shift for situations in which the rule of law is threatened.

Åkerberg Fransson was certainly an attempt by the CJEU to return to a case law that existed long before the framing of the Charter. Since the *ERT* judgment it has been the consistent case-law that general principles apply to Member States in situations falling within the scope of application of EU law.[10] In fact, the decisive paragraph of the *Åkerberg Fransson* judgment quotes the langue of the *ERT* judgment literally.[11] By that, the CJEU actually followed the explanations to Article 51 (1) CFR which describe the framing of the relevant part of this provision as an expression of the previous case law of the Court.[12]

In contrast, it was submitted especially in German scholarship before[13] and after[14] the *Åkerberg Fransson* judgment that the framers of the Charter intended to correct the breadth of the application of EU fundamental rights suggested by the *ERT* case law by using the term 'implement' in Article 51 (1) CFR. For this view, the explanations to the Charter have a questionable status as on the basis of Article

[9]CJEU, Case C-617/10 *Åkerberg Fransson*, Judgment of 26 February 2013, para. 19.

[10]CJEU, Case C-260/89 *ERT*, Judgment of the Court of 18 June 1991, para. 42.

[11]The Court 'has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures', *ERT*, *supra* note 10, para. 42, *Åkerberg Fransson supra* note 9, para. 19.

[12]Explanations relating to the Charter of Fundamental Rights, Explanation on Article 51—Field of application 'As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules . . .' (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds)' OJ 14.12.2007 C 303/32.

[13]Huber (2008), p. 197.

[14]Schorkopf (2014), para. 26; also Hancox (2013), p. 1411.

52 (7) CFR they only need be considered to provide guidance in the interpretation of the Charter.[15]

This debate would have not had particular bearings if only the German Bundesverfassungsgericht did not take up the issue only two months after *Åkerberg Fransson* in its judgment on the counter-terrorism database.[16] Here Karlsruhe went as far as to use the term 'ultra vires' in relation to the *Åkerberg Fransson* judgment and advised Luxemburg that '[t]he decision must thus not be understood and applied in such a way that absolutely any connection of a provision's subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, would be sufficient for binding the Member States by the Union's fundamental rights set forth in the EUCFR.'[17]

The *Siragusa and Hernandez* judgments can be understood in this context. In *Siragusa* the CJEU in essence requires the assessment of the following for the applicability of the Charter against Member States: whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it.[18] In essence it needs be ascertained whether there is an EU law obligation on Member States with regard to the situation at issue.[19] This 'specific obligation' test was soon articulated more clearly in the Hernandez judgment[20] and can now be regarded as the guiding interpretation of Article 51 (1).

It may occur that the CJEU still relies on the *Åkerberg Fransson* doctrine, as the judgment has been referred to in the case law several times even after the *Siragusa* judgment. Nevertheless, a closer look reveals that *Åkerberg Fransson* is not invoked to exploit the 'scope of application' doctrine. Rather, *Åkerberg Fransson* is quoted to deny the applicability of the Charter,[21] or in a solely VAT related context.[22] The only exception to this pattern is *Delvigne*, where the Court ultimately found the Charter to be applicable relying on *Åkerberg Fransson* because the member state in question was implementing its obligation under Article 14(3) TEU and Article 1(3) of the

[15]Schorkopf (2014), para. 26.

[16]BVerfG 133, 277.

[17]BVerfG 133, 277, 316 para. 91. For a detailed analyses and critical appraisal see Thym (2013), p. 391 et seq.

[18]CJEU, Case C-206/13 *Siragusa*, Judgment of the Court of 6 March 2014, para. 25.

[19]*Siragusa*, *supra* note 18, para. 26.

[20]CJEU, Case C-198/13 *Hernández*, Judgment of the Court of 10 July 2014, para. 35.

[21]CJEU, Case C-265/13, *Torralbo Marcos*, Judgment of the Court of 27 March 2014, para. 30; CJEU, Cases C-650/13 and C-395/15 *Mohamed Daouidi v. Bootes Plus SL and Others*, Judgment of the Court of 1 December 2016, paras. 63–64; CJEU, Case C-638/16 PPU, *X and X v. État belge*, Judgment of 7 March 2017, para. 45.

[22]CJEU, Case C-42/17, *M.A.S. and M.B.*, Judgment of 5 December 2017, para. 31.

1976 Act while excluding certain convicted EU citizens from the right to vote in the elections to the European Parliament.[23]

The Court gets closest to applying the 'scope of application' doctrine in cases where it deals with the classic *ERT* scenario in which the member state is relying on grounds envisaged in the TFEU or on overriding reasons in the public interest that are recognised by EU law in order to justify the obstruction of one or more fundamental freedoms by the member state.[24]

It is fair to state that the 'scope of application doctrine' would have given more teeth to the Charter as an instrument of protecting the constitutional values enshrined in Article 2. It may seem somewhat exaggerated to assume that *Åkerberg Fransson* would subject a nearly unlimited breadth of Member States competencies to the application of the Charter.[25] Nevertheless the scope of application doctrine would definitely have yielded a more flexible approach and a far more effective enforcement of the basic values of Article 2 against Member States.

Especially damming are the underlying considerations behind the restrictive 'specific obligations' doctrine. According to *Siragusa*, the reason for pursuing the objective of fundamental rights protection by the EU is 'the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law.'[26] According to this, the CJEU still seems to regard the protection of fundamental rights as a necessary evil to protect the supremacy of EU law from fundamental rights based challenges by national constitutional courts. Fundamental rights are thus not protected following the mandate of Article 2 TEU, but as a matter of expediency for the uniform application of EU law. To put the message bluntly: the CJEU will protect fundamental rights in order to prevent interferences by the constitutional courts but will not take it as far as to disturb the sensitivity of the very same constitutional courts, especially the Bundesverfassungsgericht.

In the following I shall demonstrate how the restrictive approach of the CJEU in relation to the interpretation of Article 51 (1) impacted the handling the case of Hungary and how it did not serve the promotion of the rule of law in the EU.

[23]CJEU, Case C-650/13, *Delvigne*, Judgment of the Court of 6 October 2015, para. 27–33.

[24]CJEU, Case C-201/15, *AGET Iraklis*, Judgment of the Court of 21 December 2016, paras. 62–63; CJEU, Case C-235/17, *Commission v. Hungary*, Judgment of 21 May 2019, paras. 64–65.

[25]Schorkopf (2014), para. 26.

[26]Case C-206/13 *Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo* Judgment of the Court of 20 March 2014, para. 32 'The reason for pursuing that objective is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law.'

2.2 *Consequences of the Restrictive Interpretation of 51 (1) CFR Until 2017 in Hungary*

Against the above outlined background, it does not come as a surprise that until December 2017 the European Commission attempted to intervene with undesired constitutional developments in Hungary by means of an infringement procedure only in three cases. All three cases addressed issues of primary importance for the rule of law and democracy: the freedom of the press, the independence of the judiciary and the independence of the date protection commissioner. Out of these only two made it to a judgment by the CJEU, and none was based on the Charter.[27]

2.2.1 The Media Law

One of the first steps of reshaping the legal landscape in Hungary in 2010 was to adopt new laws on print and electronic media: Act CIV of 9 November 2010 on the freedom of the press and the fundamental rules on media content (Press Freedom Act)[28] and Act CLXXXV of 30 December 2010 on media services and on the mass media (Mass Media Act). These laws raised a number of grave concerns from the perspective of the freedom of the press.[29] To name a few, the new regulation provided for an obligation to register for all media, including print, electronic and online media;[30] it obliged all media to provide balanced coverage;[31] it contained a general, broadly framed content based prohibitions for all media to protect vaguely defined concepts as human dignity,[32] human rights and privacy;[33] it reduced significantly the protection for sources, created the position of a Media Ombudsman giving it vaguely defined sanctioning powers and it authorised the newly created National Media and Infocommunications Authority to impose severe sanctions.[34] The President of the National Media and Infocommunications Authority was to be appointed for the unusually long term of nine years (more than two legislative periods) by the President of the Republic.[35]

[27] Article 47 (2) EU Charter (right to a fair trial before an independent and impartial tribunal); Article 8 (3) EU Charter (guarantee of an independent data protection authority).

[28] For an English translation of the original text see http://cmcs.ceu.hu/sites/default/files/domain-69/cmcs-archive/act_civ_media_content.pdf.

[29] For a critical appraisal see Polyák (2015), p. 125 et seq.

[30] Sec. 41 (4) Mass Media Act as of 31 December 2010.

[31] Sec. 13. Press Freedom Act and Sec. 12 (1) Mass Media Act as of 31 December 2010.

[32] On this specific aspect see Koltay (2013), p. 823 et seq.

[33] Part Two Chapter I Mass Media Act as of 31 December 2010.

[34] Secs. 185–187 Mass Media Act as of 31 December 2010.

[35] Sec. 111/A. (1) Mass Media Act.

It is by no surprise that the European Commission reacted quickly and strongly to the new legislation.[36] Already on 23 December 2010 Neelie Kroes, vice-president of the European Commission addressed her Hungarian counterpart in a letter, stating her concerns in general terms.[37] This letter was followed by a more detailed one on 21 January 2011[38] requiring clarifications of three issues.[39] The Hungarian side gave in rapidly in all points raised by the Commission. Although the amending legislation was only adopted on 7 March and published in the Official Gazette on 22 March 2011,[40] Commission Vice-President Kroes welcomed the planned amendments to Hungarian Media Law already on 16 February in a press release.[41]

Notably, these amendments did not address many general concerns relating to the freedom of the press and focused on those aspects that had a direct link to European Union law.[42] Especially telling is the exclusion of the Charter of the discussion between the Commission and Hungary.

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[36]For a highly informative collection of relevant documents, see https://cmcs.ceu.hu/node/26249#euro. See also Hoffmeister (2015), p. 195 et seq.

[37]See http://www.kormany.hu./download/8/01/10000/kroes.pdf. According to the letter: 'Independent regulatory authorities for the broadcasting sector have an important role to play to ensure the existence of a wide range of independent and autonomous media. Concerns have been expressed by numerous commentators that the recently adopted Media Act risks jeopardising the rights by giving very broad competences to the Media Authority. These same commentators also allege that the composition of the Media Authority does not seem to guarantee its independence. In addition, doubts have been raised about some of the provisions of the Act which apparently are applicable to broadcasters established in other Member States, which raises potential questions of coherence with one of the basic principles of the Audiovisual Media Services Directive.'

[38]See http://cmcs.ceu.hu/sites/default/files/domain-69/cmcs-archive/EC_lettertoHungary_2011Jan21.pdf.

[39]These included the obligation to provide balanced coverage applicable to all audiovisual media service providers on the basis of Sec. 13. Press Freedom Act and Sec. 12 (1) Mass Media Act, the power of the National Media and Infocommunications Authority to impose fines and other sanctions on media service providers established in another member states of the EU on the basis of Sec. 176 ad 177 Mass Media Act, as well as the requirement in Sec. 41 Mass Media Act that all media, in particular press and online media be registered. The Commission and the Hungarian authorities held thereafter meetings in Brussels at experts level between on 7th February and 15th February.

[40]A sajtószabadságról és a médiatartalmak alapvető szabályairól szóló 2010. évi CIV. törvény és a médiaszolgáltatásokról és a tömegkommunikációról szóló 2010. évi CLXXXV. törvény módosításáról szóló 2011. évi XIX. törvény.

[41]See http://europa.eu/rapid/press-release_MEMO-11-89_en.htm.

[42]The amendments agreed included the following:

- limitation of the balanced coverage requirements to broadcasting, these no longer apply to on-demand media services;
- broadcasters and other audiovisual media service providers legally established and authorised in other Member States can no longer be fined for breaching the Hungarian Media Law's provisions on incitement to hatred;
- on-demand audiovisual media service providers, media product publishers and ancillary media service providers established in Hungary and in other Member States are no longer subject to prior authorisation by the Hungarian authorities;
- the prohibition not to cause offence to individuals, minorities or majorities is limited to situations of incitement to hatred or discrimination.

In her first relevant letter of 23 December 2010 Vice-President Kroes seemed to take a broader approach which would have warranted the examination of the Hungarian legislation on the basis of the Charter of Fundamental Rights. First, the letter expressed the understanding that the media legislation 'primarily aims to transpose the Audiovisual Media Services Directive (Directive 2010/13/EU)'. It then continued by stating that '[t]he freedom of expression constitutes one of the essential foundations of our democratic societies[. . .] Media pluralism, freedom of expression and press freedom are underlying elements of European democracy guaranteed by the Charter of Fundamental Rights.'[43] This opening could be understood as paving the way for the application of Art. 51 (1) of the Charter of Fundamental Rights inasmuch it referred to the Hungarian legislation as an implementation of EU law.

In contrast, the following letter of 21 January 2011 took a narrow approach and only relied on specific provisions of the Audiovisual Media Services Directive as well as on the freedom of establishment and the free provision of services guaranteed by Art. 49 and 56 TFEU.[44] This letter made no mention of the Charter of Fundamental Rights whatsoever.

2.2.2 The Forced Retirement of Justices

Until the entry into force of the Basic Law, relevant legislation essentially allowed judges to remain in office until the age of 70. The Basic Law provided in its Article 26(2) that 'with the exception of the President of the Kúria, judges may remain in office until the general retirement age'. This provision was supplemented by Article 12(1) of the Transitional Provisions. With these provisions, applied together with the relevant pension legislation, the constitution-maker tied the cessation of the mandate of the judges to the general retirement age, which in 2012 was 62 years and would progressively increase up until 2022, when it will be 65 years. As a result, around 10% of all judges, including many in leading positions, were forced to leave office within a year.

The Constitutional Court was confronted with the forced retirement of judges in its Decision 33/2012 (VII.17) AB.[45] The Court declared the sudden reduction of the upper age limit for judges unconstitutional on the grounds that it was a breach of judicial independence protected by article 26(1) of the Basic Law. Ultimately, the Decision annulled the statutory provisions on early retirement with *ex tunc* effect. The implementation of this judgment has resulted in considerable legal uncertainty. The legal basis of forced retirement was declared null and void, but this did not directly affect the individual resolutions of the President of Hungary, which actually

[43] See http://www.kormany.hu./download/8/01/10000/kroes.pdf.

[44] See http://cmcs.ceu.hu/sites/default/files/domain-69/cmcs-archive/EC_lettertoHungary_2011Jan21.pdf.

[45] Kocsis (2013), p. 556.

dismissed the judges. What is more, the President of the National Judicial Office did not initiate a procedure to reinstate those who had been removed, and without an appropriate proposal the President of the Republic could not repeal the previous decisions. Even if a justice was reinstated, by that time the leading positions were already filled.

The European Commission and the CJEU also reacted to the issue of early retirement, but in a different context. The lowering of the mandatory retirement age of judges from 70 to 62 was addressed by the European Commission as discrimination in the workplace on grounds of age in the light of the rules on equal treatment in employment (Directive 2000/78/EC).[46] The CJEU acceded to the position of the European Commission and ruled that the relevant national legislation gives rise to a difference in treatment on grounds of age which is neither appropriate nor necessary to attain the objectives pursued and therefore does not comply with the principle of proportionality.[47] Judicial independence or Article 47 CFR were not addressed.

In response, Hungary, taking into account the previous decision of the Hungarian Constitutional Court as well, amended the legislation on the legal status of the judges, and it introduced a new method of calculation, setting the retirement age to between 65 and 70, depending on the date of birth of the judge. The law also set forth a unified retirement age calculation method for judges, prosecutors and notaries.[48] Nevertheless, only a small number of judges requested to be reinstated, and none of them regained the leading position they previously possessed.

2.2.3 The Removal of the Data Protection Commissioner

The six-year term of the incumbent Data Protection Commissioner was prematurely terminated by Article 16 of the Transitional Provisions on the day of the entry into force of the Basic Law on 1 January 2012. This came along with the creation of a new National Agency for Data Protection to replace the current Data Protection Commissioner's Office.

This move was challenged by the European Commission before the CJEU. In its action submitted on 8 June 2012, the Commission relied on Article 28(1) of Directive 95/46/EC on the protection of individuals with regard to the processing of

[46]Letter from Vice-President Viviane Reding to Vice-Prime Minister Tibor Navracsics (Brussels, 12 December 2011), available at www.lapa.princeton.edu/hosteddocs/hungary/letter_from_vp_of_the_european_commission.pdf. European Commission Press Release, 'European Commission Launches Accelerated Infringement Proceedings against Hungary over the Independence of its Central Bank and Data Protection Authorities as well as over Measures affecting the Judiciary' (Strasbourg, 17 January 2012), available at www.europa.eu/rapid/pressReleasesAction.do?reference=IP/12/24.

[47]C-286/12 *Commission v Hungary*, Judgment of the Court of 6 November 2012, para. 48 et seq.

[48]Act XX of 2013 (2013. évi XX. törvény az egyes igazságügyi jogviszonyokban alkalmazandó felső korhatárral kapcsolatos törvénymódosításokról).

personal data and on the free movement of such data and argued that the removal from office before time of the authority responsible for supervising data protection undermines the independence required by the Directive of that authority.[49] The judgment of the CJEU on 8 April 2014 confirmed this.[50] It is remarkable that the central concern in the case was actually orchestrated as a matter of the personal fate of the previous Commissioner, and not as a matter of principle. Besides, the judgment does not mention Article 8 (3) CFR which, in the light of Article 51 (1) CFR has the potential to be interpreted as referring also to national supervisory authorities.

2.3 *Article 19 (1) TEU as a Partial Supplement for a Broad Interpretation of Article 51 (1)*

By the time Polish constitutional developments took a turn in 2015, the forced retirement of justices and the removal of the data protection commissioner were the only cases where an infringement procedure was initiated against Hungary for concerns relating to the values listed in Art. 2 TEU. They show a pattern which can be best characterised by recourse to narrow internal market related provisions and by strictly avoiding the conflicts that may arise from the application of the Charter to a member state. This approach clearly reflects the *Siragusa and Hernández* line of cases and the expediencies following from the Bundesverfassungsgericht's stance on fundamental rights protection by the CJEU.

By that, the CJEU clearly had ignored that protection against removal from office is one of the most important aspects of independence of the judiciary or of any other independent office. In relation to the judiciary, the European Court of Human Rights has repeatedly made it clear that the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of the right to a fair trial.[51] This does not necessarily mean that this irremovability must under all circumstances be formally declared in law. It suffices that the irremovability is recognised in fact and that the other necessary guarantees are present.[52] From this it follows that independence presupposes a general protection from removal from office except in cases clearly and narrowly defined by law relating to the misconduct or lack of capabilities of the person bearing the office.

[49]CJEU, Case C-288/12, *Commission v Hungary* [2012] OJ C227/15–16.

[50]CJEU, Case C-288/12, *Commission v. Hungary,* Judgment of the Court of 8 April 2014.

[51]ECtHR, *Campbell and Fell v United Kingdom*, Judgment of 28 June 1984, Application no. 7819/77; 7878/77 para. 80.

[52]Id., with reference to ECtHR, *Engel and others*, Judgment of 8 June 1976, Application no 5100/71 para. 68.

Irremovability is also considered an important guarantee of independence under express provisions of EU law. With regard to the CJEU, Art 19 TEU and Art 254 TFEU stipulate the independence of the Justices of the Court. This is supplemented by several provisions of the Statute of the Court of Justice of the European Union. Amongst these, Article 5(1) provides that '[a]part from normal replacement, or death, the duties of a Judge shall end when he resigns'. Article 6 of the Statute only allows for removal from office if a Justice 'no longer fulfils the requisite conditions or meets the obligations arising from his office.' As a procedural safeguard in Article 6 of the Statute, decision on the removal may only be taken by a unanimous Court and all Advocates General. Similar rules apply to members of the European Commission. Article 17(3) III TEU declares that 'in carrying out its responsibilities, the Commission shall be completely independent.' The Commission being a political organ with political responsibility, a motion of censure of the Commission in the European Parliament is possible under Art 18(8) TEU. But the independence of individual commissioners is protected by Art 247 TFEU which only allows for the removal of individual commissioners if he or she 'no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct.'

These considerations had to have a bearing as it became clear that Hungary will not remain an isolated case and Poland would use the same legislative means to change the composition of the judiciary. The decision in ASJP[53] and the *Commission v. Poland* case on the Supreme Court[54] clearly indicate this understanding.

Nevertheless Article 19 (1) TEU is not a vehicle to trigger the application of the Charter through Article 51 (1) CFR.[55] Rather, the second subparagraph of Article 19 (1) TEU is a stand-alone guarantee which shall be interpreted in the light of Article 47 CFR. This was the position of the Commission at the hearing in the *Commission v. Poland* case,[56] and this follows from the operative parts of the judgments in the same case and in the ASJP case. In ASJP the requesting court sought an interpretation of Article 19 (1) and Article 47 CFR,[57] but the CJEU merely pronounced on the former.[58] In *Commission v. Poland*, the operative part of the judgment found solely a violation of the obligations following from the second subparagraph of Article 19 (1) TEU, but did not establish a violation of Article 47 CFR.[59] It is to be expected that the cases pending in relation to the judiciary in Poland[60] will be decided along the same lines.

[53]CJEU *Associação Sindical dos Juízes Portugueses*, *supra* note 6.

[54]CJEU *Commission v. Poland*, *supra* note 7.

[55]For a different view see Spieker (2019).

[56]CJEU *Commission v. Poland*, *supra* note 7, para. 32.

[57]CJEU *Associação Sindical dos Juízes Portugueses*, *supra* note 6, para. 1.

[58]CJEU *Associação Sindical dos Juízes Portugueses*, *supra* note 6, operative part.

[59]CJEU *Commission v. Poland*, *supra* note 7, operative part 1.

[60]See the case relating to the law on ordinary courts organisation—CJEU, Case C-192/18, *European Commission v. Republic of Poland*, Opinion of AG Tanchev of 20 June 2019; the case

2.4 *Revival of ERT?*

It follows that the CJEU regards the independence of the judiciary as an issue completely separated from the application of the Charter to Member States. ASJP thus has not broadened the applicability of the Charter to Member States. It is highly questionable whether other vital elements of the rule of law protected by fundamental rights will still remain within the restraints of the *Siragusa and Hernández* case law.

There are signs that the CJEU might take up the *ERT* case law in the stricter sense and find the Charter applicable in situations where fundamental freedoms are involved and Member States seem to rely on exceptions to such fundamental freedoms. Examples can be found regarding Hungary, in relation to which the European Commission launched three infringement procedures based on fundamental freedoms and the Charter. These include the following: (i) the case relating to the amendment of the Act on National Higher Education affecting foreign universities, most of all the Central European University;[61] (ii) the case relating to the law on the transparency of organisations that receive financial support from abroad;[62] (iii) the case of Act VI of 2018 on the amendment of certain laws relating to measures to combat illegal immigration.[63] Common to these cases is that the European Commission relies on one of the fundamental freedoms and in connection with that provisions of the Charter. In relation to the Act on National Higher Education the freedom to provide services is invoked, and in relation to that Articles 13, 14(3) and 16 CFR. As regards the transparency of foreign funded organisations the vehicle is the freedom of movement of capital, which seems to trigger the application of Articles 7, 8 and 12 CFR. The case of Act VI of 2018 on the amendment of certain laws relating to measures to combat illegal immigration the Commission invokes the freedom of movement, whereas the press release on the reasoned opinion only refers to the Charter in general terms.

As neither the reasoned opinions nor the applications of the Commission to the CJEU are public, it is unclear whether the Commission indeed utilises the *ERT* precedent to trigger the application of the Charter. Yet these cases certainly point in that direction. It would mean that while the CJEU is not ready to apply the 'scope of application' doctrine of the *ERT* and *Åkerberg Fransson* judgment to broaden the applicability of the Charter to Member States in situations sensitive to the rule of law in general, it sticks with the already established precedent of the *ERT* judgment if it is applicable. This conclusion is reinforced by the already mentioned post-*Siragusa*

relating to the new disciplinary regime for Polish judges—Reasoned Opinion of the European Commission of 17 July 2019, http://europa.eu/rapid/press-release_IP-19-4189_en.htm.

[61]CJEU, Case C-66/18, *Commission v Hungary*, Action brought on 1 February 2018.

[62]CJEU, Case C-78/18, *Commission v Hungary*, Action brought on 1 June 2018.

[63]Reasoned opinion of the European Commission of 24 January 2019, http://europa.eu/rapid/press-release_IP-19-469_EN.htm.

and Hernández cases not involving systemic rule of law concerns where the CJEU relied on the *ERT* precedent to invite the application of the Charter.[64]

3 Unused Means to Control the Constitution Making Power

3.1 The Convolution of Pouvoir Constituant and Pouvoir Constitué

The circumstances of the activity of the Hungarian Constitutional Court could hardly be more different than those of the CJEU. Out of the past ten years the governing coalition in Hungary had a constitution making majority for about seven years altogether.[65] This majority did not refrain from amending the Constitution and from 2012 the Basic Law. Between 2010 and 2012 the Constitution was amended eight times. Following the adoption of a new Basic Law, seven different amendment thereto were adopted within seven years. In other words, nine years have seen the adoption of a new constitution (the Basic Law) and fifteen constitutional amendments out of which seven affected the brand-new Basic Law.

Not only the statistics suggest a volatile constitutional environment. Almost all constitutional amendments were borne out of immediate political needs and motivations. With a few exceptions, they served to exclude or reduce the possibility of challenging specific legislative projects before the Constitutional Court or attempted to undo the results of previous Constitutional Court decisions.[66] Especially the curtailing of the competences of the Constitutional Court in tax matters by what is now Article 37 (4) of the Basic Law and the Fourth Amendment made it clear that the legislative power is ready to use its constitution making power to combat the Constitutional Court.

As regards Article 37 (4) of the Basic Law, the restriction of the competences of the Constitutional Court is certainly a very serious loophole in the Basic Law. This is because Article 37(4) of the Basic Law excludes a wide range of laws on the central budget, on the implementation of the budget, on central taxes, on duties and on contributions, on customs duties, and on the central conditions for local taxes issues from the competence of the Constitutional Court, and only allows for the review of these on the basis of a limited list of fundamental rights, i.e. the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, and the rights related to Hungarian citizenship. This language arose out of a conflict between Parliament and the Constitutional Court over a 98% punitive tax charged on severance payments of dismissed civil servants and public employees

[64]See CJEU *AGET Iraklis*, *supra* note 24, paras 62–63; C-235/17, CJEU *Commission v. Hungary*, *supra* note 24, paras. 64–65.

[65]May 2010 to February 2015, May 2018 to present (July 2020).

[66]Vincze (2014), p. 86.

before the adoption of the Basic Law. In its Decision 184/2010 (X.28) AB[67] the Constitutional Court declared this punitive tax to be in violation of the right to property, even though Parliament had previously specifically amended the Constitution to cover the impugned legislation. Apparently, Parliament felt it necessary to protect its prerogatives by stripping the power of the Constitutional Court to adjudicate tax matters in the broad sense, and introduced Article 32/A(2) of the Constitution, the language of which was identical to what is today Article 37 (4) of the Basic Law.[68]

The Fourth Amendment was adopted in reaction to Decision 45/2012 (XII.29) AB of the Constitutional Court which had declared the so-called transitory provisions of the Basic Law unconstitutional. Accordingly, the most important part of the Fourth Amendment was that it incorporated those provisions of the Transitional Provisions into the text of the Basic Law that were previously annulled by the Constitutional Court. These reinstated rules included substantive provisions, such as the reallocation of cases by the President of the National Judicial Office (Article 27(4)), the possibility to reduce pensions of former communist leaders (Article U (5)), and the suspension of the statute of limitations for crimes not prosecuted for political reasons in the communist regime (Article U(6)). Besides these, the Fourth Amendment included in Article U(1) of the Basic Law the previous Preamble to the Transitional Provisions, which declared, inter alia, that the Hungarian Socialist Workers' Party (the communist party before 1989) bears responsibility for different wrongdoings, including 'the systematic destruction of European civilisation, legacy and prominence'. What is more, the newly inserted Article U(1) also declares that the successor of the Hungarian Socialist Workers' Party, the Hungarian Socialist Party (MSZP, which is at the present time the strongest opposition), shares the responsibility of its predecessor.

However, the constitution-making power did not stop at undoing one single Constitutional Court ruling. Rather, the Fourth Amendment basically reversed all politically sensitive decisions handed down by the Constitutional Court after the 2010 elections. This was carried out by including specific exceptions to fundamental rights provisions in the Basic Law based on which laws previously annulled by the Constitutional Court can no longer be regarded as unconstitutional.

For example, the Fourth Amendment inserted the following provision into Article L(1) of the Basic Law: 'Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation's survival. Family ties shall be based on marriage or the relationship between parents and children.'

This was a direct response to Decision 43/2012 (XII.20) AB,[69] in which the Constitutional Court annulled section 7 of the Act on Protection of Families. Section 7 had defined family as a system of relations that generates an emotional

[67]Constitutional Court of Hungary Decision 184/2010 (X.28) AB határozat para 900.

[68]I shall address this conflict in detail below at point 3.2.3.

[69]Constitutional Court of Hungary, Decision 43/2012 (XII.20) AB, para. 296.

and economic community of natural persons, based on the marriage of a man and a woman, next of kinship or adoptive guardianship. The Court found this concept of a family too narrow as the state should also protect long-term emotional and economic partnerships of persons living together (for example, those relationships in which the couples raise and take care of each other's children, or couples who do not have any children or are not able to have any children, grandchildren cared for by grandparents, etc.).

Another reaction to one of the contemporary decisions of the Constitutional Court was the amendment of Article VII(2) and (3) of the Basic Law which authorise Parliament to recognise religious organisations as churches. Just ten days before the adoption of the Fourth Amendment, in its Decision 6/2013 (III.1) AB, the Constitutional Court decided, inter alia, that on the basis of freedom of religion Parliament cannot be authorised to grant church status.[70] Both of these will be elaborated on in more detail in Sect. 3.2.

Similarly, to reverse a Constitutional Court Decision, Article XXII of the Basic Law introduced an obligation of the state and local governments to strive for the protection of homeless persons but at the same time granted authorisation for the Parliament and the local governments to outlaw the use of certain specific sections of public areas for habitation. This amendment was a reaction to Decision 38/2012 (XI.14) AB,[71] in which the Constitutional Court reviewed the Petty Offence Act and stated that the punishment of homeless people for living in a public area is in violation of the right to human dignity. In the Court's view, homelessness is a social problem which the state must handle within the framework of social administration and social care instead of punishment. Ultimately, therefore, the newly introduced Article XXII(3) created an exception to the protection of human dignity concerning homeless people at the level of the Basic Law.

Equally, the Fourth Amendment included a new paragraph in Article IX of the Basic Law which explicitly allows for banning political advertisements from private broadcasting in times of political campaign, thereby reversing Decision 45/2012 (XII.29) AB, discussed above. Besides this, the new Article IX(3) discourages political advertising in private broadcasting by prohibiting media outlets from charging for broadcasting political adverts, should they decide to air these.

What is more, some provisions of the Fourth Amendment relating to hate speech aim to cut back a 20-year-old case law of the Constitutional Court. Between 1992 and 2008, the Constitutional Court found several laws to be unconstitutional that aimed to penalise hate speech.[72] As an answer to this, Article 5(2) of the Basic Law stipulates that: '[t]he right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or

[70]Constitutional Court of Hungary, Decision 6/2013 (III.1) AB para. 203.

[71]Constitutional Court of Hungary, Decision 38/2012 (XI.14) AB para. 185.

[72]See Constitutional Court of Hungary, Decision 30/1992 (V.26) AB; Constitutional Court of Hungary, Decision 18/2004 (IV.25) AB; Constitutional Court of Hungary, Decision 95/2008 (VII.3) AB.

religious community. Members of such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates their community, invoking the violation of their human dignity as determined by law.'

In general, reversing several decisions of the Constitutional Court by constitutional amendment resulted in a Basic Law packed with specific exceptions to fundamental rights and provisions that are normally at the level of an ordinary law. Not only did this lower the level of protection of fundamental rights, it also had the aim of reducing the possibility of review by the Constitutional Court. And above all, the Fourth Amendment sent an extraordinary strong message to the Constitutional Court that no other power is supposed to control the legislative and at the same time constitution making branch.

Under these circumstances it is fair to ask what role constitutional adjudication can play. Is it at all possible to maintain a meaningful constitutional review, or is the role of the Constitutional Court necessarily reduced to review politically non-sensitive issues? Do we experience the development of a new, special Eastern European type of the well-known political question doctrine? Naturally this 'new political question' doctrine would not be a constitutional standard, rather the necessity of judicial self-restraint in matters the actual legislative and constitution making power would deem too important to be decided by anybody else than itself.

I submit that even under these difficult circumstances constitutional review is possible. The Hungarian Constitutional Court had developed tools that are, to a certain extent, capable of limiting the constitution making power or enable the Court to adjudicate irrespective of the existing substantive and competence limitations.

As regards the limitation of the constitution-making power, the identity of the Basic Law as well as international *ius cogens* serve as a standard (Sect. 3.2). Constitutional adjudication is further possible in the present setting based on international human rights treaties, especially the European Convention on Human Rights (Sect. 3.3).

3.2 Limits of the Constitution Making Power

The concept of an unconstitutional constitutional amendments is equally fascinating and controversial, especially if the substantive limits to constitutional change are implied[73] and are not foreseen explicitly by the respective constitution. Declaring a constitutional amendment to be unconstitutional by the constitutional court is not only a harsh interference with popular sovereignty, but also comes dangerously close to to a 'juristocracy'[74] and—due to the lacking standards against which constitutional amendments can be reviewed (e.g. an explicit eternity clause)—even judicial arbitrariness. It is therefore tempting for a constitutional court to seek objective and

[73]Jacobsohn (2006), p. 460 et seq.

[74]Hirschl (2007).

relevant criteria in historic documents or European[75] and international law. This temptation may raise questions of legitimacy, but it can help overcoming accusations that the respective constitutional court is inventing standards that do not exist.

It occurs that the case law of the Constitutional Court and ultimately the Basic Law offer two different sets of supraconstitutional norms: the concept of constitutional identity (Sect. 3.2.1) and international law. International law even has a double role to play in this context: it is considered as a binding standard of interpretation of constitutional provisions (Sect. 3.2.2) and constitutional amendments must conform international jus cogens (Sect. 3.2.3).

3.2.1 Constitutional Identity

Constitutional identity is a new phenomenon in Hungarian law. It was first stipulated in Decision 22/2016. (XII. 5.) of the Constitutional Court without an express constitutional foundation and is now codified by the seventh amendment to the Basic Law. The seventh amendment namely included a reference in the Preamble of the Basic Law to the constitutional identity of Hungary. According to this new language, 'We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State'. This is reinforced also in the operative part of the Basic Law, as a new Article R (4) is included stating that '[t]he protection of the constitutional identity of Hungary is an obligation of all organs of the state.'

The contours of constitutional identity are rather vague. Decision 22/2016. (XII. 5.) states that the Constitutional Court 'unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution.'[76] There is thus a close link between constitutional identity and the historic constitution, which may be further reinforced by the seventh amendment to the Basic Law declaring the constitutional identity of Hungary to be rooted in the historic constitutions. Yet, there is a strong consensus in academia that the historic constitution of Hungary is an empty shell, the content of which cannot be reconstructed.[77] What remains at the moment is thus an exemplificatory reference in Decision 22/2016 (XII. 5.) to certain values as part of constitutional identity. These are 'freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us.'[78]

[75] On this, see Dupré (2015), p. 351 et seq.

[76] Constitutional Court of Hungary, Decision 22/2016 (XII. 5.) AB para. 64.

[77] Szente (2011), p. 1 et seq.

[78] Constitutional Court of Hungary, Decision 22/2016 (XII. 5.) AB para. 65.

What makes the concept of constitutional identity intriguing is that it seems to have a rank above the Basic Law. This follows from the language of Decision 22/2016. (XII. 5.) according to which 'the constitutional identity of Hungary is a fundamental value which was not created by the Basic Law, it is merely recognised by the Basic Law'[79] This clearly suggests the existence of pre-constitutional values which serve as a standard for the actual written constitution, the Basic Law. And because constitutional identity is defined by reference to the historic constitution, and this concept is capable of having a variety of contents and meanings, the Constitutional Court enjoys a considerable discretion in reviewing constitutional amendments on the basis of constitutional identity.

3.2.2 International Law as a Standard of Interpretation of Constitutional Provisions

For a long time, it seemed unclear, whether from the perspective of the Hungarian constitutional order the role of the jurisprudence of the European Court of Human Rights is merely of non-binding, inspiring character, or whether the case law of the Court should be deemed to define the scope and content of the respective rights, and as such have a binding force.[80]

At the beginning, this question was answered almost unanimously in the negative. Representative of this was the view of the first President of the Hungarian Constitutional Court, who argued that reference to the Strasbourg case law is merely of auxiliary nature besides the reasoning of the Constitutional Court, and such reference might also emphasize the importance of a specific rule of the Constitution.[81] For two decades the Hungarian Court never went as far as to derive binding constitutional standards from the Convention. Only once has the Constitutional Court found that the understanding of the freedom of expression by the European Court of Human Rights is 'forming and binding the Hungarian jurisprudence.'[82] Yet this statement had no consequences in later decisions and the Court continued to refer to the practice of the Convention without declaring them to be binding in the interpretation of the Constitution.

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[79]Constitutional Court of Hungary, Decision 22/2016 (XII. 5.) AB para. 67.

[80]This approach seems to follow from the Commentaries attached to the Charter of Fundamental Rights. Cf. the comments on Article 52. (3) [2007] OJ C 303/33.

[81]*Sólyom and Brunner* (2000), p. 1317. This view was certainly in line with the case law of the Bundesverfassungsgericht. Cf. BVerfG, Judgement of 14 October 2004, 2 BvR 1481/04, *Görgülü*, para. 30–32, BVerfG, Judgment of 12 June 2018, 2 BvR 1738/12, *Ban on strike action for civil servants*, para. 126: 'Using them as guidelines for interpretation does not require that the statements of the Basic Law and those of the European Convention on Human Rights be schematically aligned or completely harmonised.'

[82]Constitutional Court of Hungary, 18/2004. (V. 25.) AB, ABH 2004, 303, 306. The Constitutional Court referred to a series of judgments in this context, Hungary was not party to any of them.

This picture seems to gradually change by decisions of the Court that actually give effect to judgments of the European Court of Human Rights. The first instance of this was a consequence of the Judgment *Bukta and others v. Hungary*.[83] Here the European Court of Human Rights ruled that the subjection of public assemblies to a prior–authorisation procedure does not normally encroach upon the essence of Article 11 of the Convention.[84] But when an immediate response, in the form of a demonstration, to a political event might be justified, a decision to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly.[85] Shortly after this judgment the Constitutional Court decided on the constitutionality of the Act Nr. III of 1989 on the right of assembly in its Decision Nr. 75/2008.[86] This Decision actually comes to the same conclusion as the ECHR. Yet the Hungarian Court merely refers to the *Bukta* judgment in a brief paragraph, and the same paragraph also quotes the jurisprudence of the German Bundesverfassungsgericht. The substantive argument is solely based on Article 62 para. 1 of the Constitution. It appears that the Court did not want to tie its hands for the future, even if it was ready to follow the path of interpretation drawn by the European Court of Human Rights,[87] and even if the Constitutional Court is deciding on a statute the application of which was reviewed by the European Court of Human Rights.

The breakthrough came with Decision Nr. 61/2011.[88] Here the Court declared clearly that it is under an obligation to follow the case law of the Convention in its decisions interpreting the Constitution as long as the language of both corresponds. In the words of the Court: 'In the case of certain fundamental rights the Constitution sets out the essential content of the fundamental right in the same fashion as an international treaty (i.e. the International Covenant on Civil and Political Rights and the European Convention on Human Rights). In these cases, the level of protection for fundamental rights provided by the Constitutional Court may under no circumstances be lower than the level of international protection (typically elaborated by the European Court of Human Rights). Therefore following from the principle of *pacta sunt servanda* [Article 7 (1) Constitution Article Q (2)-(3) Basic Law] the Constitutional Court has to follow the Strasbourg case law and the level of fundamental rights protection defined therein even if this would not be necessitated by its previous 'precedents'.[89] This statement was later referred to in Decision Nr. 166/2011[90] and after the entry into force of the Basic Law in Decision

[83]ECtHR, *Bukta and others v. Hungary*, Judgment of 17 July 2007, Application no. 25691/04.

[84]Id. para. 35.

[85]Id. para. 36.

[86]Constitutional Court of Hungary, 75/2008. (V. 29.) AB, ABH 2008, 651.

[87]Id. 663 et seq.

[88]See Kovács (2013), p. 73 et seq.

[89]Constitutional Court of Hungary, 61/2011. (VII.13.) AB, ABH 2011, 321.

[90]Constitutional Court of Hungary, 166/2011. (XII.20.) AB, ABH 2011, 545.

Nr. 43/2012.[91] It occurs therefore that the rights of the Convention as interpreted by the European Court of Human Rights are obligatory standards of interpretation of the rights of the Basic Law at least in the sense that they provide for a minimum of protection.[92] Absent express provisions to the contrary in the language of the Basic Law this shall help in maintaining European minimum standards domestically.

3.2.3 International Law as a Standard of Legality of the Constitution

The Hungarian Constitutional Court has already relied on international *ius cogens* to define the eternal core of the constitution of Hungary in two of its decisions. Both decisions were made in the context of a controversial constitutional amendment, yet none of them actually found a violation of international *ius cogens*.

Decision 61/2011 (VII.13.) AB was made under the 1989 Constitution in a battle between Parliament and the Constitutional Court over a piece of tax legislation. On 22 July 2010, the Hungarian Parliament adopted several economic and financial Acts. The Act, *inter alia*, introduced a new punitive tax on certain payments for employees of the public sector (civil servants, public servants, etc.) whose employment was terminated. Accordingly, severance payments and other payments related to the termination of employment exceeding a certain amount became subject to a 98% tax. The proposal of the Act justified the punitive tax by reference to the needs of the society to do justice, claiming that under the previous government public employees had been granted immorally excessive severance payments. Although the Act entered into force on 1 October 2010, the punitive tax was to be applied to the relevant incomes starting from 1 January 2010. In order to ensure the constitutionality of this Act, Parliament also amended Article 70/I of the 1989 Constitution by including a new paragraph (2) in the Article that allowed for special taxes.[93]

The punitive tax was challenged before the Constitutional Court within the framework of an *actio popularis*, and the Court found the relevant provisions of the Act to be unconstitutional in its Decision 184/2010 (X.28) AB, because, inter alia, Article 70/I(2) of the Constitution did not cover the retroactive 98% tax.[94]

In response, Parliament reintroduced the 98% tax with certain modifications. At the same time, Parliament modified Article 70/I(2) of the Constitution allowing for retroactive taxation going back five years from the actual tax year. To prevent the Constitutional Court from reviewing the legislation, a limitation was also introduced

[91] Constitutional Court of Hungary, 43/2012. (XII.20.) AB, ABH 2012, 320.

[92] In this sense Kovács (2013), p. 76.

[93] Article 70/I(2) of the Constitution (no longer in force): 'In respect of any remuneration received against the good morals from public funds, or from bodies entrusted to manage state assets and state property, including bodies under majority state ownership or control, tax liabilities of a special extent may be introduced on the strength of law, beginning with the given tax year.'

[94] Constitutional Court of Hungary, Decision 184/2010 (X.28) AB para. 900.

in Article 32/A(2)–(3) of the Constitution, the language of which was basically identical with what is today Article 37(4) of the Basic Law.

The Constitutional Court was confronted with this limitation on its powers in Decision 61/2011 (VII.13.) AB where several petitioners challenged the constitutional amendments that made the new Articles 32/A(2) and 70/I(2) part of the Constitution. The Constitutional Court was not ready to find these amendments unconstitutional but indicated that it might be ready to review constitutional amendments on the basis of international law. The Decision stated that 'norms, principles and fundamental values of *ius cogens* together form a standard which all subsequent constitutional amendments and the Constitution must comply with.'[95]

In spite of this clear language Decision 61/2011 (VII.13.) AB did not state clearly that the Constitutional Court would possess the power to enforce these standards against the constitution-making power. This came only after the entry into force of the Basic Law in Decision 45/2012 (XII. 29.) of the Constitutional Court.

Decision 45/2012 (XII. 29.) concerned the Transitional Provisions to the Basic Law. The Transitional Provisions were a document separate from the Basic Law but it were, according to Point 3 of the Final Provisions of the Basic Law, to be adopted by Parliament according to the rules of the previous Constitution on constitutional amendments. Since these provisions were also the legal basis of the Basic Law itself, it seemed reasonable to suppose that the constitution-maker intended to attribute to the Transitional Provisions a rank similar to that of the Basic Law. This was reinforced by the First Amendment to the Basic Law which inserted Point 5 in the closing provisions of the Basic Law, according to which the Transitional Provisions form an integral part of the Basic Law.

In its Decision 45/2012 (XII.29) AB, the Constitutional Court declared the Transitional Provisions null and void.[96] The core of the Court's argument was that Parliament had overstepped its constitutional authorisation when it implemented regulations in the Transitional Provisions which had no transitional character. It was probably to reduce confrontation with Parliament that the Constitutional Court cautiously framed its ruling as the enforcement of formal rules and emphasised that it did not review the merits of the Transitional Provisions. Still, the Decision also seems to establish the power for itself to review the constitutionality of constitutional amendments in its paragraph 118, which reads as follows: 'Constitutional legality has substantive criteria besides the procedural, formal, public law ones. [These are] [t]he constitutional requirements of the democratic state under the rule of law, constitutional values and principles acknowledged by democratic communities under the rule of law and enshrined in international agreements, as well the so-called *ius cogens,* which partly overlaps with these. Under certain circumstances the Constitutional Court is empowered to review whether the substantive

[95]Constitutional Court of Hungary, Decision 61/2011. (VII.13.) AB, ABH 2011, 321.

[96]Constitutional Court of Hungary, Decision 45/2012 (XII.29) para. 347.

constitutional requirements, guarantees and values of a democratic state under the rule of law are consistently respected and included in the constitution.'[97]

It is remarkable that the Court here not only reiterated its findings on the role of international *ius cogens* as a standard of review of the constitutional amendments, but also claimed the power to carry out a substantive review of norms formally incorporated into the Basic Law.

3.3 The European Convention on Human Rights as a Standard of Review by the Constitutional Court

The Basic Law of Hungary seems to be surprisingly open towards international law. Article Q (2) of the Basic Law provides that 'Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under international law.' Further, according to Article Q (3) international treaties become part of Hungarian Law upon their promulgation by a piece of Hungarian legislation. From these it follows that international treaties promulgated by an Act of Parliament shall take precedence over domestic legislation. This is supplemented by Section 32 of the Constitutional Court Act which specifically entitles the Constitutional Court to review the conformity of domestic legislation with international treaties. Should such a procedure establish a conflict between an international treaty promulgated by Act of Parliament and a domestic piece of legislation, the Constitutional Court is obliged to declare the domestic law null and void. What is more, the already mentioned limitation on the competences of the Constitutional Court in Article 37 (4) in relation to tax laws does not apply to this type of procedure. In effect, the combination of these provisions enables the Constitutional Court to conduct review on the basis of international law.

The real question is who may initiate this type of review. The European Convention on Human Rights was promulgated in the Hungarian legal order by Act Nr. XXXI of 1993, and therefore can be invoked by individuals before ordinary courts. Yet individuals are not listed in Section 32 (2) amongst those entitled to request the review of conflict with international treaties.[98] Nevertheless concrete, incidental norm control is open under Section 33 (2) of the Constitutional Court Act, which provides that 'judges shall suspend judicial proceedings and initiate Constitutional Court proceedings if, in the course of the adjudication of a concrete case,

[97]Id., paras. 347, 403.

[98]Section 32 (2) CC Act 'The proceedings may be requested by one quarter of Members of Parliament, the Government, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights. Judges shall suspend judicial proceedings and initiate Constitutional Court proceedings if, in the course of the adjudication of a concrete case, they are bound to apply a legal regulation that they perceive to be contrary to an international treaty.'

they are bound to apply a legal regulation that they perceive to be contrary to an international treaty.'

As a result, ordinary courts are not only bound to apply the applicable Hungarian laws and interpret them in conformity with the Convention as far as possible.[99] Should a harmonious interpretation not be possible because of the express language of the Hungarian law in question, courts are entitled to call upon the Constitutional Court and ask for a review of the Hungarian piece of legislation on the basis of international treaties, notably the European Convention on Human Rights. In case of a conflict the Constitutional Court is obliged to declare the Hungarian law in question unconstitutional.

4 Conclusions

The present Chapter attempted to demonstrate that the enforcement of the basic values of the EU by courts has unexploited potentials. It occurs that both the legal system of the EU and Hungarian constitutional law offers possibilities that are not used for considerations of non-legal nature.

In the case of the CJEU, deference to constitutional courts, especially the Bundesverfassungsgericht and an outdated approach to fundamental rights protection are a crucial shortcoming. As demonstrated by the *Siragusa* judgment, the CJEU seems to regard the protection of fundamental rights protection as a means of preventing challenges to the supremacy of EU law by national constitutional courts. I submit that this mid 1960s understanding does not fit the state of the EU as it is in the 2010s, at least for two reasons. First, the constitutional foundations of the EU have changed radically. Second, the realities changed with the accession of Member States with more fragile democratic traditions and by the rise of populist parties all over Europe.

As regards the changed constitutional foundations, the express stipulation of constitutional values in Article 2 TEU clearly calls for the application of the Charter as the concretisation of these values also against Member States. Besides, the EU is equipped with far reaching consequences in the field of criminal cooperation and the mandate to facilitate the full application of the principle of mutual recognition by virtue of Article 70 TFEU.

Changed realities are clear from the developments in Hungary, Romania[100] and the subject matter of the present volume, Poland. It occurs that the presumption of an approximately homogenic area of the rule of law no longer applies and certain

[99]Such a harmonious interpretation is a constitutional mandate repeatedly confirmed by the Constitutional Court. Cf. Constitutional Court of Hungary 53/1993 (X. 13.) AB, ABH 1993, 323, 327; Constitutional Court of Hungary, 4/1997. (I. 22.) AB, ABH 1997, 41, 51.

[100]For these see inter alia von Bogdandy and Sonnevend (2015).

Member States do not meet all supposedly common standards of fundamental rights protection and the rule of law.

The implications and eventual perils following from the changed constitutional and sociological realities are aptly demonstrated by the *Aranyosi*[101] and *LM*[102] line of cases. Especially LM demonstrates that mutual recognition and mutual trust presuppose a coherent level of respect for human rights in all EU Member States. If this is missing, the whole fabric of EU law may fall apart. As a result, the protection of fundamental rights by Member States is a common concern.

The situation of the Hungarian Constitutional Court is different in many respects. Constitutional adjudication against the constitution making power is a seemingly insurmountable task, especially when the constitution making power is not separated from the legislative power. This situation requires extreme means like the concept of an unconstitutional constitution. These means are, however, readily available. Both the new concept of constitutional identity and the case law on international *ius cogens* as a binding standard of constitutional provisions offer munition for extreme situations. These possibilities, I believe, exist even in the face of Article 25 (4) of the Basic Law, which enables the Constitutional Court to review the constitutionality of Amendments of the Basic Law only on procedural grounds.[103] In an already extreme situation triggering the application of the constitutional identity of the Basic Law or international *ius cogens* it is possible to argue that any competence limitation in Article 25 (4) of the Basic Law is also in violation of said supra-constitutional norms.

Besides these extreme situations the European Convention on Human Rights offers a perfect secondary tool of constitutional adjudication through the procedure of review of conformity of laws with international treaties. This has remained thus far completely underexplored and unused by the Constitutional Court. This, I submit, is a self-restraint that does not follow from the law as it stands today.

The phenomenon of constitutional adjudication was borne for the first time out of the consideration that courts are inherently called upon to apply the law, and the concept of law necessarily encompasses the constitution. As the US Supreme Court stated in *Marbury v. Madison* '[i]t is emphatically the province and duty of the Judicial Department to say what the law is.'[104] The birth of modern constitutionalism

[101] CJEU, Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, Judgment of the Court of 5 April 2016.

[102] CJEU, C-216/18 PPU. *LM*, Judgment of the Court of 25 July 2018.

[103] Article 25 (4) of the Basic Law: 'The Constitutional Court may review the Basic Law and an amendment to the Basic Law only with respect to the procedural requirements set out in the Basic Law pertaining to the adoption and the promulgation of the Basic Law and any amendment thereof. This review may be initiated by:

a) the President of the Republic, in the case where the Fundamental Law or an amendment to the Basic Law was adopted by Parliament but not yet promulgated;
b) the Government, one fourth of all Members of Parliament, the President of the Kúria, President of the Közigazgatási Felsőbíróság, the Prosecutor General, or the Commissioner for Fundamental Rights within thirty days of promulgation.'

[104] *Marbury v. Madison* 5 U.S. 137 (1803).

is thus intimately linked to the responsibility of the courts to enforce the constitutional documents of the respective polity. All courts shall follow the mandate resulting from this and apply all available means in order to preserve the common basic values of constitutionalism.

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