

The Hungarian Constitutional Court and the Central European University Case: Justice Delayed is Justice Denied

Decision of the Hungarian Constitutional Court of 6 July 2021 and
the Judgment of the ECJ of 6 October 2020, Case C-66/18

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BACKGROUND AND SETTING THE SCENE

In 2018, Fidesz (the governing party in Hungary) based its election campaign on attacking George Soros, an American investor with Hungarian roots, blaming him for the mass immigration that the Hungarian government was constantly fighting. This was orchestrated as and called a ‘Stop Soros’ campaign.¹ But this

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¹V. Havlík and V. Hloušek, ‘Differential Illiberalism: Classifying Illiberal Trends in Central European Party Politics’, in A. Lorenz and L.H. Anders (eds.), *Illiberal Trends and Anti-EU Politics in East Central Europe* (Palgrave Macmillan 2021) p. 111. According to a fact-finding newspaper €8,124,000 was spent on the ‘Stop Soros’ campaign on TV, online, print, radio and outdoor ads in December 2017 and January 2018: see K. Erdélyi, ‘Hungarian government spent €8.1 million on its latest “Stop Soros” campaign’ (<https://english.atlatszo.hu/2018/03/22/>)

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was not the beginning of the Hungarian government's fight against Soros. In an interview in December 2016 the Prime Minister said that the next year would be about 'ousting Soros and the forces he symbolizes'.² The political rhetoric was soon supported and supplemented by legislation: by a law targeting non-governmental organisations³ and by amendment to the Hungarian Higher Education Act (Act XXV of 2017, the so-called 'Lex CEU') which, according to some commentators, was tailor-made to force the Central European University, a university financed by one of Mr Soros' foundations, out of Hungary.⁴ This goal was obviously achieved, as the prestigious university has, since 2019, had its campus in Vienna.

The criticised amendments to the Higher Education Act imposed two new conditions to be fulfilled before universities accredited abroad can provide teaching in Hungary: first, that they have a campus in their country of origin; and, second and more onerous, that they operate on the basis of an intergovernmental agreement between the two countries (the country of origin and the country of operation). This latter condition made the operation of foreign university campuses subject to the goodwill of the Government, because the conclusion of the necessary international agreements is unenforceable in the sense that even when the university concerned does its best it cannot influence whether the Government and the other state party will sign the agreement at the end of the day. In the case of the Central European University, New York State was ready and willing to conclude the prepared agreement but the Hungarian Government was not. (There are several international colleges in Budapest, and the Government was eager to point out that in the case of those other colleges – like

hungarian-government-spent-e8-1-million-on-its-latest-stop-soros-campaign/), visited 29 November 2021. See also P.L. Lánkos, 'The State of Academic Freedom in Hungary: The Saga of the Central European University', in M. Seckelmann et al. (eds.), *Academic Freedom under Pressure?: A Comparative Perspective* (Springer 2021) p 76-77.

²'2017 a lázadás éve lesz', 15 December 2016, (<https://miniszterelnok.hu/2017-a-lazadas-eve-lepsz/>), visited 29 November 2021.

³Act LXXVI of 2017 on the transparency of foreign-funded organisations; ECJ 18 June 2020, Case C-78/18, *European Commission v Hungary*, ECLI:EU:C:2020:476 (foreign-supported non-governmental organisations).

⁴L.H. Anders and S. Priebe, 'Does It Help to Call a Spade a Spade? Examining the Legal Bases and Effects of Rule of Law – Related Infringement Procedures Against Hungary', in Lorenz and Anders, *supra* n. 1, p. 235 at p. 242, G. Halmi, 'Legally sophisticated authoritarians: the Hungarian Lex CEU', *Verfassungsblog*, 31 March 2017, (<https://verfassungsblog.de/legally-sophisticated-authoritarians-the-hungarian-lex-ceu/>), visited 29 November 2021, R. Uitz, 'Academic Freedom in an Illiberal Democracy: From Rule of Law through Rule by Law to Rule by Men in Hungary', *Verfassungsblog*, 13 October 2017, (<https://verfassungsblog.de/academic-freedom-in-an-illiberal-democracy-from-rule-of-law-through-rule-by-law-to-rule-by-men-in-hungary/>), visited 29 November 2021.

McDaniel College – there was no difficulty in reaching an agreement.⁵ This was partly true, but based on a very benevolent and generous interpretation of the word ‘agreement’ in the case of those institutions.)

The Central European University was an ideal target, not only because of its founder, who has a controversial image in the political sphere (a generous benefactor on the one hand and a political influencer and speculator on the other),⁶ but also because of its rather peculiar business model (which was often compared to a ‘letter box company’⁷): the university offered several programmes leading to American degrees without having an actual campus or conducting any teaching activities in the USA.⁸ Even though the university offered valuable knowledge and a highly competitive education in the Central European region, the Hungarian Government ruthlessly relied on a calculation that the other EU member states would be rather reluctant to accept a university education system comparable to the Central European University model on their own territory and, thus, Hungary would face only political but no legal consequences for forcing the university out of Hungary. This calculation was indeed at least partially rational since in the area of education the EU has only limited (supporting, coordinating and supplementing) powers, leaving the member states with considerable leeway to design their

⁵ECJ 6 October 2020, Case C-66/18, *European Commission v Hungary*, ECLI:EU:C:2020:792, para. 36.

⁶The Orban regime, like other populist regimes, underpins the latter, even if several politicians of the governing party – including Orban himself – have benefited from Soros foundation grants. On the background to the campaign see e.g. K. Krause-Sandner, ‘Viktor Orbán gegen George Soros: Genese einer Hasskampagne’ (<https://kurier.at/politik/ausland/viktor-orban-gegen-george-soros-genese-einer-hasskampagne/400379876>), visited 29 November 2021; S. Löwenstein, ‘Orbán’s Feindbild’ (<https://www.faz.net/aktuell/politik/ausland/der-ursprung-der-kampagne-gegen-george-soros-15995899.html>), visited 29 November 2021.

⁷The Justice Minister also stressed this after the publication of the ECJ judgment: ‘At the end of the day, the appropriate functioning of higher education institutions is the pledge of trust in a country’s education system and of the reputation of its higher education, while the degree issued by it is an embodiment thereof. We don’t need PO box universities’: Press release of the Ministry of Justice, (<https://2015-2019.kormany.hu/en/ministry-of-justice/news/double-standards-are-unacceptable>), visited 29 November 2021.

⁸Section 8(3), Annex 1 to the Higher Education Act lists those higher education institutions that have state recognition. According to point 30 of the annex, the Central European University of Budapest is a non-state university that is recognised by the Hungarian state. This was originally stated in Act LXI of 2004 on the State Recognition of the Central European University, and its first licence to operate in Hungary was issued in 1995. The Central European University was operating in full compliance with Hungarian laws. It was not a purely foreign, but a foreign *and* Hungarian higher education institution, with dual legal personality, but its study programmes were exclusively carried out in Hungary, and in certain fields it issued diplomas recognised abroad.

own educational systems.⁹ Because this power is of significant value to most member states, the Hungarian Government could also rely on its view that the other member states would rather sacrifice a small American private university than accept any interference by the European Commission in the field of higher education. Moreover, the Central European University, as an American institution, could (at least at first glance) rely less on European law than could European private universities because a European cross-border element was apparently lacking, a fact which makes the European freedoms inapplicable. As an American educational institution, the Central European University could have claimed that some WTO obligation applied, but knowing the reluctance of the European Court of Justice to uphold the direct applicability of WTO obligations, there was minimal risk of facing legal consequences.

Like the forced retirement of judges in 2012,¹⁰ the criticised amendments were challenged on two bases: one national and one European. At the national level, two cases were filed with the Constitutional Court, and at the European level the European Commission initiated infringement proceedings against Hungary before the European Court of Justice. The Commission alleged infringements of the Services Directive (Directive 2006/123), the freedom to provide services and that of establishment, and, quite surprisingly, violations of the GATS and, less surprisingly, of the Charter of Fundamental Rights, especially of academic freedom (Art. 13 Charter), the right to education (Art. 14(3) Charter) and the freedom to conduct business (Art. 16 Charter).

In parallel to the proceedings before the European Court of Justice, an abstract constitutional review was initiated by members of parliament from the opposition parties¹¹ alleging that the amendments¹² had been adopted without the legally necessary consultations with the bodies concerned (such as the Hungarian Academy of Sciences and the Hungarian Rectors' Conference, a representative body of Hungarian universities) and that there had been flagrant violations of the Standing Orders of the Parliament. These were claimed to be major procedural

⁹The Hungarian Government relied heavily on this argument before the ECJ: see C-66/18, *supra* n. 5, para. 59.

¹⁰A. Vincze, 'Judicial independence and its guarantees beyond the nation state – some recent Hungarian experience', 56 *Journal of the Indian Law Institute* (2014) p. 202; A. Vincze, 'The ECJ as the Guardian of the Hungarian Constitution: Case C-286/12 Commission v. Hungary', 9 *European Public Law* (2013) p. 489.

¹¹Case Nr. II/1036/2017, filed 21 April 2017 with the Hungarian Constitutional Court.

¹²Bill T/14686, submitted by the Hungarian Government on 28 March 2017, amending the Higher Education Act (Act CCIV of 2011 on National Higher Education), was under the exceptional legislative procedure adopted by the Hungarian Parliament on 4 April 2017, signed by the President of the Republic on 10 April 2017 and published in the Hungarian Official Journal as Act XXV of 2017.

errors leading to the unconstitutionality of the criticised legislation. It was also alleged that the amendments disproportionately and hence unconstitutionally restricted academic freedom. The hasty bringing into force of the amendments, endangering the completion of studies, was claimed to be contrary to legitimate expectations, a part of the principle of the rule of law.

In addition to this abstract constitutional review, the Central European University, as a directly affected entity, also submitted an own constitutional complaint¹³ containing similar allegations. The complainant made nonetheless clear that the amendments of the Higher Education Act, although formulated in general terms, are factually applicable only to the Central European University, which supported the claim that the law was tailor-made for and targeted at this very special institution. The University also alleged violations of the European Convention on Human Rights, claiming that the right to education according to Art. 2 of the (First) Protocol to the Convention is also applicable to institutions providing education.

In contrast to the case of the forced retirement of judges, in which the Hungarian Constitutional Court did not wait for the European Court of Justice but pronounced a rather Solomonic judgment condemning the retirement but not offering a real remedy to the judges affected,¹⁴ the Constitutional Court adjourned the proceedings regarding the Central European University (and foreign-funded non-governmental organisations as well¹⁵) pending the infringement proceedings on the same issue before the European Court of Justice. Although the Constitutional Court emphasised the necessity for national courts and the European Court of Justice to co-operate,¹⁶ which seemed to be a friendly attitude at first glance, the members of the Court were strongly divided¹⁷ on the issue of adjournment, and some of the judges saw no reason for it, basically because the Constitutional Court and the European Court of Justice apply

¹³Case Nr. IV/01810/2017, filed 19 September 2017 with the Hungarian Constitutional Court.

¹⁴See Constitutional Court Decision 33/2012 (VII. 17) AB on the retirement of judges. Though it was known that the ECJ was also dealing with the case brought by the European Commission, the Constitutional Court did not seek any European constitutional dialogue. See also Vincze, *supra* n. 10.

¹⁵The 2017 Act on the Transparency of Organisations Supported from Abroad required organisations receiving more than €24,000 to register as 'foreign-supported organisations' and publicly to identify their foreign supporters. This Act was also challenged at the Constitutional Court which suspended the case (*see* 3198/2018 (VI. 21) AB [NGO-case]), which is still pending even though the ECJ made its decision in 2020 (*see supra* n. 3).

¹⁶Constitutional Court Orders in 3199/2018 (VI. 21) AB [CEU case, abstract constitutional review], 3200/2018. (VI. 21.) AB [CEU case, constitutional complaint].

¹⁷Judges Ágnes Czine, Ildikó Marosi Hörcherné and Balázs Schanda attached concurring opinions, and judges István Balsai, Imre Juhász, László Salamon, István Stumpf and Mária Szívós attached dissenting opinions to the rulings.

different legal provisions and therefore a violation of European law cannot have any influence on the constitutionality of national legislation.

Because of these differences, there was eager anticipation about how the Constitutional Court would react to the judgment of the European Court of Justice. There were obviously three possible options: first, to follow the European Court of Justice's lead and declare the national law to be void; second, to follow the German Bundesverfassungsgericht's lead and rely on a national constitutional identity and/or ultra vires argument against the supremacy of EU law;¹⁸ or, third, to fish in troubled waters and avoid direct collision without obeying the authority of the European Court of Justice.

THE DECISION OF THE EUROPEAN COURT OF JUSTICE IN A NUTSHELL

The very lengthy decision of the Grand Chamber, issued in October 2020, found the Hungarian legislation to be contrary to EU law on three grounds: violation of the GATS, the rules of the internal market (freedom of establishment and the Services Directive) and the Charter of Fundamental Rights. All these grounds for infringement proceedings were somewhat surprising.

Although international agreements concluded by the Union are an integral part of the EU's legal order and are binding upon the institutions of both the Union and its member states (Article 216, para 2 TFEU), and the European Court of Justice has found an obligation to interpret EU law in light of the WTO obligations in order to ensure a treaty-consistent interpretation of EU law,¹⁹ the WTO rules have always had a special status in EU law because of the ECJ's reluctance to acknowledge their direct applicability (with some exceptions).²⁰ Moreover, the Commission has not been keen to enforce obligations

¹⁸See the *PSPP* judgment, Bundesverfassungsgericht, 5 May 2020, 2 BvR 859/15 and others; and a thorough comment on it with further references: F.C. Meyer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's *PSPP* decision of 5 May 2020', 16 *EuConst* (2020) p. 733.

¹⁹Case C-61/94 *Commission of the European Communities v Federal Republic of Germany (International Dairy Arrangement)* [1996] ECR I-3989, para. 52. Similar passages can be found in Case C-76/00, *P Petrotub SA and Republica SA v Council and Commission* [2003] ECR I-79, para. 57; Case C-431/05, *Merck Genéricos – Produtos Farmacêuticos Lda v Merck & Co. Inc. and Merck Sharp & DohmeLda* [2007] ECR I-7001, para. 35; M. Bronckers, 'From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case Law on the WTO and Beyond', *Journal of International Economic Law* (2008) p. 885.

²⁰If a Union act expresses the Union's intention to implement a particular WTO obligation ('Nakajima exception') or if the Union act in question refers to specific provisions of a WTO agreement ('Fediol exception'), cf. M. Matsushita et al., *The World Trade Organization*, 3rd edn. (Oxford University Press 2017) p. 40.

under WTO law against member states by way of infringement proceedings,²¹ especially if those obligations were not transposed into secondary EU law.²² In this respect, reliance on the infringement of the GATS (without there having been earlier dispute settlement proceedings) is rather unusual, and it remains to be seen whether it marks a new attitude towards WTO rules generally or was an exception.

The Central European University was registered as an educational institution in New York, but pursued an economic activity (teaching) in Hungary partly by way of a subsidiary campus. The establishment of this Hungarian branch was not protected by the freedom of establishment (due to the lack of a European cross-border element) and, hence, the university (unlike other European private universities) could hardly evoke the market freedoms before the Hungarian courts. So even if the infringement of the market freedoms can be established on an abstract level without the existence of an actual detriment,²³ the main victim and the obvious target of the Hungarian legislation could not have effectively claimed the infringement before national courts. So, the university (before national courts) must have relied on either the swift implementation of the European Court of Justice's judgment (hoping that the newly enacted rules would facilitate its business model), or solely on the breach of the WTO rules.

The third ground of infringement, violation of the Charter, is tricky, because its applicability requires the implementation of EU law (*cf.* Article 51(1) of the Charter).²⁴ This is no problem in the case of market freedoms, but it seems to be a novelty that the implementation of the obligations imposed by Article XVII(1) GATS also triggers the applicability of the Charter.²⁵ It seems to be at least somewhat surprising that obligations under WTO law, which are usually not considered to be directly applicable, may justify evoking the fundamental rights of the Charter, which again seems further to widen the Charter's scope. As a result, the Central European University could have invoked the Charter before the Hungarian courts, relying only on the (non-)imposition of the WTO rules even if its educational activities did not fall under the scope

²¹Which does not mean that the Commission did not enforce other international obligations by means of infringement proceedings: *cf.* e.g. Joined Cases 194 and 241/85, *Commission v Greece*, EU:C:1988:95; *cf.* further L. Prete, 'Enforcement actions', in R. Schutze and T. Tridimas (eds.), *The Oxford Principles of European Union Law*, Vol. 1 (Oxford University Press 2017) p. 948.

²²If a WTO obligation is transposed in the form of a directive, the Commission is however ready to enforce it by way of infringement proceedings, *cf.* e.g. Case C-165/08, *Commission of the European Communities v Republic of Poland*.

²³No actual detrimental effect is necessary to support an infringement action: *cf.* Prete, *supra* n. 21, p. 948-949.

²⁴C-66/18, *supra* n. 5, para. 212.

²⁵*Ibid.*, para. 213.

of the market freedoms, which seems to be a further extension of the scope of the Charter.

The delicate point of the case was that the Hungarian legislation was designed to apply to the Central European University which, as an American institution, could only rely on the rules of the WTO to protect and facilitate its activities. These rules nonetheless were earlier thought to be not directly applicable, and thus it was believed that their violation was not punishable. These circumstances required a peculiar logic also from the Commission, which obviously hoped to avoid addressing the legal questions as an inherent rule of law issue, and instead of making a frontal attack the infringement was first dressed up as a trade law issue and then given a nuance that interfered with fundamental EU freedoms and academic freedom.²⁶ The ruling was certainly a victory for the Commission in the courtroom, but the mentioned peculiarities of the case and the reasoning of the European Court of Justice were indeed idiosyncratic. This unique and delicate argumentation could also have been deployed by the Hungarian Constitutional Court pointing out (like the German Federal Constitutional Court) that the decision is ‘incomprehensible’,²⁷ and in doing so it could become engaged in a direct conflict with the European Court of Justice. The escalation of the conflict was obviously not necessary, because the European Court of Justice’s favourable ruling came too late for the Central European University which, in the meantime, decided to relocate its campus to Vienna in order to avoid uncertainties.

THE DECISION(S) OF THE CONSTITUTIONAL COURT IN A NUTSHELL

Although the European Court of Justice handed down its judgment on 6 October 2020, the Central European University case did not appear in the list for the full session of the Constitutional Court until the following summer.

It is worth recalling here that the Constitutional Court adjourned its own proceedings in June 2018 because of the infringement proceedings which were in train before the European Court of Justice. In its reasoning for the adjournment

²⁶C.I. Nagy, ‘The Commission’s Al Capone Tricks: Using GATS to protect academic freedom in the European Union’, *Verfassungsblog*, 20 November 2020, (<https://verfassungsblog.de/the-commissions-al-capone-tricks/>), visited 29 November 2021. C.I. Nagy, ‘Case C-66/18 Commission v. Hungary (Central European University) (October 17, 2021)’, 115(4) *American Journal of International Law* (2021) p. 700.

²⁷Only concurring opinions (especially that of Judge Dienes-Oehm) argued this way (*see infra*). For the German decision *see* inter alia I. Feichtner, ‘The German Constitutional Court’s PSPF Judgment: Impediment and Impetus for the Democratization of Europe’, 21(5) *German Law Journal* (2020) p. 1090.

orders it also stressed the importance of the European judicial dialogue between national and European judiciaries. The Constitutional Court stated that:

the European Union is able to ensure, through institutional reforms, the Charter of Fundamental Rights and the European Court of Justice, that fundamental rights are largely or at least satisfactorily protected at the level guaranteed by national constitutions [...]. Consequently, the possibility of review reserved for the Constitutional Court should be applied in the light of the duty to cooperate, with a view to enforcing European law as far as possible. On this basis the Constitutional Court concluded that, in view of the fundamental rights context specifically raised by the case under consideration and the obligation to cooperate within the European Union, it is necessary to await the completion of the proceedings pending before the European Court of Justice.²⁸

In May 2021 the Government proposed and the Parliament shortly thereafter adopted an amendment of the National Higher Education Act in order to implement the judgment of the European Court of Justice in Case C-66/18. The explanatory memorandum to the law underlines that, in order to conclude the debate, the Bill proposes to transpose into Hungarian law legislation that has already been tried and tested in other European countries. Based on Bavarian law, the proposal contains different rules for the operation in Hungary of state-recognised foreign higher education institutions established in a state party to the EEA Agreement and foreign higher education institutions established in a state not party to the EEA Agreement (non-EEA state). The legislation is essentially a translation of the Bavarian Higher Education Act. However, the new legislation also includes the condition that a university established in a non-EEA state may carry out degree-granting activities only if the Government of Hungary and the Government of the state where the foreign higher education institution is established have concluded an international treaty on the equivalence of higher education qualifications and degrees.

The plenary session of the Constitutional Court restored the proceedings in the Central European University case to the list only after the new legislation had entered into force, i.e. on 29 June 2021, and quickly concluded both cases on 6 July.²⁹

The two orders are very similar in structure and in content. They both describe at length the motions and the constitutional problems they raise, and then explain that the change in the regulatory environment has rendered the motions devoid of purpose.

²⁸Constitutional Court Order 3199/2018. (VI. 21.) AB, Reasoning [5].

²⁹Constitutional Court Orders 3318/2021 and 3319/2021, both decided on 6 July and published on 23 July 2021.

The only difference is that, in the case of the order dealing with the Central European University's constitutional complaint, four of the judges attached concurring opinions.

It is also worth mentioning that the orders do not consider the *amicus curiae* briefs in the case, one of which was filed jointly by the former Head of State and President of the Constitutional Court, László Sólyom, a former Constitutional Court judge, Miklós Lévay and two internationally renowned law professors, Zoltán Szente and András Jakab, and the other one was filed by Professor Matthias Mahlmann from the University of Zürich. They argued that the violation of the rule of law and academic freedom is caused precisely by the imposition of the international convention as a condition, because the university concerned has no control over it.

During the proceedings, the Constitutional Court noted that on 27 May 2021 an amendment to the National Higher Education Act was published in the Hungarian Official Gazette in order to implement the judgment of the European Court of Justice in Case C-66/18. The Constitutional Court observed that none of the petitioners had supplemented its motions for constitutional review with regard to the amendment. The Constitutional Court came to the conclusion that the petitioners' motions could not be adjudicated upon on the merits on the basis of the new regulatory concept and new statutory regulation introduced by the Amendment Act in 2021. In the Constitutional Court's view, the new regulatory model introduced by the Amendment Act 2021 differed fundamentally from the previous regulatory model challenged by the motion. The title of the Act and the relevant explanatory memorandum made it clear that the legislator had drafted the Act to implement the judgment of the European Court of Justice in Case C-66/2018, in which it took the legislation of a member state of the European Union (Germany) as a basis and applied it to the domestic legislation. All this, according to the Hungarian Constitutional Court, confirmed that a new regulatory concept had been adopted by the legislator.

Moreover, the Constitutional Court also compared each of the elements of the claim (referring to the provisions of the Higher Education Act as amended in 2017) one by one with the provisions of the Amendment Act 2021, taking into account the arguments of the petitions. As a result, it was also concluded that neither of the motions could any longer be examined on the basis of its original arguments and constitutional grounds in the new regulatory and legislative context. The Constitutional Court emphasised that most of the challenged rules were closely linked to the previous regulatory context, to the different rules contained therein and to the (factual) situation in which the petition raised constitutional problems in relation to those rules. The legal regime had thus changed substantially in concept and content, and the (factual) situation in which the petitioner raised the constitutionality issues on the basis of the regulatory concept previously

in force had also changed. Thus the Constitutional Court concluded that the motion for a constitutional complaint had become manifestly devoid of purpose and therefore closed the proceedings.³⁰

In a concurring opinion, Judge Egon Dienes Oehm pointed out that the challenged provisions had not been applied against the Central European University because it had already left Hungary by the time they could have been applied at all. He added that, in his view, the European Court of Justice's decision was vitiated by legal doubts on the merits, as the regulation of higher education belongs to the member states and is not directly covered by EU law. The European Court of Justice extended without limitation the European Commission's exclusive external trade policy powers to the internal relations of the European Union. It had implemented the substantive and procedural rules falling within the competence of the WTO, attributing direct effect to them, and had considered its own procedure to be the applicable law, a view which is in principle debatable.

In his concurring reasoning Judge Marcel Szabó stressed that adjourning proceedings for the sake of the European constitutional dialogue, or indeed refraining from making such a decision, is absolutely within the discretion of the Constitutional Court.

PARALLEL MONOLOGUES INSTEAD OF DIALOGUES?

Since 2016, the Hungarian Constitutional Court has emphasised the outstanding importance of a European constitutional dialogue. It was mentioned for the first time in the context of the refugee crisis of 2015.³¹ However, it was rather doubtful how serious the Constitutional Court was on this issue and, as the outcome of the Central European University case shows, the 'dialogue' often remains a rhetorical turnaround and vanishes into thin air once its utility or usefulness ceases. However, making empty references to dialogue is not simply a misuse of terms; it leads to an abusive constitutional practice.³² To understand better how an

³⁰Constitutional Court Order 3318/2021, Reasoning [33]-[40].

³¹For the first time, in the reasoning of the Decision 22/2016. (XII. 5.) AB, available at (https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf), visited 29 November 2021. See on this e.g. Á. Mohay and N. Tóth, 'Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E(2) of the Fundamental Law', 111(2) *American Journal of International Law* (2017) p. 468; B. Bakó, 'The Zauberehrlich Unchained?: The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires- and Fundamental Rights Review in Hungary', 4 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2018) p. 863; G. Halmay, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law', 43(1) *Review of Central and East European Law* (2018) p. 23.

³²D. Landau and R. Dixon, 'Abusive Judicial Review: Courts Against Democracy', 53 *UCDLRev* (2020) p. 1313.

illiberal constitutional court develops an empty rhetoric about dialogue we have to look a little beyond the Central European University saga.

Regarding the refugee quota, the Hungarian Government, together with the Government of the Slovak Republic, challenged the EU decision on relocation³³ before the European Court of Justice. In parallel to these proceedings, the Hungarian Ombudsman questioned the constitutionality of the relocation scheme and put forward the rather bold idea that the transfer of asylum seekers residing in Italy and Greece to Hungary would be contrary to the prohibition on collective expulsion. Although the Constitutional Court remained very unclear, in 2016 it reached a decision which (by copying the German Constitutional Court³⁴) created a constitutional identity claim (i.e. a competence to review whether the joint exercise of competences in the framework of the EU violates Hungary's constitutional identity) as a limitation on European integration. Nonetheless, it was also stressed in the ruling that an identity review should be exercised within the framework of a constitutional dialogue, but it was not specified what the substantive or procedural framework for such a dialogue is. Even if the importance of the dialogue was highlighted, the Constitutional Court did not await judgments of the European Court of Justice on current issues on the refugee relocation quota.³⁵

When speaking about the paramount importance of European constitutional dialogue since 2016 the Constitutional Court has never formally pursued contact with the European Court of Justice and never requested a preliminary

³³The Slovak Republic and Hungary sought annulment of Council Decision (EU) 2015/1604 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (also known as 'the Relocation decision').

³⁴The decision simply copied some paragraphs from the *OMT* ruling of the German Constitutional Court. (BVerfG, 21.06.2016 - 2 BvR 2728/13; 2 BvR 2728/13; 2 BvR 2729/13; 2 BvR 2730/13; 2 BvR 2731/13; 2 BvE 13/13). Paras. 142 of the German reasoning and 34 of the Hungarian ruling are literally identical. Copying the German decision obviously served to legitimise the newly invented constitutional identity by borrowing the prestige of the German Federal Constitutional Court and was described by the president of the Hungarian Constitutional Court at the XVII Congress of European Constitutional Courts in Georgia in 2017 as a vivid and practical realisation of a Multilevel Cooperation of the European Constitutional Courts ('*Der Europäische Verfassungsgerichtsverbund*') and as a vertical dialogue between national constitutional courts: see on this in detail A. Vincze, 'Ist die Rechtsübernahme gefährlich?', *Zeitschrift für öffentliches Recht* (2018) p. 193. This kind of vertical dialogue is also described as an integral part of the co-operation of the European Constitutional Courts: see C. Grabenwarter et al., 'The Role of the Constitutional Courts in the European Judicial Network', 27(1) *European Public Law* (2021) p. 43. See further critically on the role of the German Federal Constitutional Court, T. Ellerbrok and R. Pracht, 'Das Bundesverfassungsgericht als Taktgeber im horizontalen Verfassungsgerichtsverbund – Ausstrahlungswirkungen der Rechtsprechung zum Integrationsverfassungsrecht in Europa', 56(5) *Europarecht* (2021) p. 188.

³⁵ECJ, 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, ECLI:EU:C:2017:631.

ruling³⁶ even had it been possible not only in the case of the forced retirement of judges³⁷ but also in other cases,³⁸ like the implementation of the European Arrest Warrant³⁹ or the restriction on the foreign employment of Hungarian university graduates (so called student contracts).⁴⁰ Moreover, the Hungarian Constitutional Court had not taken a stance until December 2020 as to whether it can itself request a preliminary ruling, and affirmed it only *obiter dictum* in the context of the requirements of fair trial.⁴¹ Although the Hungarian Constitutional Court emphasised that open judicial dialogue was an appropriate tool for striking a balance between the inviolable core of member states' constitutional law and the directly applicable European law, it also pointed out that it would make use of

³⁶F. Gárdos-Orosz, 'Preliminary Reference and the Hungarian Constitutional Court: A Context of Non-Reference', 16(6) *German Law Journal* (2015) p. 1569.

³⁷Constitutional Court Decision 33/2012 (VII. 17) AB; ECJ 6 November 2012, Case C-286/12, *Commission v Hungary*; A. Vincze, 'Der EuGH als Hüter der ungarischen Verfassung – Anmerkung zum Urteil des EuGH v. 6.11.2012, Rs. EUGH 2012-11-06 Aktenzeichen C-286/12 (Kommission/Ungarn)', *Europarecht* (2013) p. 324–325.

³⁸There is a detailed analysis of the case law in A. Vincze and N. Chronowski, *Magyar alkotmányosság az európai integrációban*, 3rd edn. (HVG-ORAC Press 2018) p. 483–517.

³⁹Constitutional Court Decision 3025/2014 (II. 17) AB. In this decision, by the way, the Constitutional Court used decisions of the European Court of Human Rights when interpreting the right to freedom and personal security, but did so on only one occasion, indicating a reference to the ECJ decision. It appears from the dissenting opinion of Judge Miklós Lévay that other decisions from the case law of the ECJ may have been used for the argument and it would have been worth requesting the interpretation of the EU law for the sake of overall clarity.

⁴⁰Constitutional Court Decision 32/2012 (VII. 4) AB. The Commissioner of Fundamental Rights asked the Constitutional Court to review whether a Governmental Decree on the state scholarship students' contracts was compatible with the Fundamental Law. According to the Commissioner, the decree was against the Fundamental Law, because the subject matter of state scholarship students' contracts concerns fundamental rights (the right freely to choose a job or a profession and the right to education). Therefore, it should have been regulated by an Act of Parliament (formal ground). In addition, the Commissioner argued that obliging students benefiting from state grants to sign a contract restricts their rights freely to choose a job and participate in higher education (substantive ground). The Decree obliged students with state grants to sign contracts according to which they agreed after graduation to take up employment in Hungary for a period equal to double their period of study. The Constitutional Court, when interpreting the right freely to choose a job or profession, took the relevant EU law into account, and considered the relevant case law of the ECJ (Joined Cases C-11/06 and C-12/06, *Rhiannon Morgan v Bezirksregierung Köln* and *Iris Bucher v Landrat des Kreises Düren*), but finally annulled the decree on formal grounds.

⁴¹Decision 26/2020 (XII. 2) AB acknowledged the ECJ as a legitimate judge in the context of fair trial rights, but only if the (ordinary) court initiates preliminary ruling proceedings. Before this, the Hungarian Constitutional Court completely ignored this problem, see e.g. Constitutional Court Order 3110/2014 (VI. 17) AB; reinforced by Constitutional Court Order 3165/2014 (VI. 23) AB. The petitioners argued in both cases that the ordinary court had not fulfilled the request to initiate a preliminary ruling in their case and Art. XXVIII(1) of the Fundamental Law on fair trial had therefore been infringed.

a preliminary reference only if 'Hungary's inalienable powers to its territory, population, the form of government and state structure' are at stake, which restricts requests for preliminary rulings to the very few cases with huge potential conflict. These circumstances made questionable whether the dialogue argument has ever been meant seriously.

If dialogue serves to achieve the situation where national law is both constitutional and conforms to the law of the EU at the same time, the sensible starting point is to avoid collisions with the European Court of Justice. This result may be achieved by actively referring cases to the European Court of Justice (which, as was pointed out, the Hungarian Constitutional Court has not yet done) or, in a more passive way, awaiting judgments of the European Court of Justice in pending cases without actively becoming engaged in actual dialogue. The dialogue *topos* of the Hungarian Constitutional Court returned exactly in this latter shape in June 2018, when the Constitutional Court adjourned its proceedings in the both the Central European University and the foreign-funded non-governmental organisations cases. Reflecting the then current infringement proceedings against Hungary, the adjournment highlighted the potential enforcement of European law by avoiding contradictory outcomes, was being taken into account by the adjournment. Nonetheless, the final orders, as we saw, did not mention the dialogue argument at all and give the impression that it was only a facade, but never meant seriously. The Constitutional Court seems to have wanted to avoid a direct clash with the European Court of Justice and with the national legislation both at once, and so, by taking advantage of the passage of time, has manoeuvred itself out of taking sides. This can be seen as at least a partially positive outcome, given the recent battles waged by the Polish Constitutional Tribunal against the primacy of EU law. Just one concurring opinion raised the issue that the European Court of Justice's Central European University ruling might be of concern for the EU clause of the Fundamental Law and briefly discussed whether WTO law could be given direct effect. However, the European Court of Justice did not rule in favour of the direct effect of WTO law in general, but only allowed the Commission to bring infringement proceedings to compel a member state to comply.⁴²

Furthermore, it is doubtful how seriously the dialogue is taken if the Constitutional Court emphatically declares itself – even in EU law-related cases – to be the final and authentic interpreter of the Constitution (obviously without having the duty to reconcile its interpretation with either international or European commitments)⁴³ and, as Judge M. Szabó pointed out in his

⁴²Nagy, *supra* n. 26.

⁴³See Constitutional Court Decision 2/2019 (III. 5) AB, according to which the Constitutional Court is the authentic interpreter of the Fundamental Law, whose interpretation cannot be affected by that given by another body, and must be respected by all. In this case on behalf of the

concurring opinion in the Central European University case, it is absolutely up to the Constitutional Court whether or not it adjourns its proceedings.

So far – unlike its Polish counterpart⁴⁴ – the Hungarian Constitutional Court has avoided an open confrontation with the European Court of Justice but has not tried to make use of the European judicial dialogue to resolve conflicts. Instead, in the Central European University case it built up a Potemkin village of dialogue by vocally stressing its importance but rather prolonged the decision-making and ignored the actual findings of the European Court of Justice. The so-called dialogue argument was rather used pragmatically in order to gain time for supporting the political ambitions of the Fidesz government in its efforts to force the university's educational activities out of Hungary. This attitude of the Constitutional Court fits into the logic of an illiberal legal system, which instrumentalises the law and deconstructs legal concepts.

INSTRUMENTAL USE OF THE LAW

Populist or illiberal regimes, at least in Europe, share a common ideology of inward-looking nationalism. This is mainly complemented by an instrumentalist view of the law cynically rejecting any inbuilt integrity of the legal system and turning a blind eye to the rule of law and human rights. Their fundamental philosophy is upholding the black letter of the law without obeying its spirit, misusing the available legal instruments by turning their meaning inside out, which results in a post-modern deconstruction and relativisation of inherent values of the law. Like deconstruction in philosophical terms, which aims to show that 'things – texts, institutions, traditions, societies, beliefs, and practices of whatever

Government of Hungary, the minister of justice submitted a motion to the Constitutional Court requesting the interpretation of the Fundamental Law concerning the relationship between the Fundamental Law and the law of the European Union. The background to the case was that the European Commission sent an official note to Hungary – in the framework of infringement proceedings – in which it explained that according to the Commission's interpretation the provisions of the Fundamental Law on asylum violated the relevant regulations of the European Union. The particular constitutional issue raised by the minister of justice was the relationship between the interpretation of the Fundamental Law by an organ of the EU and the genuine interpretation provided by the Constitutional Court.

⁴⁴The Polish Constitutional Tribunal, in Judgment 14 July 2021, Case P 7/20, declared the ECJ's interim measure on Polish disciplinary chambers to be *ultra vires*: see (<https://trybunal.gov.pl/en/hearings/judgments/art/11589-obowiazek-panstwa-czlonkowskiego-ue-polegajacy-nawykonywaniu-srodkow-tymczasowych-odnoszacych-sie-do-kszaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa>), visited 29 November 2021. Furthermore, in Judgment 7 October 2021, Case K 3/21, the Tribunal declared Arts. 1, 2 and 19 TEU to be partly unconstitutional, and in doing so it undermined the primacy of EU law in Poland.

size and sort you need – do not have definable meanings’,⁴⁵ the illiberal regimes demonstrate an unbelievable capacity to turn the meaning, purpose and sense of legal institutions inside out, and to exploit them for their own benefit. Usually, the rules and institutions are formally upheld even if their sense is disregarded.

The present case is a further astonishing example of this pattern. The Constitutional Court rejected the Central European University’s constitutional complaint because the legal framework had been amended in order to comply with the judgment of the European Court of Justice, and the newly enacted provisions of the Higher Education Act do not contain exactly the contested provisions. The Constitutional Court blamed the applicant for not submitting the necessary supplementary arguments regarding the amended rules and highlighted that under those conditions it was not possible to extend the complaint *ex officio* to the new provisions.⁴⁶ The old rules were *stricto sensu* never applied to the applicant, and for several reasons they are no longer applicable to the Central European University; the new ones do not contain the disputed provisions and hence they do not raise any concerns.⁴⁷

The reasoning suggests that it is rather the applicant’s fault that the complaint had to be rejected because it failed to expand the petition, and it also indicates that the Central European University actually suffered detriment not due to the application of the contested legislation (because the Hungarian authorities made no decisions) but due to its own hasty decision to relocate its campus to Vienna. The arguments also give the impression that the Hungarian government is a law-abiding one, which duly proposed and implemented all the necessary legal steps in order to comply with the judgment of the European Court of Justice, and hence it is rather inconceivable that the university would have suffered any harm if it had awaited the result of the pending legal proceedings and respected the due process of law. One might also add that respect for the jurisdiction of a duly established court is part of the rule of law commonly shared by the member states of the EU irrespective of the relative value plurality among them. The fact that the reasoning of the Constitutional Court highlighted the due implementation of the judgment of the European Court of Justice⁴⁸ may also imply that the correction could have been made earlier if the European Court of Justice had delivered its judgment more rapidly, an argument which subtly blames the lengthy procedures before the European Court of Justice for the detriment

⁴⁵J. Derrida and J.D. Caputo, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (Fordham University Press 2020) p. 31.

⁴⁶Constitutional Court Order 3318/2021, Reasoning [33].

⁴⁷*Ibid.*, Reasoning [34]-[35].

⁴⁸The Constitutional Court emphasised twice in its orders that the title of the Act and the related explanatory memorandum make it clear that the legislator drafted the Act as an implementation of the ECJ’s judgment in Case C-66/2018.

suffered by the Central European University. One can even explain why the government amended the Higher Education Act only in May 2021, after the European Court of Justice's decision in October 2020: it wanted to find a considered and well-founded model that would comply with the European Court of Justice's decision and chose the Bavarian model on the basis of a long comparative study. So, an alternative narrative is built according to which all the harm and detriment were caused by the irresponsible behaviour of other actors (the hasty relocation of the campus and the sluggish procedures of the European Court of Justice) while the Hungarian authorities acted honestly and with respect for the authority of the European Court of Justice, because the Hungarian Constitutional Court adjourned its proceedings and the Government acted in accordance with the decision of the European Court of Justice.

And this narrative is almost true, because the Hungarian authorities indeed made no decision concerning the Central European University. Indeed, it was not necessary at all. The contested Hungarian legislation set a time limit on fulfilling all the legal requirements and banned those international universities which did not meet them. Nonetheless, one might wonder why it was necessary to combine the new conditions for foreign universities with a deadline. A possible explanation might be perfect timing for the election campaign. If the European Commission repeated the same behavioural pattern as in the case of the forced retirement of Hungarian judges, it would apply to accelerated proceedings which would culminate during the elections, delivering a perfect topic for the already mentioned 'Stop Soros' campaign.

Moreover, the application of the Lex CEU was not suspended for the time of the pending judicial proceedings, so the precious time went by leaving not too many alternatives to relocation. From this perspective it is interesting and worrying at the same time that nobody applied for an interim measure:⁴⁹ neither the Central European University before the Constitutional Court nor the Commission before the European Court of Justice. This is more than surprising precisely because the Hungarian Government is keen to exploit all the loopholes of infringement proceedings, especially their declaratory character and the fact that the European Court of Justice does not have the power to annul or declare void or inapplicable a state measure.⁵⁰ The weakest point of the whole infringement proceedings is that they enable *faits accomplis*. If a piece of legislation is contrary to EU law, the effect of infringement proceedings is basically to amend the contested legislation for the future; however, it does not require past wrongs to be remedied. The same happened here: the Government was more than happy to comply with the judgment of the European Court of Justice precisely because the effects of the Higher

⁴⁹Prete, *supra* n. 21, p. 967-968.

⁵⁰Prete, *supra* n. 21, p. 970

Education Act – that is to say the relocation of the Central European University’s campus – had been achieved and it was fairly certain that the university would not return. The Government and the Constitutional Court upheld the black letter of the law, and they could highlight that no interim measures had been requested, and hence they could not be blamed for not acting *ultra petita*. After a decade of illiberalism in Hungary and the vast amount of experience gained with the Orban regime, one is still dazzled by the naïve expectation that the Hungarian government will behave with *bona fides*.

The behaviour of the Hungarian Constitutional Court may be labelled as excessive formalism. Nonetheless this has been the strategy for a long time. This logic is behind creating ‘Frankenstein legislation’ borrowed from different national laws and cobbled together like the infamous monster which never existed,⁵¹ but which is nonetheless defended by very primitive formalistic arguments: if the Hungarian rules are bad, then others’ rules must be bad as well. The same is true for the borrowing of constitutional identity from German case law,⁵² or for the present case in which the Bavarian legislation on higher education was copied (which the Hungarian Constitutional Court itself highlighted in its decision) in the hope that the Commission would not be keen to force the issue again by initiating infringement proceedings against Germany, which might also be labelled abusive constitutional borrowing.⁵³ Although the Hungarian Constitutional Court did not investigate whether the new Hungarian legislation was in line with European law, it mentioned that the new legislation was a copy of the Bavarian Act, and hence it had to be compatible with the requirements of the EU.⁵⁴

CONCLUSION – A PYRRHIC VICTORY?

Although the European Court of Justice declared the Hungarian legislation to be contrary to European law and Hungary consequently amended the legislation in question, the main objective was achieved: the Central European University left Hungary⁵⁵ and opened a new campus in Vienna.

⁵¹Cf. K.L. Scheppele, ‘The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work’, 26(4) *Governance: An International Journal of Policy, Administration, and Institutions* (2013) p. 559.

⁵²Vincze, *supra* n. 34, p. 193.

⁵³R. Dixon and D. Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021).

⁵⁴Müller, for instance, offers serious counter-arguments against this very primitive comparative reasoning: J.W. Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States?’, 21(2) *European Law Journal* (2015) p. 141.

⁵⁵However, Viktor Orbán’s narrative is still that the Central European University is currently operating in Hungary. He bases this view on the fact that a conference was held in the university’s

The case revives several current tendencies. The Hungarian government has a unique understanding of law (both national and European) and sees it as an obstacle or hurdle for its opponents (which must obey the law) and an opportunity for itself to misuse every loophole and to instrumentalise it for purely political reasons. The amendment of the Higher Education Act is an example of this behavioural pattern, as are the calculation and taking advantage of every inbuilt weakness of the infringement proceedings: their length, their effects and the conditions of the imposition of the judgment.

This, of course, could not have happened without the backing of the Constitutional Court which, unlike the German Federal Constitutional Court, despite avoiding full-blown conflicts with the European Court of Justice, shows resourcefulness in ways of sabotaging the full effect of Union law: instead of requesting a preliminary ruling (which could be to some extent binding) it adjourned its proceedings (and waited for a decision which was later declared to be of no importance) and, instead of deciding the case in line with the judgment because of which the proceedings had been said to be adjourned, it rather awaited the imposition of the judgment in order to be able to declare that the legal situation had been profoundly changed. Instead of actually making use of the dialogue and rationally addressing the national constitutional sensibilities (in contrast to many other national constitutional courts), the Hungarian Constitutional Court delayed the whole proceedings in order to make things factually irreparable, undermining the spirit both of the infringement proceedings and of the constitutional dialogue.



Budapest building in September 2021. In contrast, the fact is that the university has not been able to launch courses in Budapest, even though educational activity is the essence of a university. Only a research institute operates currently in the university's Budapest building, and the education takes place in Vienna. See on this 'PM Orbán: Those Campaigning with CEU's Expulsion Were not Telling Truth', *MTI-Hungary Today*, 19 September 2021 (<https://hungarytoday.hu/pm-orban-samizdat-ceu-conference-expulsion-not-telling-truth/>), 'Karácsony to Orbán: CEU Building Not Disappeared but No Classes Held', *MTI-Hungary Today*, 20 September 2021 (<https://hungarytoday.hu/karacsony-ceu-budapest-hungary/>), both visited 29 November 2021.