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6. The role of constitutional identity in the responses to the terror attacks in France and the refugee-management crisis in Hungary

Katalin Dobias

Introduction

In 2015 European news was dominated by the refugee-management crisis, terror attacks and fears that radicalized Muslim Europeans may conduct further attacks in their home countries, or travel to join the Islamic State in Iraq and Syria (ISIS) in the Middle East. These crises revealed the cracks in the cohesion of the European Union and its 'established' democracies, as countries grappled with issues of national and European values, political community and nationhood often revolving around the question of identity, as embodied in their constitutions.

In particular, France and Hungary, which have become symbols of the European response to 'terrorism from within' and the refugee-management crisis, respectively, demonstrate that whether it is the 200-year-old 'Indivisibilité de la République' principle of the French Constitution or the reference to the role of Christianity in preserving nationhood in the 2011 Hungarian Fundamental Law, constitutional identity matters.

After a short overview of the year's constitutional amendment proposals regarding the state of exception in France and Hungary, this chapter seeks to explain two notions of constitutional identity through the fundamental values and principles these countries drew on in a time of crisis. Without delving into the complexities of French and Hungarian constitutional identity, it discusses how these identity-defining values continue to guide and legitimize changes in laws, policies and even constitutions.

The chapter stresses that, despite the persistent myth of homogenous nation states, in the face of attacks on the democratic core of European states, it is essential that constitutional identities reflect the heterogeneous realities of contemporary Europe. For a constitution to serve its unifying function and prevent further fragmentation, it must (re)define its political community in an inclusive way.

States of emergency in 2015

France: state of emergency—with a citizenship twist

The attacks on the headquarters of the magazine *Charlie Hebdo* in Paris on 7 January 2015 prompted proposals for a new state of emergency regime suitable to address the challenges of modern terrorism. As the current 1958 Constitution provides for emergency powers only in cases of traditional warfare (article 36) or when the functioning of the state is interrupted (article 16), President Hollande proclaimed a state of emergency, under the State of Emergency Act 1955, amounting to sweeping executive powers.[1] Parliament then expanded the scope of permissible rights limitations to include a broad range of powers, from ordering house arrests or police searches without judicial authorization to preventing public gatherings and blocking websites that glorify terrorism (HRW 2015).

The obvious limitations imposed on constitutionally enshrined fundamental rights, and the danger that multiple extensions would result in a permanent state of emergency (*The Economist* 2016), underlined the necessity of the president's amendment proposal (French National Assembly 2015b) that sought constitutional legitimation of the restrictions—even if their proportionality or timing was questioned (Fassassi 2016). The bill quickly passed the lower house with support from across the political spectrum in the immediate aftermath of the attacks, yet it has since become divisive.

The controversy, which also brought about the resignation of Justice Minister Taubira, was not the constitutionalization of the state of emergency per se, but rather its twin measure of revoking the citizenship of dual-national French citizens convicted of terror offences. As a signatory of the 1961 Convention on the Reduction of Statelessness, France should not strip mono-nationals of their citizenship, as they would then become stateless—meaning that this clause would have only applied to dual nationals. In effect, this would have constitutionalized two categories of French citizens—implying that half of the French immigrant population, over three million dual citizens mainly from North Africa (*Le Monde* 2015), was inherently more suspect. Despite widespread support for the state of emergency clause, the failure to broker consensus for the denationalization proposal led president Hollande to abandon the entire constitutional amendment project (Nossiter 2016).

Hollande originally sought to justify the initiative with the weight of the offence, and France's interest in rapidly deporting the offenders, adding that '[o]ur Constitution . . . is a contract which unites all the citizens of the same country. And if the Constitution is a collective agreement, an

essential agreement for living together, then the Constitution should include responses for combating those who want to undermine it' (*France Diplomatie* 2015). The president seemed to suggest that either the state, as one party to the contract, should have the right to unilaterally terminate it, or that through the commission of terror offences the individual essentially broke the social contract, which justifies the state in then formalizing the severance of the relationship. This interpretation seems to presume that state power is constitutive rather than declarative in nature by assuming that the state has the power to revoke an individual's legal personality, and thus her or his recognition as the bearer of rights.

Except for the human rights guarantees under international law, deprivation of citizenship amounts to the denial of 'the right to have rights' (Arendt 1948: 296) within French jurisdiction without regard for the individual's ability to exercise her or his rights in their other (and now likely only) country of nationality. The proposed citizenship amendment thus appears to be simply punitive in nature, using denationalization as the ultimate punishment for misconduct. Such banishment (Macklin 2015: 3) is an ancient practice that precedes criminal justice systems (or constitutional guarantees), which fails to recognize that 'citizenship is not a license that expires on misbehavior' (US Supreme Court 1958: paragraph 80).

Hungary: state of emergency due to threats of terror, or the 'state of diversity' panic

While Hungary has not been targeted by jihadist extremism, the politics of its Christian-Conservative government blurring together terrorism and mass migration has built an image of Muslims as threats to Hungarians in one form or another. According to Prime Minister Viktor Orbán, 'the fact is that all the terrorists are basically migrants. The question is when they migrated to the European Union' (*Politico* 2015). Following the ruling coalition's anti-migrant campaign, the government conducted a 'National Consultation'—a survey tellingly titled 'Immigration and Terrorism'—through which it claimed the support of over one million citizens for its nationalist rhetoric, further polarizing the politically and socially divided country.

Throughout the year, the governing coalition sought to secure executive emergency powers and was quick to put forward a constitutional amendment proposal (Amendment No. 6, 2015) to introduce a new form of state of emergency in case of acts or threats of terror, even though the constitution already specifies five different grounds for exercising 'special legal orders' (articles 48–53) in times of a 'state of exception'.[2] After five years of maintaining a constitution-amending supermajority in Parliament, during which the

Fidesz coalition easily passed five controversial amendments in a row, this was the first time Fidesz had to convene five-party negotiations to broker a consensus. While initial government drafts contained extensive executive powers to order curfews, conduct surveillance or ban public gatherings, the government's aim to propose a sixth state of exception type, in a democracy with comparatively little history of emergencies, was to enable it to deploy the army domestically (Office of the Hungarian Prime Minister 2016a).

The Constitution currently permits deploying the army at home contingent either on two-thirds parliamentary majority support or, under the existing state of exception, on the decision of the president or the National Defence Council (Fundamental Law 2011, article 49(1)). Therefore, what distinguished this state of exception proposal from the other five grounds was not its material scope, but rather its reallocation of power to the government—begging the question of why a state of exception due to a terror threat would require higher levels concentration of executive power than, for instance, a foreign attack.

Hungary has not experienced known acts or serious threats of terror, and the government in fact used the army in its response to the refugee-management crisis. While the government sought constitutional legitimation for the deployment of the army against (likely home-grown, that is, Hungarian) terrorists, it has without much fanfare introduced a 'state of crisis due to mass migration' by simply decreeing a comprehensive statutory amendment package.[3] It was then quick to expand the powers of the National Defence Forces and deploy the army to build a 175-kilometre-long fence, currently guarded by 6,000 to 10,000 armed soldiers, to forcibly close the border to irregular migrants (Office of the Hungarian Prime Minister 2016b)—without considering it to be a matter of constitutional relevance.[4]

While doing so, the government prevented the possibility of invoking the right to asylum for many by excluding jurisdiction through limiting access to its territory—despite Hungary's international and EU obligations to at least *process* asylum claims. Thus, the threat Hungary arms itself against does not seem to be an actual threat of terror, but rather a perceived diversity threat to its (newly announced) constitutional identity—which is now defined in ethno-religious terms.

Constitutional identity in the making? Evolving versus constructed identity

Does constitutional identity matter?

Understanding a constitution as 'the foundation for both legal and social relations within the polity' (Jacobsohn 2006: 364) explains the expectation that constitutions should reach beyond the normative sphere and embody the social cohesion of the nation, understood as an inherently limited and sovereign imagined political community (Anderson 2006: 48). This community is imagined, as no national can know each fellow national, yet 'in the minds of each lives the image of their communion' (Seton-Watson 1977: 5). This imagined community creates a kinship-like link that forms a community, which is sovereign and limited by the invisible boundaries of other nations. Importantly, the community 'is always conceived as a deep, horizontal comradeship. Ultimately, it is this fraternity that made possible . . . for so many millions of people, not so much to kill, as willingly to die for such limited imaginings' (Anderson 2006: 50).

The constitutional order should not only reflect the identity of the political community, but also create conditions that facilitate its social embeddedness and eventually its ownership (Harris 1993: 177) through interpretation and implementation in politics, courts, legislatures and all walks of life (Jacobsohn 2011). This procedural understanding of constitutional identity allows for its continuous rediscovery through dialogue that maintains its legitimacy. To that end, this 'constitutional discourse' plays a central unifying role, weaving the political community together by consciously bridging the gap between the key differences of 'self' and 'other' in the spirit of constitutionalism to develop an accommodative narrative of a shared identity. At the same time, constitutionalism requires a 'fundamental commitment to the norms and procedures of the constitution [that] has more to do with behaviour, practice, and internalization of norms than the constitutional text' (Ghai 2010: 3).

Thus when the constitution fails to capture the common values and identities of the political community, such internalization and voluntary practice become unlikely, either rendering the constitution hollow or—even more alarmingly—imposing a constitutional identity alien to its subject and (ab)using the seemingly democratic institutional framework to enforce it. In this way the constitution risks becoming a tool for subordinating people to the state instead of bringing the state under the sovereignty of the people. Such an effect also fuels existing divisions that remain unaddressed—defeating the unifying purpose of the constitutional project.

France: Indivisibilité de la République—the deal maker

The constitutional negotiations in France during 2015 demonstrated how the essence of French constitutional identity transcends even urgent national security considerations. French parliamentarians appeared to be willing to give up the exercise of some of their fundamental rights for the enhanced security promised by the state of emergency measures, but were reluctant to accept any measures deemed contrary to 'the founding principles of the French Republic' (Bisserbe and Meichtry 2016). This mentality demonstrates the continued influence of the republican pact—which requires 'France [to] be an indivisible, secular, democratic and social Republic' (Constitution 1958: article 1)—as a 'basic regime-defining characteristic that provides general definitional content to [French] constitutional identity' (Jacobsohn 2006: 362). The constitutional recognition of a two-tiered nationality regime that contradicts the indivisibility principle could thus be perceived as an attack on one of the central tenets of French identity.

As Ombudsman Jacques Toubon stressed, 'citizenship is as indivisible as the Republic' (French National Assembly 2015a); if the constitutional amendment were passed, 'we would go from an indivisible to a divisible Republic and from an indivisible citizenship to a divisible one . . .affecting the very fundamental principle of the Republic' (*France Inter* 2015). This fear has united policymakers across political lines; with members of Parliament (even from Hollande's Socialist parliamentary majority) actively upholding the fundamental principles: 'A Republic which forgets its origins would soon disown them . . . our great republican principles are not and will never be indelible and irreversible. So do not change the Constitution under the influence of emotion! ... Do not give up what makes the strength of our Republic: the unity and indivisibility of our republican society' (Commission on Constitutional Laws 2016).

In a divisive time of home-grown terrorism, France chose to reach back to the indivisibility principle that has guided French public life since its incorporation in its first written constitution in 1719 (article 1).[5] Even though this principle is largely understood as pertaining to territorial integrity (Daly 2015), its social dimension triggered opposition to the classification that would have divided the French citizenry. The constitutional and social embeddedness of the indivisibility principle has made it a bedrock of French constitutional identity. The principle, which rejects any form of non-political (including religious) identity as a basis for distinction under the Constitution, has endured for 200 years because it has gradually evolved through dynamic interaction with constitutionally relevant developments throughout French history. This continued legitimacy, which suggests that the principle reflects—

rather than imposes—identity, explains why it prevailed over a reactive (but understandable) state of emergency amendment. The indivisibility principle continues to be at the heart of the French demos, where abstract constituent power is vested in the people, who are imagined as a political community formed through equal citizenship as a result of the social contract. This notion stands in stark contrast to the ethno-religious understanding of the Hungarian ethnos introduced by the Fundamental Law in 2011.

Hungary: Christian nation or imposed identity?

The Hungarian president, Pál Schmitt, symbolically signed the 2011 Fundamental Law on Easter Monday; with that, 'a value-neutral interim constitution was replaced by a clearly value-laden Fundamental Law' (*24Hu* 2016). The government sought legitimacy for the Fundamental Law by pointing out that Hungary was the only country that had not drafted a new constitution following its transition to constitutional democracy after 1989—even though the Constitution Act XX of 1949 had been substantially revised, and this 'patchwork constitution' (Elster 1991: 447) had governed democratic Hungary for over two decades.

Although the Fidesz coalition's constitution-making majority in Parliament represented a slim majority of only 52 per cent of the electorate (National Election Commission of Hungary 2010), the new constitutional initiative essentially declared a constitutional identity by attempting to codify what it means to be Hungarian. The Fundamental Law introduced the National Avowal of Faith, a solemn preamble embodying an unprecedented shift in the characteristics of Hungarian constitutionalism. The building blocks of liberty, equality and democracy of the 1949 constitution, as revised in 1989, were replaced by the values of family, nation and loyalty couched in religious tones that marked the end of secular constitutionalism in the country.

These religious proclamations of the new Constitution—which define Hungary as 'a part of Christian Europe', 'recognize the role of Christianity in preserving nationhood', and take pride in how Hungarian 'people ha[ve] over the centuries defended Europe in a series of struggles'—give context to Prime Minister Orbán's wariness of migration: 'those arriving have been raised in another religion, and represent a radically different culture. Most of them are not Christians, but Muslims. This is an important question, because Europe and European identity is rooted in Christianity' (Office of the Prime Minister of Hungary 2015). Translating the seemingly vague principles and historical references of the National Avowal into policies has more than one precedent. For instance, immediately after its promulgation, the 2012 Church Law codified the classification and differential treatment of various

religious denominations in the country—in effect, favouring Christianity—and at first revoked official recognition of a range of other religions, including Islam.[6]

While the majority of the Hungarian population is (self-declared, albeit non-practicing) Christian, in the wake of the democratic transition the Constitutional Court declared state neutrality to be a constitutional principle of the new Hungarian democracy in one of its first landmark decisions (Constitutional Court of Hungary 1993). Since then, the Fundamental Law has redrawn the boundaries of the 1949 Constitution's prohibition on entanglement (article 60(3)).[7] Even though it requires state and religious communities to operate separately, it allows their cooperation for the public good, but only if the religious community is recognized (by the National Assembly) as an established church (Fundamental Law 2011, article VII).

The notion of state neutrality entered the Hungarian constitutional tradition from the German *Grundgesetz* as well as the jurisprudence of the Federal Constitutional Court, which appears to have a consistent position based on a rather pluralist understanding that 'the state constituted by the Basic Law is to be home to all citizens, irrespective of religion and worldview' (Haupt 2011: 164). From a legal perspective, the Fundamental Law's 'Christian nation' concept thus goes against 60 years of state neutrality and non-entanglement tradition and does not necessarily follow from the country's history either. While Saint Istvan established Hungary as a Christian Kingdom in 1000 and the monarchy lasted, with a brief interruption, for 10 centuries (until 1946), the recognition of Christianity has varied from a strong state-forming role under Saint István or László to tolerated religion under 150 years of Ottoman occupation. Such changing dynamics were reflected in the 'historical constitution' encompassing unwritten constitutional principles and statutes of constitutional relevance.

While Christianization was common in Europe from the Late Antiquity to the Middle Ages, of the 28 EU countries, only the Latvian Constitution mentions Christian values, while the Polish Constitution recognizes the country's Christian heritage. The Hungarian Constitution's explicit identification with Christianity is peculiar in both the regional and supranational context: the EU consistently refrained from endorsing religious identity of any kind in the (failed) 2004 EU constitution. Article 8 of the Treaty on the European Union establishing EU citizenship only listed the set of rights guaranteed by virtue of union citizenship, without attempting to define or forge a shared identity, pledging to respect the distinctive identity of each member state. The EU has consistently reiterated that '[t]he Union is founded on values [that] are common to the Member States in a society in which pluralism, non-

discrimination, tolerance, justice, solidarity . . . prevail' (Consolidated TFEU-TEU 2007: article 2).[8] The current EU presidency was even more specific, stating that these 'fundamental values and the rule of law are not only Treaty principles but also essential parts of European identity' (Netherlands EU Presidency 2016).

In contrast with these fundamental European values and this year's unifying constitutional discourse in France, the Hungarian case demonstrates how the proliferation of the political elite's sustained exclusionary discourse—and its manifestation in a new constitution and corresponding laws and practices—has called the legitimacy of the constitution into question (Bulmer 2015). Since the promulgation of the 'alliance among Hungarians of the past, present and future . . . [that] is a living framework which expresses the nation's will and the form in which we want to live', emigration rates have climbed dramatically: over 500,000 Hungarians have left the country in the past five years (*Hungary Today* 2015).

Inclusion processes: resilient democracies in testing times?

Beyond the religious 'Christianity' and political 'indivisibility' elements discussed above, a variety of other substantive components seem to reappear in different constitutional identity formulations. Such normative content through which constitutions may seek to express constitutional identity remains polity-specific, and can be reflected in corresponding diversity management models. It is not the substantive building blocks of identity per se, but their inclusive (rather than exclusive) nature that creates a constitution that can unify a polity and make it more resilient to fragmentation. While social cohesion is achieved through integration that, by its nature, takes place in the societal rather than the normative realm, constitutions continue to set the framework for not only law and policymaking but also for acceptable behaviour in society.

In order for the constitution to provide an enabling structure for diversity management, it needs to (re)define the community in an inclusive manner that requires self-reflection and conscious social, political and, at times, constitutional engineering. Since it is imperative to enhance the resilience of European states against physical and ideological attacks on their democratic core, the integrative function of constitutions becomes essential. The ability of constitutions—and of European constitutionalism—to address questions of diversity will be paramount in determining whether they can channel societal conflict through political processes. A failure to recognize the inevitable diversification of the polity risks contributing to growing

nationalist extremism and ignoring the millions living in shadow societies on the edge of European democracies with little to no political participation.

The notion (or myth) of homogenous nation states does not apply to 21st-century Europe. Diversity goes beyond the hundreds of thousands of newly arrived asylum seekers, who only added to the estimated 54 million foreign-born persons in the EU (Eurostat 2016).[9] National identity concepts that ignore or exclude these residents are the seedbed of fragmentation. Understanding the majority identity as singular will inevitably risk being exclusionary; rather, the first step is to see it as a 'predominant identity' that is potentially distinct from, but is in constant interaction with, a variety of competing ethnic, religious, cultural or other identities within the polity (Rosenfeld 1994: 4).

Identifying the elements of the predominant identity in inclusive terms is a precondition for designing a political (rather than ethnic) community that reflects the country's heterogeneous makeup. Such inclusiveness requires that the substantive building blocks of constitutional identity do not set conditions that cannot be fulfilled (or be expected to be fulfilled) without reference to origin, race, religion and so on. Similarly, the procedural rediscovery of identity through continuous interpretation and implementation of constitutional values and principles in all walks of life also needs to be open to public participation.

While diversity management has long been considered a pressing question for constitutional design, responses have mainly been placed within a context of either cross-cutting or segmental cleavages in divided societies (Choudry 2010), reflecting a group (rights-) based formula of state-building. Such approaches may be valid in the context of divided societies that have been formed by different ethnic, religious or cultural communities thrown together due to national borders that have been moved or imposed for various reasons, from colonialism to state succession. Yet group rights-based diversity management models might not respond directly to needs stemming from the 'super-diversity' of contemporary Europe, which is instead a product of migration and is characterized by various 'new, small and scattered, multiple-origin, transnationally connected, socio-economically differentiated and legally stratified' immigrant generations (Vertovec 2007: 1024). These complexities and their interplay distinguish the European case from classic divided societies, as the relative homogeneity of subgroups can no longer be assumed. Thus, in the context of super-diversity, individual rights-based considerations may be more dominant in developing diversity management frameworks.

Unity within diversity—France's inclusive constitutional 'self'

The preliminary challenge of any attempt to manage diversity is to address the issue of 'who we are'. This is a simple question with a complex answer that in France has long been considered to be part of a political rather than ethnic or religious public identity, set through the constitutional entrenchment of the indivisibility principle. The principle became judicially enforceable with the 1958 Constitution, which established the Constitutional Council. The council's growing jurisprudence has affirmed that any division of the 'French people' is unconstitutional, when, for example, annulling the legislative act referring to 'the people of Corsica, [as] a component of the French people', and in so doing noting that 'many constitutional texts from two centuries refer only to the legal concept of "French people", which has constitutional value' (Constitutional Council of France 2002). Nevertheless, the equality framework within which the indivisibility principle operates continues to be imperfect with the complete rejection of (sub)group identities in the French demos—and, correspondingly, minority rights as such. The infamous veil ban controversy is just one example of France's republican integrationist approach to diversity management (Choudry 2010: 46) that creates the legal and constitutional framework for including religious and other minorities.

Accordingly, earlier this year the Senate rejected another Constitutional Amendment Bill (Nationalia 2015) that would have allowed France to ratify the European Charter for Regional and Minority Languages, arguing that the constitutional recognition of languages other than French would go against the unity/indivisibility of the nation. Nor does the constitutional text recognize the people of territorial communities, such as the French Polynesians, as distinct from French people (Constitution 1958: Title XII). The French principle of laïcité (secularism) follows the same logic when, rather than protecting an individual's right to manifest her or his religion, it stresses the (perceived) interest of the community through a broad interpretation of the prohibition 'to profess religious beliefs for the purpose of non-compliance with the common rules governing the relations between public communities and private individuals' (Constitutional Council of France 2004).

Despite a 'muscular' constitutional tradition supporting state neutrality in France, simply assuming the value neutrality of the state might overlook the majority's tendency to interpret foundational principles, such as equality or indivisibility, through the lens of the majority's identity (Phillips 2007). As a result, the dominant identity might clandestinely govern everyday life through setting standards that are invisible to members of the majority, yet restrictive for members with minority backgrounds—amounting to discriminatory effects on the exercise of individual rights. The theoretical and

practical downsides of the French understanding of the demos—from the veil controversy to the refusal to recognize minority rights—has repeatedly called its unifying function into question. Yet, its constitutional identity formulation in political (as opposed to ethnic or religious) terms continues to provide the backbone of an inclusive constitutional discourse that at least leaves the legal and ideological door open for unity within diversity in the French Republic.

Unity as uniformity—Hungary's exclusive national 'self'

Hungary's response to the refugee-management crisis is a sharp reminder of how an exclusionary answer to the 'who are we' question in the constitution creates a framework that invites legal, political and societal responses that exacerbate the identity crisis. Through the ethnicization of its subject, the Fundamental Law reinforced a constitutional identity that incentivizes the exclusion of ethnically or religiously different people, while on a policy level it disincentivizes diversity management of any kind and instead aims to minimize differences within the polity—leaving the door open for exclusionary or assimilationist policies.

Prime Minister Orbán has been clear: 'we do not want a large number of Muslim people in our country. We do not like the consequences . . . we see in other countries' (Mackey 2015). Thus the focus has not been on reconciling sameness and difference within the community of all people in the Hungarian jurisdiction, but on introducing a binary framework in which 'we the people' has become 'we the Christian ethnically Hungarian citizens, who live in faithful procreating marriages'—as envisaged by the values the coalition constitutionalized.[10] Therefore, it is unsurprising that 'equality' is not even mentioned as one of the values proclaimed in the lengthy National Avowal (Tóth 2012: 186).

Rather than just political rhetoric, 2015 has brought about the latest manifestation of Fidesz' nation-building project that neatly fits with the prime minister's infamous vision for Hungary announced shortly after Fidesz secured its third term in office in 2014: 'the new state that we are constructing in Hungary is an illiberal state, a non-liberal state. . . . [it] includes a different, special, national approach' (Office of the Prime Minister of Hungary 2014). By the end of 2015, the then-scandalous proclamation was seen as a prediction of the emergence of illiberal democracies at the heart of Europe (Kaufmann 2016). Michel Rosenfeld's framework for understanding the process of creating constitutional identity, described in more detail below, helps deconstruct the steps of Fidesz' nation-building attempt to move beyond a one-dimensional perception of the Orbánian rhetoric as

simply authoritarian. In light of Rosenfeld's constitutional identity-building stages, the recurrent political rhetoric appears to have constituted steps to re-engineer the Hungarian nation—under the direction and framework of the 2011 Fundamental Law.

According to Rosenfeld, constitutional discourse essentially (re)creates identity by selecting, organizing and discarding its key elements at various stages: negation, metaphor and metonymy (Rosenfeld 2010: 45). In Hungary, constitutional discourse following the rise of Fidesz labelled the 1949 Constitution a communist one, despite its complete overhaul in 1989 and the ensuing two decades of democratic constitutionalism (negation stage). To fill the void created by the denial of the past identity, Fidesz offered an alternative positive identity—by attempting to form a community through stressed similarities (metaphor stage).

Such identities are typically rooted in the traditional identities dismissed at the negation stage, but purified in the subsequent constitutional discourse to increase the constitution's legitimacy. Given that the Fundamental Law and its amendments were passed in a non-inclusive manner, the constitution-building process failed to facilitate a framework of constitutional governance that encourages public participation. Substantively, this unifying stage should have also aimed to strike a balance between grounded traditional identities and aspirational identities striving to realize constitutionalism (Rosenfeld 2010: 47). To this end, access to membership of the political community is paramount. As the Fundamental Law set such standards in ethno-religious terms, the new imagined community has become that of Christian Hungarians—which makes being Muslim, for instance, a tension difficult to reconcile.

The last stage of Rosenfeld's identity creation, metonymy, is meant to provide a touch of local flavour with an emphasis on context in order to tailor the constitutional identity to the actual self by considering the nuances of the de facto community governed by the constitution. Here, Fidesz missed yet another chance to recognize the striking gap between the community it has and the community it constitutionalized, by selecting and amplifying instances that reinforce differences, and dismissing those that could bridge them. As a chief paediatrician volunteering to treat asylum seekers stranded at the capital's railway stations put it: 'The help of all the civilians is touching, and stands in stark contrast with the astonishing hate campaign that is going on against them [migrants] on state level' (Nyilas and Szabó 2015).

The Fundamental Law's aim was to re-imagine an ethno-religious (rather than political) community by constitutionalizing an exclusionary national

rather than inclusive political identity. Despite the democratic legitimacy of the (then) supermajority coalition, the lack of broad participation or representation of political and societal groups, coupled with its exclusionary substantive provisions have rendered the Fundamental Law the constitution of only 'some'.

Conclusion

After both World War I and World War II, Central and Eastern European countries had to come to terms with the fact that redefining their borders changed the people who were de facto governed by their constitutions—and that addressing such diversity was a precondition of peace. Now Europe must accept that its population has changed again, this time due to the movement of people. Ignoring this diversity or demonizing differences, which are part of the human experience, is a futile and dangerous enterprise. To successfully negotiate sameness and differences within a political community governed by the constitution, the precondition is to 'accept the tension as an enduring component of the constitutional predicament' (Jacobsohn 2012: 782).

In order to create more resilient democracies, EU countries need to develop and maintain enabling constitutional (and corresponding legal and policy) frameworks within which the tensions between various conflicting and overlapping identities can be resolved through peaceful political processes. The substantive elements of constitutional identity and the constitution-building process must be inclusive in order to develop a constitutional identity that reflects that of the polity and thus makes, rather than breaks, constitutional deals. This is essential for the constitution to become a living instrument that simultaneously regulates and represents its political community in order to maintain social cohesion. The omission or exclusion of marginalized communities inevitably risks eroding—and eventually severing—the bond between the constitution and 'we the people'. In order to address the identity vacuum that has left Europe vulnerable to radicalization and fragmentation, and to tackle the root causes of the ongoing crises, it is essential to re-imagine its constitutional communities according to inclusive identity-forming factors.

Notes

1 The full text of the 1958 Constitution is available at <https://www.constituteproject.org/constitution/France_2008?lang=en>, accessed 22 June 2016. The text of Hollande's state of emergency proclamation can be found at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350>, accessed 20 June 2016.

2 The full text of Hungary's Fundamental Law 2011 is available on ConstitutionNet, <https://www.constituteproject.org/constitution/Hungary_2013?lang=en>, accessed 22 June 2016.

3 Article 13 of the Government Bill on the Amendment of Certain Laws Regarding and in Connection with Migration, August 2015, <http://www.parlament.hu/irom40/09634/09634.pdf>, codified in Act XXXIX of 2016 <http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600039.TV&txtreferer=00000003.TXT>, accessed 22 June 2016.

4 National Defence, Hungarian National Defence Forces and measures to be introduced in a time of Special Legal Orders (Act 2011), article 36 (1)h, <http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100113.TV#lbj54id53b3>, accessed 22 June 2016.

5 The full text of France's 1719 Constitution is available at <https://web.archive.org/web/20111217062556/http://sourcebook.fsc.edu/history/constitutionof1791.html>, accessed 22 June 2016.

6 Act CCVI of 2011 on the Right to Freedom of Conscience and Religion, and the Legal Status of Churches, Religious Denominations and Religious Communities (Church Law) deprived hundreds of religious denominations of their former church status and corresponding entitlements including the entitlement to collect income tax donations. The act also granted power to parliament to decide on the 'established church' status of a given religious community: a condition the Constitutional Court found unconstitutional in its decision annulling the act. Instead of remedying the unconstitutionality, the governing majority amended the Constitution to entrench this parliamentary entitlement. The Venice Commission expressed concerns about the amendment; and in 2014 the European Court of Human Rights also found Hungary in violation of both the freedom of thought, conscience and religion and the right to an effective remedy, given that there was no possibility to appeal against Parliament's decision. While the Hungarian state has yet to remedy the rights' violation with regards various other religious communities and in terms of legislative (and constitutional) changes to bring domestic law in line with the European Convention on Human Rights, a 2012 amendment to the Church Law added the

Hungarian Islamic Council to the Annex enumerating the 'established churches' recognized in Hungary. The list originally (December 2011) included only 14 churches, none of which were Muslim.

7 The full text of Hungary's 1949 Constitution is available at <http://lapa.princeton.edu/hosteddocs/hungary/1989-90%20constitution_english.pdf>, accessed 22 June 2016.

8 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union are available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=EN>, accessed 23 June 2016.

9 Understood broadly, 'foreign-born' comprises people born abroad (according to present-day borders), including those born in another EU member state or in non-EU countries, and who were the residents of an EU country in 2015.

10 Besides the references to Christianity and nationhood in the National Avowal of Faith, such value choices are also reflected throughout the binding chapters of the Fundamental Law of Hungary (2011d); for instance, Article L stipulates that '1. 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 survival of the nation. Family ties shall be based on marriage and/or the relationship between parents and children. 2. Hungary shall encourage the commitment to have children . . . '.

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