

Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law

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Abstract

This paper discusses a decision of the Hungarian Constitutional Court issued in December 2016, in which the judges refer to the country's constitutional identity to justify the government's refusal to apply the EU's refugee relocation scheme in Hungary. The paper concludes that this abuse of constitutional identity for merely nationalistic political purposes discredits every genuine and legitimate reference to national constitutional identity claims, and strengthens calls for an end to constitutional pluralism in the EU altogether.

Keywords

Constitutional identity; Hungary; Constitutional Court; Anti-migration legislation

1 Introduction

Before and after Hungary's accession to the EU, the Hungarian Constitutional Court, a powerful and still independent institution, developed a consistent jurisprudence regarding the primacy of EU law. This was a moderate version of a German-type limited primacy approach. The pre-accession constitutional amendment of 2002 was supported by then-opposition leader Viktor Orbán, who was reluctant to insert a provision explicitly accepting EU primacy in the text of the constitution, but like the Constitutional Court's jurisprudence, was ready to acknowledge the role of shared European constitutional principles in what was still—at that time—Hungary's liberal democratic constitutional system. But since the 2010 parliamentary elections, Hungary has set off on a journey to become an 'illiberal' EU Member State which does not comply with the shared values of rule of law and democracy: the 'basic structure' of Europe. Among the elements of the 'illiberal state' is the elimination of checks and balances, first and foremost the exercise of control over the once very active Constitutional Court.¹ This process began with the alteration of the system for nominating Constitutional Court justices, giving governing parties the exclusive power to nominate and subsequently elect justices.² The new Fundamental Law of 2011³

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¹ See a more detailed analysis of the lack of checks and balances in Miklós Bánkúti and Gábor Halmai & Kim Lane Scheppele, "From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions", in Gábor Attila Tóth (ed.), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law* (CEU Press, Budapest, 2012).

² The new procedure replaced the previous consensual one. In July 2010, the government made use of the new rules, and elected to the bench two new judges who did not even fulfil the legal requirements set for justices. Later that year the government also expanded the number of justices in the Court from 11 to 15 to give themselves four more seats to fill with non-consensual candidates.

³ Magyarország Alaptörvénye (25 April 2011). For the 'official' English translation of the Fundamental Law, see: <<http://www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>>.

also considerably restricted ex-post control over the power of the Court by withdrawing its right to review financial laws. In 2013, the Fourth Amendment⁴ to the new constitution annulled the entire case law of the Constitutional Court from 1990-2011. By that time, the majority of the justices were loyal to the governing parties.⁵

From the very beginning, the government of Viktor Orbán has justified non-compliance with EU law by referring to national sovereignty,⁶ and lately—as an immediate reaction to EU efforts to solve the refugee crisis—to the country’s constitutional identity guaranteed in Article 4(2) of the Treaty on the European Union (TEU). In its Decision 22/2016 AB on the interpretation of Article E) (2) of the Fundamental Law, the packed Constitutional Court rubberstamped the government’s constitutional identity defense.

This comment proceeds as follows: after describing the government’s political and legal reaction to the refugee crisis, I discuss attempts to legitimize non-compliance with the EU relocation plan, first by an invalid referendum, followed by a failed constitutional amendment, and finally by a decision of the Constitutional Court.

2 The Government’s Anti-Migration Policy as a Matter of Constitutional Identity?

⁴ See the ‘official’ English text of the amendment provided by the government: Council of Europe, Venice Commission, “Fourth Amendment to the Fundamental Law of Hungary and Technical Note”, CDL-REF(2013)014-e, Strasbourg, 21 March 2013, available at <<http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF%282013%29014-e>>.

⁵ In February 2013, an eighth justice out of the 15 members of the Constitutional Court was added, and in April 2013, a ninth Fidesz justice joined the bench with the exclusive votes of the governing parties without consultation with opposition parties, civil or professional organizations. In this way, the justices elected by consensus became a minority. By now all the members of the Court are loyal to the government.

⁶ The first reaction of the Hungarian government to the ‘Tavares report’ of 3 July 2013 of the European Parliament on the Hungarian constitutional situation (European Parliament, Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), 25 June 2013, available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN>>)

was not a sign of willingness to comply with the recommendations of the report but, rather, a harsh rejection. Two days after the European Parliament adopted the report at its plenary session, the Hungarian Parliament adopted Resolution 69/2013 on “the equal treatment due to Hungary” (69/2013. (VII. 5.) OGY Határozat, 26 November 2015, available <<http://www.complex.hu/kzldat/o13h0069.htm/o13h0069.htm>>). The document is written in the first person plural as an anti-European manifesto on behalf of all Hungarians: “We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain.” (*Translation by the author.*) The resolution argues that the European Parliament exceeded its jurisdiction by passing the report, and creating institutions that violate Hungary’s sovereignty as guaranteed by the TEU. The Hungarian text also points out that behind this abuse of power lie business interests, which were violated by the Hungarian government by reducing the costs of energy paid by families. This in turn could undermine the interest of many European companies, which for years have gained extra profits from their monopoly in Hungary. In its conclusion, the Hungarian Parliament called on the Hungarian government “not to cede to the pressure of the European Union, not to let the nation’s rights guaranteed in the fundamental treaty be violated, and to continue the politics of improving life for Hungarian families”. These words very much reflect the Orbán government’s view of ‘national freedom’, which emphasizes the liberty of the state (or the nation) to determine its own laws: “This is why we are writing our own constitution... And we don’t want any unsolicited help from strangers who are keen to guide us... Hungary must turn on its own axis”. (For the original, Hungarian-language text of Orbán’s speech, entitled *Nem leszünk gyarmat!* [We won’t be a colony any longer!] see e.g., <http://2010-2015.miniszterelnok.hu/cikk/nem_leszunk_gyarmat_>. The English-language translation of excerpts from Orbán’s speech was made available by Hungarian officials, see e.g., Kester Eddy, “Orban compares EU to Soviet Union”, *Financial Times* (15 March 2012), at: <<https://www.ft.com/content/6feaca90-6ecb-11e1-afb8-00144feab49a>>).

As early as May 2015, a few days after many hundreds of refugees had drowned in the Mediterranean Sea, Viktor Orbán announced that ‘We need no refugees’, arguing that Europe does not need immigrants at all, and that the European Union should be sealed and defended against intruders by the military, and should not overreach in its immigration and refugee policies. Rather, Member States should formulate their own policies and deal with their unwanted immigrants as they see fit. In the summer of 2015, the Hungarian government left thousands of refugees to languish on fields and in the streets, forcibly herded others into detention camps, and fired water cannons and teargas at refugees gathered against the razor fence it had erected, first on its border with Serbia, and later with Croatia, another EU Member State. Viktor Orbán, styling himself as the defender of Europe’s ‘Christian civilization’ against an Islamic invasion, managed to encourage other eastern European governments to follow his example.

In order to legitimate this policy against Hungary’s unwanted immigrants, the government announced it would hold a ‘national consultation’. The government sent out eight million questionnaires to the voting-age population, with questions like these: “Do you agree that mistaken immigration policies contribute to the spread of terrorism? In your opinion, did Brussels’ policies on immigration and terrorism fail? Would you support a new regulation that would allow the government to place immigrants who illegally entered the country into internment camps?”⁷

After this psychological preparation, the Parliament amended the asylum law, and adopted a National List of Safe Countries, considering Serbia a safe third country for asylum-seekers (in contradiction with the clear position of the European Court of Human Rights⁸ and the Hungarian Supreme Court⁹). These changes, which entered into force on 1 August 2015, accelerated the asylum proceedings, rendering an ineffective one-instance judicial review with unreasonably short deadlines into a quasi-automatic rejection at first glance of over 99% of asylum claims (as 99% of asylum-seekers entered Hungary from Serbia). The same amendments also entitled the government to declare a ‘state of migration emergency’, if more than 500 migrants seek asylum daily for a month, if 2000 migrants are in transit camps for a week, or if migrants riot anywhere in the country. Such emergency situations entitle the government to send fully armed soldiers to guard the borders with dogs, rubber bullets, and teargas, in addition to the police, who are normally authorized to do so. In June 2016, National Assembly representatives of the Fidesz-KDNP (the Christian Democratic People’s Party) governing alliance and the radical-nationalist opposition party Jobbik approved the Sixth Amendment to the Fundamental Law. This amendment authorizes the National Assembly to declare, at the initiative of the government, a “terrorism state of emergency” (*terrorveszélyhelyzet*) in the event of a terrorist attack or a “significant and direct danger of a terrorist attack” (*terrortámadás jelentős és közvetlen veszélye*). In March 2017, the Hungarian Parliament passed an amendment to the Asylum Act that forces all asylum seekers into

⁷ Gábor Halmai, “Hungary’s Anti-European Immigration Laws”, *Institut für die Wissenschaften vom Menschen / Institute for Human Sciences* (4 November 2015), available at <<http://www.iwm.at/transit/transit-online/hungarys-anti-european-immigration-laws/>>; Gábor Halmai, “Viktor Orbán’s rampage to attract more far right voters”, *Verfassungsblog* (7 May 2015), available at <<http://verfassungsblog.de/viktor-orbans-rampage-to-attract-more-far-right-voters/>>.

⁸ “The Court observes that between January 2013 and July 2015 Serbia was not considered a safe third country by Hungary. This was so in accordance with reports of international institutions regarding the shortcomings of asylum proceedings in Serbia [...] However, the 2015 legislative change produced an abrupt change in the Hungarian stance on Serbia from the perspective of asylum proceedings. The altered position of the Hungarian authorities in this matter begs the question whether it reflects a substantive improvement in the guarantees afforded to asylum-seekers in Serbia. However, no convincing explanation or reasons have been adduced by the Government for this reversal of attitude, especially in light of the reservations of the UNHCR and respected international human rights organisations expressed as late as December 2016.” See ECtHR, *Ilias and Ahmed v. Hungary*, Appl. No.47287/15, Judgment of 14 March 2017.

⁹ 2/2012. (XII. 10.) KMK opinion of the Administrative and Labour Law Collegium of the Supreme Court based on the assessment of the UNCHR.

guarded detention camps. While their cases are being decided, asylum seekers, including women and children over the age of 14, will be herded into shipping containers surrounded by a high razor-fence on the Hungarian side of the border.¹⁰

With these legislative measures adopted, the government started a campaign against the EU's relocation plan. The first step was a referendum initiated by the government. On 2 October 2016, Hungarian voters went to the polls to answer one referendum question: "Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?". Although 92 percent of those who cast votes and 98 percent of all the valid votes agreed with the government, answering 'no' (6% were spoiled ballots), the referendum was invalid because the turnout was only around 40 percent, instead of the required 50 percent.¹¹

Despite the fact that at the time of the referendum the idea of a constitutional amendment was not on the table, arguing with the 3.3 million Hungarians who voted in favor of the anti-EU referendum, Prime Minister Orbán introduced the Seventh Amendment to defend Hungarian constitutional identity to politically legitimize non-compliance with EU law in this area. The draft amendment touched upon the National Avowal, the Europe clause and the provision on the interpretation of the Fundamental law in the Foundation part, and the provision on prohibition of expulsion of Hungarian citizens and the collective expulsion of foreigners in the part on Freedoms and Responsibilities.¹²

The proposal was to add a new sentence to the National Avowal, following the sentence, "We honor the achievements of our historical constitution and we honor the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation". The new sentence would read: "We hold that the defense of our constitutional self-identity, which is rooted in our historical constitution, is the fundamental responsibility of the state."

Paragraph 2 of the Europe clause (Article E) of the Fundamental Law would be amended to read: "Hungary, as a Member State of the European Union and in accordance with the international treaty, will act sufficiently in accordance with the rights and responsibilities granted by the founding treaty, in conjunction with powers granted to it under the Fundamental Law together with other Member States and European Union institutions. *The powers referred to in this paragraph must be in harmony with the fundamental rights and freedoms established in the Fundamental Law and must not place restrictions on Hungarian territory, its population, the state, or its inalienable rights.*" (The new sentence appears here in italics.)

A new paragraph 4 would be added to Article R: "(4) It is the responsibility of every state institution to defend Hungary's constitutional identity."

The following new Paragraph 1 was planned to be added to Article XIV: "(1) No foreign population can be settled in Hungary. Foreign citizens, not including the citizens of countries in the European Economic Area, in accordance with the procedures established by the National Assembly for

¹⁰ On 14 March 2017, the European Court of Human Rights found that the detention of two Bangladeshi asylum-seekers for more than three weeks in a guarded compound without a formal, reasoned decision and without appropriate judicial review had amounted to a de facto deprivation of their liberty (Article 5 of the Convention) and right to effective remedy (Article 13). The Court also found a violation of Article 3 on account of the applicants' expulsion to Serbia insofar as they had not had the benefit of effective guarantees to protect them from exposure to a real risk of being subjected to inhuman and degrading treatment (*Ilias and Ahmed v. Hungary, ibid.*). We should take into account that this unlawful detention of the applicants in the transit zone was based on less restrictive rules enacted in 2015.

¹¹ Gábor Halmai, "The Invalid Anti-Migrant Referendum in Hungary", *Verfassungsblog* (4 October 2016), available at <<http://verfassungsblog.de/hungarys-anti-european-immigration-laws/>>; Krisztina Than, Gergely Szakacs, "Hungarians vote to reject migrant quotas, but turnout too low to be valid", *Reuters* (2 October 2016), available at <<https://www.reuters.com/article/us-europe-migrants-hungary-referendum/hungarians-vote-to-reject-migrant-quotas-but-turnout-too-low-to-be-valid-idUSKCN1213Q3?il=0>>.

¹² The National Avowal is the preamble of the 2011 Fundamental Law of Hungary; the Foundation part contains the main principles, while the Rights and Responsibilities part contains the fundamental rights and obligations.

Hungarian territory, may have their documentation individually evaluated by the Hungarian authorities”.

All 131 members of parliament (MPs) of the Fidesz-KDNP governing coalition voted in favor of the proposed amendment, while all 69 opposition MPs either did not vote (66 representatives) or voted against the amendment (3 representatives). The proposed amendment thus fell two votes short of the two-thirds majority required to approve amendments to the Fundamental Law.¹³ Although in principle Jobbik supported the proposed Seventh Amendment, the party’s MPs did not participate in the vote because the government had failed to satisfy Jobbik’s demand for repeal of the Hungarian Investment Immigration Program, which grants permanent residence in Hungary to citizens of foreign countries who purchase 300,000 euros in government ‘residency bonds’.¹⁴

3 Decision 22/2016. (XII. 5.) of the Hungarian Constitutional Court

After the failed constitutional amendment, the Hungarian Constitutional Court, loyal to the government, came to the rescue of Orbán’s constitutional identity defense of its policies on migration. The Court carved out an abandoned¹⁵ petition of the also loyal Commissioner for Fundamental Rights (hereinafter: Commissioner), filed a year earlier, before the referendum was initiated. In his motion, the Commissioner asked the Court to deliver an abstract interpretation of the Fundamental Law in connection with Council Decision 2015/1601 of 22 September 2015.¹⁶ The Commissioner asked the following four questions:

1. Whether the absolute prohibition of expulsion of foreigners from Hungary in Article XIV (1) of the Fundamental Law¹⁷ forbids this kind of action only by the Hungarian authorities, or if it also covers actions performed by the bodies or institutions of the Hungarian State as necessary for implementing an unlawful collective expulsion executed by another State.
2. Whether under Article E) (2), state bodies, agencies, and institutions are entitled or obliged to implement EU legal acts that conflict with fundamental rights stipulated by the Fundamental Law. If not, which state organ can establish that fact?
3. Whether under Article E) (2), the exercise of powers bound to the extent necessary may restrict implementation of an *ultra vires* act. If state bodies, agencies, and institutions are not entitled or obliged to implement *ultra vires* EU legislation, which state organ can establish that fact?
4. Whether Article XIV (1) and Article E) can be interpreted in a way that authorizes or restricts Hungarian state bodies, agencies, and institutions, within the legal framework of the EU, to facilitate relocation of a large group of foreigners legally staying in one Member States without their expressed or implied consent and without personalized and objective criteria applied during their selection.

¹³ Due to two by-elections in early 2015 Fidesz lost its 2/3 majority by two votes.

¹⁴ During the vote on the amendment, Jobbik MPs displayed a sign referring to the program reading “Those who allow terrorists in for money are traitors!”

¹⁵ The Constitutional Court has no deadline to decide on petitions.

¹⁶ The petition was based on Section 38 para.(1) of Act CLI of 2011 on the Constitutional Court, which reads: “On the petition of Parliament or its standing committee, the President of the Republic, the Government, or the Commissioner of the Fundamental Rights, the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a concrete constitutional issue, provided that the interpretation can be directly deduced from the Fundamental Law”.

¹⁷ Article XIV (1) reads as follows: “Hungarian citizens shall not be expelled from the territory of Hungary and may return at any time from abroad. Foreigners staying in the territory of Hungary may only be expelled on the basis of a lawful decision. Collective expulsion shall be prohibited”.

The Commissioner's own interpretation was clear from the formulation of the questions. With regard to the first question, the Commissioner argued that "the rules of international law grant a right for asylum seekers waiting to be transferred to stay in Italy or Greece until the end of the asylum procedure". In the context of the Council decision, the Commissioner concluded that although "the collective expulsion was – prima facie – implemented by these two Member States", nevertheless, since "the transfer cannot be exercised by a Member State without the reception act of another Member State (*according to the petition this Member State would be Hungary if implementing the relocation plan – G.H.*): the latter is an indispensable act of the former one". The question does not seem to take into account that Article XIV (1) of the Fundamental Law applies explicitly to Hungarian citizens, or the collective expulsion of foreigners from the territory of Hungary, and that non-Hungarian asylum seekers relocated due to the Council Decision would not be expelled by Italy or Greece. But the petition is also judgmental regarding the powers of the EU, when claiming that "the European Union has no competence to adopt regulations affecting the stay of certain groups of foreigners in the territory of the Member States".¹⁸

By rendering the petition admissible, in its Decision 22/2016 (XII. 5.) AB of 30 November 2016,¹⁹ the Court decided to answer the first question related to the interpretation of Article XIV of the Fundamental Law in a separate judgment.²⁰ Imre Juhász, one of the justices, wrote a concurring opinion in which he disagreed with the majority's decision to separate the part of the petition on interpreting Article XIV (1) of the Fundamental Law. In his view "the separation – which in fact postpones adoption of the decision for an indefinite period – is indeed questionable in the light of the fact that the Council Decision applies to persons who arrive(d) in the territory of Italy or Greece."

The Court identified question 2 as a reference to the issue whether a legal act of the European Union can violate fundamental rights, while question 3 concerned the evaluation of *ultra vires* acts of the Union. These two questions, the Court argued, are clearly constitutional issues to be examined by the Court directly at the level of the Fundamental Law, as they satisfy the condition of concreteness under Article 38 (1) of the Act on the Constitutional Court.²¹ Question 4 could only be interpreted in the framework of questions 2 and 3. Therefore, the Court explained its response to question 4 in its response to questions 2 and 3. In other words, the Court tried to avoid directly answering the question about the constitutionality of the EU's power of relocation.

Answering questions 2-4, the Court established that its own competence was regulated neither by the Fundamental Law, nor the Act on the Constitutional Court on fundamental rights review and *ultra vires* review, the latter composed of a sovereignty review and an identity review. But before creating these new competences for themselves, the justices examined the positions taken by the European Court of Justice (ECJ) and Member State constitutional courts. Referring to *Costa v. Enel*,²² the Hungarian Constitutional Court acknowledged "the fact that from the point of view of the ECJ, EU

¹⁸ In my view the legal basis for this is article 78(3) of the Treaty on the Functioning of the European Union, which states that: "In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament".

¹⁹ Hungarian Constitutional Court, Decision 22/2016. (XII. 5.) AB (30 November 2016). The English translation of the decision is available on the homepage of the Constitutional Court: <http://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf>. The citations are from this translation.

²⁰ See Injunction X/3327-31/2015. On the separation: The Constitutional Court has the power to separate parts of a petition, and decide them separately from each other. The decision on the interpretation of Article XIV (1) of the Fundamental Law has not yet been published.

²¹ Section 38(1) reads: "On the petition of Parliament or its standing committee, the President of the Republic, the Government, or the Commissioner of Fundamental Rights, the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a *concrete* constitutional issue, provided that the interpretation can be directly deduced from the Fundamental Law". (Emphasis added – G.H.)

²² ECJ, Case 6-64, *Costa v. ENEL* (15 July 1964), ECLI:EU:C:1964:66.

law is defined as an independent and autonomous legal order”, but quoting the *Kloppenburg* judgment²³ of the German Federal Constitutional Court, the Hungarian justices stated that it is Member State “national enforcement acts that ultimately determine the extent of primacy to be enjoyed by EU law against the relevant Member State’s own law in the Member State concerned”.

On the basis of a review of the case law of many of the Member States’ supreme and constitutional courts, including the Lisbon judgment of the German Federal Constitutional Court, the Hungarian justices established that “within its own scope of competences on the basis of a relevant petition, in exceptional cases and as a resort of *ultima ratio*, i.e. while respecting the constitutional dialogue between the Member States, it can examine whether exercising competences on the basis of Article E) (2) of the Fundamental Law results in a violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the State) and the constitutional self-identity of Hungary”.²⁴

With regard to the fundamental rights review, the Court established that “any exercise of public authority in the territory of Hungary (including the joint exercise of competences with other Member States) is linked to fundamental rights”.²⁵ The fundamental rights review is based on Article E) (2) and Article I (1) of the Fundamental Law. The latter provision declares that “The inviolable and inalienable fundamental rights of MAN shall be respected. It shall be the primary obligation of the State to protect these rights.” Having these rules in mind, and after referring to the *Solange* decisions of the German Federal Constitutional Court, and explicitly to the decision of 15 December 2015 (2 BvR 2735/14), and the need for cooperation in the EU and the primacy of EU law, the Court stated that it “cannot set aside the *ultima ratio* protection of human dignity and the essential contents of fundamental rights, and it must recognize that the joint exercise of competences under Article E) (2) of the Fundamental Law would not result in a violation of human dignity or the essential content of fundamental rights”.²⁶

Regarding the *ultra vires* review, the Court argued that there were two main limits on conferred or jointly exercised competencies under Article E) (2): “the joint exercise of a competence shall not violate Hungary’s sovereignty (sovereignty control), and on the other hand it shall not lead to the violation of constitutional identity (identity control)”²⁷. But the Court also emphasized that “the direct subject of sovereignty- and identity control is not a legal act of the Union or its interpretation, therefore the Court shall not comment on the validity or invalidity of the application of primacy with respect to such acts of the Union”.²⁸

The constitutional foundation of the sovereignty review is Article B) (1) of the Fundamental Law, which states: “Hungary shall be an independent, democratic rule-of-law State”. Paragraphs (3) and (4) contain the popular sovereignty principle: “(3) The source of public power shall be the people”, “(4) Power shall be exercised by the people through elected representatives or, in exceptional cases, directly”. The Court warned that these provisions of the Fundamental Law “shall not be emptied out by the Union clause in Article E)”, and it established that “the maintenance of Hungary’s sovereignty should be presumed when reviewing the joint exercise of competences” that have already been conferred on the EU.²⁹

The protection of constitutional identity, the Court argued, is based on Article 4(2) TEU and on “informal cooperation with the ECJ based on the principles of equality and collegiality, with mutual

²³ BVerfGE 75, 223 [242] (1987) - *Kloppenburg-Beschluß*.

²⁴ 22/2016. (XII. 5.) AB, *op.cit.* note 19, para.46.

²⁵ *Ibid.* para.47.

²⁶ *Ibid.*, para.49.

²⁷ *Ibid.*, para.54.

²⁸ *Ibid.*, para.56.

²⁹ *Ibid.*, paras 59-60.

respect to each other”.³⁰ The Court “interprets the concept of constitutional identity as Hungary’s self-identity and it unfolds the content of this concept from case to case, on the basis of the entire Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Article R) (3) of the Fundamental Law”.³¹ The Court held that “the constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today – can be highlighted as examples: freedoms, the separation of powers, a republic as the form of government, respect for autonomy under public law, freedom of religion, the exercise of lawful authority, parliamentarism, equality of rights, acknowledging judicial power, protection of nationalities living with us”.³² According to the Court, these are the achievements of the Hungarian historical constitution on which the legal system rests.

The Court held that “the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law, consequently constitutional identity cannot be waived by way of an international treaty”.³³ Therefore, the Court argued, “the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State”.³⁴ Because sovereignty and constitutional identity are in contact with each other in many aspects, “their review should be performed with due regard to each other in specific cases”.³⁵

Based on the above, the Court came back to the Commissioner’s question related to the transfer of third-country nationals in the context of the EU, and answered that question in the framework of this abstract constitutional interpretation as follows: “If human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution can be presumed to be violated due to the exercising of competences based on Article E) (2) of the Fundamental Law, the Constitutional Court may examine, on the basis of a relevant petition, in the course of exercising its competences, the existence of the alleged violation”.³⁶ And this very sentence is also the holding (dictum) of the judgment, which stands at the very beginning of the decision.

Looking at the competence of the Constitutional Court, neither the Fundamental Law nor the Act on the Constitutional Court authorizes the Court to perform this review. Article 24 (2) of the Fundamental Law states that in every listed jurisdiction of normative control (points a)-c) and e)) the subjects of review are either Hungarian legal norms or judicial decisions. Article T) (2) of the Fundamental Law lists all the legal regulations of Hungarian authorities, without mentioning legal acts of the European Union, which consequently cannot be subject to any review procedure of the Hungarian Constitutional Court. According to Article 23 (3) of the Act on the Constitutional Court, the Court is authorized to carry out preliminary review of the conformity of an international treaty or of its provisions with the Fundamental Law. However, this competence certainly does not apply to EU legal regulations.

Interestingly, although three of the justices recognized that the Hungarian Constitutional Court does not have the power to review EU legal acts, this did not motivate them to write a dissent by rejecting the Commissioner’s petition. István Stumpf, in his concurring opinion, claimed that the holding of the decision is limited to approving the review of “the joint exercise of competences under Article E) (2) of the Fundamental Law”, and although the reasoning deals with review of EU laws, the holding “only

³⁰ *Ibid.*, para.63.

³¹ *Ibid.*, para.64.

³² *Ibid.*, para.65.

³³ *Ibid.*, para.67.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*, para.69.

reaches a self-evident conclusion”.³⁷ But he fails to explain how the task could possibly be completed without reviewing EU legal regulation. In my view, a review of a Hungarian application of an EU decision would not amount to a review of EU law. In his concurring opinion, Béla Pokol takes it for granted that the holding of the decision declared monitoring by the Constitutional Court procedure to be against the legal acts of the Union as a possibility in the course of exercising all of its competences, although as pointed out earlier in this paper, it is not prescribed by either the Fundamental Law, or the Act on the Constitutional Court. Pokol thinks that “the right of initiating the procedure should have only been given to the Government” - by the Court.³⁸ In other words, Pokol assumes a non-existent legislative power of the Constitutional Court. László Salamon, the author of the single dissenting opinion, goes even further by stating that “in addition to establishing its own competence of review, the Constitutional Court should also declare the applicability of this requirement (*namely the duty of ultra vires review – G.H.*) to the whole of the State system”.³⁹ Make no mistake, he did not dissent on the ground that the Constitutional Court exceeded the limits of its own competences, but because he thought that the majority decision “fails to provide a complete answer to the questions aimed at interpretation of the Constitution, as requested by the Commissioner for Fundamental Rights”.⁴⁰

In an interview with Hungarian Public Radio, Viktor Orbán’s first jubilant reaction shows how enthusiastic he was that the Court helped the government’s wishes come true by making up for the failed referendum and the Seventh amendment: “I threw my hat in the air when the Constitutional Court ruled that the government has the right and obligation to stand up for Hungary’s constitutional identity.⁴¹ This means that the cabinet cannot support a decision made in Brussels that violates Hungary’s sovereignty”, adding that the Court decision is good news for “all those who do not want to see the country occupied”.⁴² In the same interview, Orbán anticipated the next issue relating to which Hungary’s national constitutional identity can be invoked, referring to the latest EU plan to terminate Hungarian state regulation of public utility prices. He said that the European Commission incorrectly argued that competition in the energy sector leads to lower prices. “Therefore Hungary insists on reducing utility rate cuts and we shall defend it in 2017. Although this will be a very tough battle, we have a chance of success”.⁴³ The next sign of the battle over asylum seekers was another speech by Viktor Orbán delivered in February 2017, in which he stated: “I find the preservation of ethnic homogeneity very important.”⁴⁴ On 5 March, a newspaper reported on Hungary’s treatment of asylum seekers, allegedly including beatings with batons and the use of dogs.⁴⁵

4 What’s Wrong with Hungary’s New Constitutional Identity?

³⁷ *Ibid.*, para.96.

³⁸ *Ibid.*, para.92.

³⁹ *Ibid.*, para.117.

⁴⁰ *Ibid.*, para.113.

⁴¹ In the context of the Constitutional Court decision it is clear that the Prime Minister was not merely referring to the possibility of the government bringing proceedings before the ECJ, but to the Court’s established power to declare EU law inapplicable.

⁴² “Orbán: Brüsszel meg akarja szüntetni a rezsicsökkentést”, *hvg.hu* (2 December 2016), available at <http://hvg.hu/itthon/20161202_Orban_beszed_pentek_reggel>.

⁴³ *Ibid.*

⁴⁴ Speech delivered on 28 February 2017 at the annual gathering of the Hungarian Chamber of Commerce. See Éva S. Balogh, “Viktor Orbán’s ‘ethnically homogeneous Hungary’”, *Hungarian Spectrum* (3 March 2017), available at <<http://hungarianspectrum.org/2017/03/01/viktor-orbans-ethnically-homogeneous-hungary/>>.

⁴⁵ The report from Belgrade was published in the Swedish newspaper *Aftonbladet*: “Flyktingarna: den ungerska polisen misshandlar och torterar oss”, *Aftonbladet* (5 March 2017), available at <<http://www.aftonbladet.se/nyheter/a/noLbn/flyktingarna-den-ungerska-polisen-misshandlar-och-torterar-oss>>.

I have to admit here that both the failed Seventh Amendment to the Fundamental Law of Hungary and the decision of the Constitutional Court on the interpretation of the country's constitutional identity look like carefully crafted documents, which seem to fit into the discourse about constitutional identity under several EU Member States' constitutional laws, as well as about national identity under EU law. Ever since its seminal judgment in *International Handelsgesellschaft*,⁴⁶ the ECJ has confirmed that national constitutional norms in conflict with secondary legislation should be inapplicable. On the other hand, Member State constitutions can specify matters of national identity, and constitutional courts claim identity review tests to EU acts. In other words, national constitutional courts must retain the authority for – as the German Federal Constitutional Court puts it – ‘safeguarding the inviolable constitutional identity’ of their states.

Decisions of the German Federal Constitutional Court, and other high courts, claiming jurisdiction to protect national identity usually refer to their co-operative relationship with the ECJ, emphasizing their ‘Europe-friendliness’,⁴⁷ and aim to increase the level of protection offered by the EU.⁴⁸ In the case of the European Central Bank's Outright Monetary Transaction (OMT) program about the ‘irreversibility of the Euro, the German Court in its first preliminary reference ever de facto declared the OMT program illegal, and called on the Court of Justice to strike it down.⁴⁹ But after the ECJ ruling delivered on 16 June 2015 reaffirmed the rule that a judgment of the Court of Justice “is binding on national courts, as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings,”⁵⁰ the German Court complied with the answer given by the ECJ.⁵¹

Similarly to their German colleagues in *Gauweiler*, the Italian Constitutional Court in its preliminary reference order 24/2017 explains to the ECJ the reasons why the Italian justices think that the ECJ Grand Chamber judgment of 8 September 2015 in case C-105/14 in *Taricco* infringes upon the Italian constitutional principle not to be prosecuted beyond the statute of limitation period that applied at the time a criminal offence was committed, and invites the ECJ to correct or qualify its decision. As Davide Paris rightly observes, even though the ECJ might well be unhappy with this development of ‘threatening references of appeal’, it is better than seeing national constitutional courts invoking constitutional identity to decide whether and to what extent Member States must comply with EU law, without the ECJ having the opportunity to express its opinion.⁵²

In the framework of dialogue between national constitutional courts and the ECJ, the Spanish Tribunal Constitucional emphasized the harmony between European and Spanish basic values and read into the identity clause a confirmation that an infringement of the core principles of the Spanish

⁴⁶ ECJ, Case C-11/70, *International Handelsgesellschaft mbH* (17 December 1970), ECLI:EU:C:1970:114.

⁴⁷ See for instance the German Federal Constitutional Court judgment of 24 April 2013 on the Counter-Terrorism Database Act, BVerfG, 1 BvR 1215/07. This judgment was referred to by the United Kingdom Supreme Court in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*, 22 January 2014, available at <<http://www.bailii.org/uk/cases/UKSC/2014/3.html>>.

⁴⁸ BVerfG, Order of 15 December 2015, 2 BvR 2735/14. See also “Protection of Fundamental Rights in Individual Cases is Ensured as Part of Identity Review”, *BVerfG, Press Release No.4/2016* (16 January 2016), available at <<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html>>. This decision of the German Federal Constitutional Court on the European Arrest Warrant led to the Grand Chamber of the ECJ judgment of 5 April 2016 in the case ECJ, C-404/15, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* (5 April 2016), ECLI:EU:C:2016:198.

⁴⁹ BVerfG, Case No. 2 BvR 2728/13, order of 7 February 2014.

⁵⁰ ECJ, Case C-62/14, *Gauweiler* (16 June 2015), ECLI:EU:C:2015:400, para.16.

⁵¹ BVerfG, 34/2016. Judgment of 21 June 2016.

⁵² Davide Paris, “Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case *Taricco*”, *Questions of International Law, Zoom-in 37* (2017), 5-20.

Constitution would also violate the European Treaty.⁵³ Similarly, in the reading of the French Conseil d'État what is 'inherent' in the constitutional identity of a Member State is what is crucial and distinctive of it, namely the 'essential of the Republic'.⁵⁴ The conclusion of the Conseil d'État in the case of Arcelor was that if in the EU legal order there is equivalent protection of the principle of rights safeguarded by the Constitution, a review of the legality of the EU law should be referred to the ECJ.⁵⁵ The Czech Constitutional Court, although reserving its power to review the constitutionality of EU law, at the same time reserved this possibility for exceptional cases, such as the 'abandoning the identity of values' or exceeding the scope of conferred powers.⁵⁶

If we ignore the Constitutional Court's lack of competence to review EU law in the current Hungarian constitutional system, as argued earlier, what is wrong then with the decision of the Hungarian Constitutional Court, which also wants to break with the absolute primacy of EU law?

First, it is important to clarify the legal nature of the decision. It is certainly not aimed at placing the legality of an EU legislative act under review. Although, as mentioned, the parliamentary Commissioner in his petition to the Constitutional Court referred to Council decision 2015/1601 of 22 September 2015 on the quota system, he did not ask for a review of its legality, nor indeed did the Court provide a review.⁵⁷ Hence the decision cannot be considered as an *ultra vires* act or as an identity review of the Council decision itself. It is rather an announcement of what the Court could do to review such an EU decision, whether it violates "human dignity, other fundamental rights, the sovereignty of Hungary or its identity based on the country's historical constitution".⁵⁸

As the ECJ has stressed in its standing case law on derogations, EU laws must be interpreted strictly so as to be applicable only when the case at hand entails a 'genuine and sufficiently serious threat to a fundamental interest of society'.⁵⁹ No strict and exhaustive list of constitutional identity-sensitive matters is accepted by the ECJ, but taking into account the jurisprudence of the ECJ there are some more frequently acknowledged issues, such as decisions on family law, the form of State, foreign and military policy, and protection of the national language.⁶⁰ The subject matter of the Hungarian Constitutional

⁵³ Tribunal Constitucional 13.12.2004, Declaration (DTC) 1/2004. Quoted by Monica Claes, "National Identity: Trump Card or Up for Negotiation?", in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia, Cambridge, 2013), 109-139, at 128.

⁵⁴ See Conclusions of the Commissaire du gouvernement: Mattias Guyomar in Société Arcelor Atlantique et autres, lecture du 8 février 2007. For the French version of these Conclusions, see <http://cuf.spbu.ru/PDF/Arcelor_et_Air_Algerie.pdf>. Quoted by Barbara Guastaferrero, "Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause", 31(1) *Yearbook of European Law* (2012), 263-318, at 270.

⁵⁵ *Ibid.*

⁵⁶ Decision 26.11.2008, Lisbon I, Pl. ÚS 19/08. Quoted by Joël Rideau, "The Case Law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the 'German Model'", in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia, Cambridge, 2013), 243-261, at 255-256.

⁵⁷ Independently from this procedure, the Hungarian government, immediately after its Slovakian counterpart's submission, also challenged the quota decision before the ECJ. This procedure is still pending, but the ECJ will not take into account the text of the Hungarian constitution in its decision or its domestically binding interpretation by the Constitutional Court. Why not? What if Hungary argued that a judgment constituted a violation of article 4(2) TEU (the EU's obligation to respect Hungary's national identity)?

⁵⁸ See the wording of the holdings of 22/2016. (XII. 5.) AB, *op.cit.* note 19.

⁵⁹ ECJ, Case C-208/09, *Sayn-Wittgenstein* (22 December 2010), ECLI:EU:C:2010:806, para.86.

⁶⁰ See these matters mentioned in Pietro Faraguna, "Taking Constitutional Identities Away from the Courts", 42(1) *Brooklyn Journal of International Law* (2016), 491-578, at 506-508. In addition to *Sayn-Wittgenstein*, Faraguna mentions the *Groener* judgment (Case C-379/87, 28 November 1989, ECLI:EU:C:1989:599) from 1989, and the more recent *Runevic* judgment (Case C-391/09, 12 May 2011, ECLI:EU:C:2011:291). Barbara Guastaferrero also discusses the *Omega and Dynamic Medien* Cases (C-244/06, 14 February 2008, ECLI:EU:C:2008:85), the *Spain v. Eurojust* Case (Case 160/03, 15 March 2005, ECLI:EU:C:2005:168), as well as the *Affatato* Case (C-3/10, 1 October 2010, ECLI:EU:C:2010:574). See Guastaferrero, *op.cit.* note 54. Besides these cases, Monica Claes also mentions from the pre-Lisbon case-law the *Michaniki* case (Case 213/07) and *Adria Energia AG* (Case 205/08),

Court decision was the quota decision of the Council, on the basis of which 1294 asylum seekers would be relocated from Greece and Italy to Hungary, and the Hungarian authorities would be obliged to process their asylum applications. What ‘fundamental interests of society’ can legitimately trump the requirement of sincere cooperation under Article 4(3) TEU here? As I pointed out earlier, this could not be the alleged collective expulsion of asylum seekers by Italy and Greece claimed by the Commissioner in his petition because the Hungarian Fundamental Law prohibits the collective expulsion of non-Hungarians from the territory of Hungary, and not from a third country. In other words, the human dignity and other fundamental rights of refugees not staying in Hungary cannot be protected under the text of the current Hungarian Constitution.

Another problem with the Constitutional Court’s interpretation of the constitution is that it claims that ‘Hungary’s constitutional identity is rooted in its historical constitution’. But the substantive meaning of the text of the Fundamental Law on ‘the achievements of our historical constitution’ is utterly ambiguous;⁶¹ no legal-scientific consensus exists in Hungary as to its precise nature.⁶² Presumably, since the case law of the Constitutional Court prior to 2011 has been annulled, it should not include precedents stemming from the Court’s accumulated practice of legal interpretation since the regime change. Justice András Varga Zs. in his concurring opinion claims that ‘the constitutional governance of the country has been one of the core values the nation has always stuck to, and that has been a living value even at times when the whole or the majority of the country was occupied by foreign powers’.⁶³ By contrast, in my view, the thousand years of the Hungarian historical constitution – with the exception of some brief moments, such as during the failed revolution of 1848 or shortly after 1945 until the communist takeover, and also after 1989, when liberal democracy again seemed to be the ‘end of history’⁶⁴ – the dominant approach was an authoritarian one.⁶⁵

5 Conclusion

When the Hungarian Constitutional Court protects Hungary’s current constitutional identity using the pretext of protecting the rights of asylum seekers against collective expulsion, but aiming at not taking part in the joint European solution to the refugee crisis⁶⁶, it does so in a way that is inconsistent with the requirement of sincere cooperation under Article 4(3) TEU. It promotes national constitutional identity

where the reference was to protection of the national cultural identity of the relevant Member States rather than to the more political form of it. See Claes, *op.cit.* note 53, at 131-32.

⁶¹ Because there is no list of laws officially considered as part of the historical constitution, an extreme interpretation could be made that the Jewish laws adopted in the 1930s, earlier than similar legislation in the Nazi Germany, belong to it.

⁶² See Gábor Schweitzer, “Fundamental Law – Cardinal Law – Historical Constitution: the Case of Hungary since 2011”, 4 *Journal on European History of Law* (2013), 124-128.

⁶³ 22/2016. (XII. 5.) AB., para.110, *op.cit.* note 19.

⁶⁴ See the results of the research project “Negotiating Modernity”: History of Modern Political Thought in East-Central Europe, led by Balázs Trencsényi, and supported by the European Research Council, available at <<https://erc.europa.eu/negotiating-modernity-history-modern-political-thought-east-central-europe>>.

⁶⁵ See Ivett Császár, Balázs Majtényi, “Hungary: The Historic Constitution as the Place of Memory”, in Markku Suksi, Kalliope Agapiou-Josephides, Jean-Paul Lehnens, Manfred Nowak (eds), *First Fundamental Rights Documents in Europe* (Intersentia, Cambridge, 2015), 57-69.

⁶⁶ In an article, Viktor Orbán warned the ‘unionists’ of the EU, who call for a United States of Europe and mandatory quotas, that if they refuse to accept the ‘sovereignists’ desire for a Europe of free and sovereign nations, who reject quotas of any kind, the mainstream will follow precisely the course that Hungary has set forth to affirm its constitutional values, Christian roots, its demographic policy, and its effort to unify a nation scattered across borders. See Viktor Orbán, “Hungary and the Crisis of Europe: Unelected Elites versus People”, *National Review* (26 January 2017), available at <<http://www.nationalreview.com/article/444279/hungary-crisis-europe-unelected-elites-versus-people>>.

without accepting the constitutional discipline demanded by the European legal order⁶⁷. The reference to national constitutional identity of Article 4(2) is legitimate only if a Member State refuses to apply EU law in a situation where a fundamental national constitutional commitment is in play.⁶⁸ The Hungarian abuse of constitutional identity is nothing but national constitutional parochialism,⁶⁹ which attempts to abandon the common European constitutional whole.

⁶⁷ This is what Joseph Weiler calls the principle of constitutional tolerance, which lies at the heart of what makes European integration possible. See Joseph H. H. Weiler, “In Defence of the Status Quo: Europe’s Constitutional Sonderweg”, in Joseph H. H. Weiler and Marlene Wind, *European Constitutionalism Beyond the State* (Cambridge University Press, Cambridge, 2003).

⁶⁸ See Mattias Kumm and Victor Ferreres Comella, “The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union”, 3 *ICON*, 473-492, at 491 and 492.

⁶⁹ See the term used by Mattias Kumm, “Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism”, in Matej Avbelj and Jan Komárek, *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, London, 2012), 39-65, at 51.