

# The Hungarian sword of constitutional identity

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### ABSTRACT

In its ‘refugee quota decision’ of 2016 the [Hungarian Constitutional Court \(HCC\)](#) ‘invented’ its competences of ultra vires, sovereignty and constitutional identity controls. The sword of constitutional identity (CI) has been forged against foreign – first of all – EU law. In the development of the new concept the interplay between the Government, the Government-dominated parliament and the Constitutional Court loyal to the Government seems to be evident. The textual analysis of the relevant HCC’s decisions proves that the Hungarian Constitutional identity (HCI) contains legal acts in force – including the Fundamental Law (constitution) and the Founding treaties of the EU –, legal acts ‘not in force but valid’ and activities related to the fight for independence of the Hungarian State.

As far as the nature of the HCI is concerned, the article demonstrates the strong relationship with sovereignty control, and the ‘historical constitution’ and emphasises the HCC’s statement according to which the CI is not created by the constitution, it is merely acknowledges it.

Given the large number of elements identified as part of the HCI, its openness to the inclusion of further elements, and the questionable nature of the HCI, the author submits that the concept is inappropriate for any meaningful constitutional review.

The HCC – at least until now – despite being invited to do so, has refused to use the sword against EU secondary law and the judgment of the European Court of Justice, and avoided overt constitutional conflict. However, this does not mean that the HCC is ready to enter into sincere dialogue with the court in Luxembourg.

### KEYWORDS

Hungary, constitutional identity, constitutional dialogue, Hungarian constitutional court, European court of justice, Hungarian government

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## 1. INTRODUCTION

The concept of constitutional identity may have been introduced into European constitutionalism discourse by the *Solange I* judgment of the German Bundesverfassungsgericht as early as 1974.<sup>1</sup> The competence of a constitutional identity review of EU legal acts was directly established in the Lisbon judgment of 2009 of the German Federal Constitutional Court<sup>2</sup>. The term appeared first time in a decision of the French Conseil Constitutionnel in 2006.<sup>3</sup> References to the elements of national constitutional identity are also present in the jurisprudence of the European Court of Justice (ECJ). The notion became à la mode, inducing an enormous number of legal studies.<sup>4</sup>

One of the newcomers on the scene is the Hungarian Alkotmánybíróság (Hungarian Constitutional Court - HCC). The cause of the introduction of Hungarian constitutional identity into its reasoning is closely related to the anti-migration policy of the Orbán government. It firmly decided that it would oppose – even at the price of breaching EU law – the unwanted migration pressure on the country. This came true when the Government refused to apply the Council's Decision on relocation.<sup>5</sup>

Being invited to take a position by the petition of the Commissioner for Fundamental Rights which questioned in substance the constitutionality of the Council's Decision, the HCC in its 'quota decision' of 2016<sup>6</sup> – following the German Constitutional Court – declared its competence to conduct a constitutional identity review vis-a-vis EU law, in addition to fundamental rights control and sovereignty control. The quota decision of the HCC was followed in 2018 by the Seventh Amendment to the Hungarian constitution (Fundamental Law – FL), according to which "The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State."<sup>7</sup>

The Hungarian Government established a fence all along its Serbian border and introduced a legal regime and administrative practice which made almost impossible not only illegal immigration but also the administration of demands for international protection as provided in EU law. The Court of Justice of the European Union declared that Hungary failed to comply with the relevant provisions of EU law.<sup>8</sup>

Shortly after the publication of the judgment, the Hungarian Government turned to the Constitutional Court questioning, in essence, the constitutionality of the judgment.

<sup>1</sup>BVerfGE 37, 271 (280).

<sup>2</sup>BVerfGE 123, 267 Lisbon-Urteil.

<sup>3</sup>Cons.cons. n° 2006–540, 27 juillet 2006, R. 88.

<sup>4</sup>Besselink (2010), Burgorgue-Larsen (ed) (2011), Saiz Arnaiz and Alcobarro Llivina (eds) (2013), Faraguna (2017).

<sup>5</sup>Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. Official Journal of the European Union L 248/80, 24.9.2015. The Decision entered into force on 25.9.2015.

<sup>6</sup>Decision 22/2016 (XII.5.) AB on the interpretation of Article E) (2) of the Fundamental Law – 'the quota decision') The English version of the Decision is accessible on the official website of the Alkotmánybíróság (Constitutional Court) available at [link1](#).

<sup>7</sup>Article R (4) of the Fundamental Law.

<sup>8</sup>C-808/18, *Commission v Hungary* (Accueil des demandeurs de protection internationale). (ECLI:EU:C:2020:1029).



The Constitutional Court was invited to further explain its understanding – once again in opposition to EU law - on the content and nature of Hungarian constitutional identity. (Decision 32/2021. (XII.20.) AB – ‘the asylum judgment decision’)

The quota decision triggered a number of reflexions, not only in the Hungarian but also in the international constitutional legal literature.

According to mainstream commentators, the decision served as a nationalist (souverainiste) opposition to EU law (the European Union, the European integration), as it is intended for use as a sword against EU law.<sup>9</sup>

For Halmai,

(T)he Hungarian abuse of constitutional identity is nothing but national constitutional parochialism, an attempt to abandon the common European constitutional whole.<sup>10</sup> ... 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.<sup>11</sup>

Kelemen and Pech maintain that ‘using constitutional identity explicitly and constitutional pluralism implicitly to justify defiance of EU migration policies, is as cunning as it is (deliberately) misguided.’<sup>12</sup> Kovács suggests that ‘...the political claim to an ethnocultural understanding of identity was transformed as the judicial understanding of constitutional identity by this decision.’<sup>13</sup>

... (t)he V4 (group of EU Member States, which consist of the Czech Republic, Hungary, Poland and Slovakia) interpretations weaken the authority of the CJEU (Court of Justice of the European Union), and therefore, ultimately, the rule of law in the EU.<sup>14</sup>

Others emphasize the uncertainties of the nature of constitutional identity (based on ‘the *acquis*’ of the ‘historical constitution’), which may cause methodological problems in the possible use of the ‘Hungarian sword’ of constitutional identity control,<sup>15</sup> and the lack of constitutional or legal bases for these new competences (i.e. the fundamental rights, sovereignty and constitutional identity controls of EU law).<sup>16</sup>

In Spieker’s typology of identity review mechanisms the Hungarian version has been classified as ‘revealing a clear tendency towards hard conflict (i.e. between the national courts and the ECJ – E.V) identity review’.<sup>17</sup> If the conflict ends up with refusal of the application of EU law (including the decision of the ECJ) the foundations of the EU legal order would be put in danger.

<sup>9</sup>Faraguna (2017) 1630.

<sup>10</sup>Halmai (2018) 42.

<sup>11</sup>Halmai (2018) 22.

<sup>12</sup>Kelemen and Pech (2019) 69.

<sup>13</sup>Kovács (2017) 1716.

<sup>14</sup>Kovács (2017) 1720.

<sup>15</sup>Pozsár-Szentmiklósy and Kéri (2018) 326.

<sup>16</sup>Blutman (2017) 2–14, Gárdos-Orosz (2017), Orbán (2020), Chronowski, Vincze and Szentgáli-Tóth (2022).

<sup>17</sup>Spieker (2020).



In order to avoid ‘la guerre des juges’ commentators advocate for ‘judicial dialogue’, ‘sincere cooperation’, ‘mutual accommodation’, and ‘constitutional empathy’ between national constitutional courts and the CJEU. However, the possibility of hard conflict cannot be excluded in the relationship between the HCC and the European Court of Justice.

The aims of this contribution are threefold:

To expose the interplay between the HCC, the Hungarian parliament and the Orbán Government and answer the question of whether there is a limit to the HCC’s loyalty to the Government as far as national constitutional identity is concerned (1); to attempt to reconstruct the (possible) meaning (content) of the term ‘constitutional self-identity’ (2); and to examine the chances of avoidance of hard conflict between the HCC and the ECJ by way of ‘sincere constitutional cooperation.’ (3).

It is hoped that the textual analysis of the most relevant decisions in this regard and the relatively lengthy citations - also from related documents - will help provide a better understanding of the formation of the Hungarian doctrine of constitutional identity, and the functioning of the constitutional court in an illiberal democracy, which Hungary has become in these days.

## 2. INTERPLAY BETWEEN THE CONSTITUTIONAL COURT, THE NATIONAL ASSEMBLY, AND THE GOVERNMENT

According to the Fundamental Law, the Constitutional Court shall be the principal organ for the protection of the Fundamental Law. It may annul any law or any provision of a law and any judicial decision which conflicts with the Fundamental Law. The fifteen members of the HCC are elected for twelve years with the votes of two thirds of the Members of the National Assembly. A member of the Constitutional Court may not be a member of a political party or engage in political activity.<sup>18</sup> The HCC enjoys a large formal (legal) personal, institutional and financial independence.

Except for a very short period of time, since 2010 the Fidesz-KDNP party coalition – led by Fidesz – has had two thirds of the votes in the parliament. This majority empowers the ruling coalition - in the interpretation of the ruling coalition itself – with not only constitutional amendment but also with constitution making competence. Due to the tight party discipline, the parliamentary control of the Government became illusory, and the parliament votes the Government’s will into law quasi automatically. Currently the HCC is composed of members loyal to the Government.<sup>19</sup> Its decisions in politically sensitive cases are systematically favourable for the Government.<sup>20</sup>

We pose the question of whether the loyalty towards the Government has its limits, or is absolute in the constitutional identity jurisprudence of the HCC.

<sup>18</sup>Article 24 of the Fundamental Law.

<sup>19</sup>For the period between 2010–2014, see [Szente \(2016\)](#). From 2014 the tendency detected until that time as far as the political orientation of the judges at the HCC is concerned became even stronger.

<sup>20</sup>Kelemen and Pech use the term ‘kangaroo court’ for captured constitutional courts such as the HCC. [Kelemen and Pech \(2019\)](#) footnote 4, 65. [Gárdos-Orosz \(2020\)](#) 31–33.



The Orbán Government made it clear that it does not accept the Council's relocation Decision.<sup>21</sup> The Hungarian Government voted against the Decision in the Council<sup>22</sup> and after the entry into force of the Decision, it did nothing to implement it.

Simultaneously, the government called for a referendum on the following question: 'Do you want the European Union, without the consent of Parliament, to order the compulsory settlement of non-Hungarian citizens in Hungary?' The political aim of the referendum was to gain the approval of the people to protect 'Hungary's and Europe's ethnic, cultural and religious identity.' The referendum held on 2 November 2016 was invalid because of the low turnout. Shortly afterwards, the Government proposed a constitutional amendment to put the wished-for results of the referendum into the Fundamental Law. The proposal for the Seventh Amendment would add to the National Avowal (a kind of preamble) FL: 'We hold that the defence of our constitutional self-identity, which is rooted in our historical constitution, is the fundamental responsibility of the state.' The EU clause (Article E) of the FL would have been amended in such a way that the exercise of constitutional powers by the Member States or by the EU institutions

must be in harmony with the fundamental rights and freedoms established in the Fundamental Law and must not curtail Hungary's inalienable right to determine its territory, population, or form of government.

The proposal for the Seventh Amendment would declared that it is the responsibility of every state institution to defend Hungary's constitutional identity. On 8 November 2016 the proposed amendment fell two votes short<sup>23</sup> of the two thirds majority required to approve amendments to the Fundamental Law.<sup>24</sup>

However, the Government did not give up its 'fight against Brussels'.

## 2.1. The quota decision

On 17 November 2015 the National Assembly adopted an Act calling on the Government to initiate an annulment procedure against the Decision before the European Court of Justice.<sup>25</sup>

<sup>21</sup>Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. Official Journal of the European Union L 280/80, 24.9.2015. The Decision entered into force on 25.9.2015.

<sup>22</sup>At the various meetings held within the Council between 17 and 22 September 2015, the Commission's initial proposal was amended on certain points. Hungary at the various meetings held within the Council stated that it rejected the notion of being classified as a 'frontline Member State' and that it did not wish to be among the Member States benefiting from relocation as were Italy and Greece. Accordingly, in the final version of the proposal, all reference to Hungary as a beneficiary Member State, including in the title of the proposal, was deleted. Likewise, Annex III to the Commission's initial proposal, concerning the distribution of 54,000 applicants for international protection whom it had initially been planned to relocate from Hungary was deleted. On the other hand, Hungary was included in Annexes I and II as a Member State of relocation of applicants for international protection from Italy and Greece respectively and allocations were therefore attributed to it in those annexes. On 22 September 2015, the Commission's initial proposal as thus amended was adopted by the Council by a qualified majority. The Czech Republic, Hungary, Romania and the Slovak Republic voted against the adoption of this proposal. Judgment of the European Court of Justice C-647/15, *Hungary v. Council*, (ECLI:EU:C:2017:631) paragraphs 9–11.

<sup>23</sup>Országgyűlési Napló (Diary of the National Assembly), 8 November 2016 at [link2](#).

<sup>24</sup>Due to two by-elections in early 2015 Fidesz-KDNP lost its two-thirds majority by two votes.

<sup>25</sup>Act CLXXV of 2016 on the action, for the protection of Hungary and Europe against the mandatory installation quota). The proposal was introduced by the members of the governing coalition (Fidesz-KDNP).



It does not come as surprise that on 3 December 2015 the Government brought an action for annulment before the ECJ.<sup>26</sup> On the very same day (!) the Commissioner for Fundamental Rights initiated a procedure before the Constitutional Court. Formally it asked the HCC for an abstract constitutional interpretation of the European integration clause (Article E) (2)) and the provision of the FL concerning the prohibition of group expulsion (Article XIV (1)–(2))<sup>27</sup>, but in essence it argued in favour of the unconstitutionality of the Council’s Decision, inciting the CC to declare it as such.<sup>28</sup> Considering that the Commissioner for Fundamental Rights was elected by the governing coalition in 2013, and the simultaneity of the action for annulment and the petition, the present author cannot exclude the possibility that a kind of consultation took place between the two actors.

The Constitutional Court adopted a Janus-faced decision. On the one hand it declared:

(T)he Constitutional Court may examine upon a relevant motion – in the course of exercising its competences – whether the joint exercise of powers under Article E) (2) of the Fundamental Law would violate human dignity, another fundamental right, the sovereignty of Hungary or its identity based on the country’s historical constitution<sup>29</sup>

In the reasoning it explained:

Respecting and safeguarding the sovereignty of Hungary and its constitutional identity is essential for everybody (including the National Assembly contributing to the European Union’s decision-making mechanism and the Government directly participating in that mechanism), and, according to Article 24 (1) of the Fundamental Law, the principal organ for the protection is the Constitutional Court.<sup>30</sup>

Commentators point out that these statements are quasi equivalent to the Government’s failed proposal relating to the Fundamental Law.<sup>31</sup>

This seems to be proven if we read the Minister of Justice’s declaration in the parliament on 5 June 2018, when – in the name of the Government – he explained the reasons for the newly introduced proposal to the amendment of the Fundamental Law:

<sup>26</sup>C-647/15, Hungary v Council (Joined Cases C-643/15 and C-647/15, Slovak Republic and Hungary v Council of the European Union (ECLI:EU:C:2017:631). In its application Hungary submitted, amongst others, that the contested act lacks proper legal basis, breaches essential procedural requirements, and violates the principles of legal certainty, normative clarity, necessity and proportionality.

<sup>27</sup>Article XIV (1): 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. (2) No one shall be expelled or extradited to a State where he or she would be in danger of being sentenced to death, being tortured, or being subjected to other inhuman treatment or punishment.’

<sup>28</sup>...the commissioner for fundamental rights concluded that ‘the Hungarian constitutional institutions, first and foremost [...] the Constitutional Court’ are also bound to safeguard the compliance with the ultra vires prohibition, as a question of constitutional law. The petitioner holds that in the course of exercising its competences the Constitutional Court may establish the inapplicability of legal acts of the Union, as they have been adopted in the absence of a relevant competence of the EU, using as an example the EU Council Decision indicated in the first question (i.e., the quota decision – EV) Quota decision paragraph [19].

<sup>29</sup>Operative part of the decision official translation on the Hungarian Constitutional Court’s home page. [Link3](#).

<sup>30</sup>Paragraph [55] of the reasoning.

<sup>31</sup>[Halmai \(2018\) 29](#), [Kovács \(2017\) 1714](#).



It is clear for us that the cooperation in the Union is based on the limits on the sovereignty of Member States, and constitutional self-restraint. This makes it possible that in the territory of the (Member) State the law of the Union will gain effective application – in certain areas of supreme power – above the citizen, and the will of the Union will gain effective application above the citizens. However, this is not in contradiction with the fact that we have a constitutional core, the protection of which is our constitutional obligation. If the law of the Union and especially the decisions of the institutions of the Union might have supremacy over the Member States' constitutional identity, or the fundamental elements of their constitutional setting, the consequence would be the dissolution of the sovereign existence of the Member States in the legal order of the Union. This doctrinal thesis may have its roots in the German Constitutional Court, which elaborated it in its Lisbon decision. Since that time the reference to the constitutional identity and to the sovereignty in various forms has been part of the jurisprudence of different constitutional courts as it is the case of the Hungarian Constitutional Court's jurisprudence. In its decision the HCC declared that Hungary, when it joined the European Union, did not surrender its sovereignty; it only made possible the common exercise of some of its competences ... (The HCC) also established that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, and its independent statehood.<sup>32</sup>

On the other hand, in the reasoning of the decision the HCC also stated that

... the Constitutional Court separated, with an independent ruling, the motion on the interpretation of Article XIV of the Fundamental Law, as a specific contested issue, from the motion on the interpretation of Article E) of the Fundamental Law, since it held it appropriate for the adjudication of the case to examine them on the merits and assess them separately.<sup>33</sup>

This means that the Constitutional Court refused in practice to carry out a control of the constitutionality of the Council's decision. In the framework of the abstract interpretation of Article E) (2) it declared as a matter of principle:

The Constitutional Court emphasizes that the direct subject of sovereignty and identity control is not the legal act of the Union or its interpretation; therefore the Court shall not comment on the validity or the primacy of application of such Union acts.<sup>34</sup>

## 2.2. The asylum judgment decision

On 28 July 2018 the General Assembly adopted the Seventh Amendment to the Fundamental Law. The amendment introduced the following text to the National Avowal:

We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State.

<sup>32</sup> Author's translation. The two final sentences are identical with sentences in paragraph [67] of the 'Quota decision' of the HCC. [Link4](#).

<sup>33</sup> Paragraph [29] of the quota decision.

<sup>34</sup> Paragraph [56] of the quota decision.



A new sentence was added to the European integration clause<sup>35</sup>  
Article E (2):

Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.

In the interpretation of the HCC

The first clause of the addendum to Article E under the Seventh Amendment essentially establishes fundamental rights control, while the second clause establishes sovereignty and identity control at the level of the Fundamental Law.<sup>36</sup>

A new paragraph was introduced to Article R: ‘(4) The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.’  
Article XIV. (1) provides:

No foreign population shall be settled in Hungary. A foreign national, not including persons who have the right to free movement and residence, may only live in the territory of Hungary under an application individually examined by the Hungarian authorities. The basic rules on the requirements for the submission and assessment of such applications shall be laid down in a cardinal Act.

...

Article XIV. (4)

Hungary shall, upon request, grant asylum to non-Hungarian nationals who are persecuted in their country or in the country of their habitual residence for reasons of race, nationality, the membership of a particular social group, religious or political beliefs, or who have a well-founded reason to fear direct persecution if they do not receive protection from their country of origin, nor from any other country. A non-Hungarian national shall not be entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution.

This amendment introduced into [the Fundamental Law of Hungary](#) the notion of constitutional identity. The orientation of the concept is clearly defensive; it is to be used against threats or offence coming from abroad. (In the parliamentary debate the Government overtly argued the necessity of the protection against the absolute primacy of EU law in Hungary.)

On 21 December 2018 the European Commission brought an action before the European Court of Justice claiming that the Hungarian anti-migration (asylum) legislation and policy was in breach of the Union’s law. On 17 December 2020 the Court of Justice in its judgment in [Case C-808/18, European Commission v Hungary](#) declared the breach of the relevant EU law.<sup>37</sup>

<sup>35</sup>Article E) paragraph (2) (‘European integration clause’) of the Fundamental Law declares: ‘With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union.’

<sup>36</sup>[Decision 32/2021](#). (XII.20.) AB (‘the asylum judgment decision’) paragraph [26].

<sup>37</sup>[C-808/18, Commission v Hungary](#) (Accueil des demandeurs de protection internationale) (ECLI:EU:C:2020:1029).





Shortly after the publication of the judgment, on 25 February 2021, the Minister of Justice turned to the Constitutional Court.<sup>38</sup> In her petition – as the Commissioner for Fundamental Rights had done in his motion concerning the quota decision – she asked for an abstract interpretation of the Fundamental Law on the surface, but implicitly invited the Court to conduct an *ultra vires* (fundamental rights, sovereignty, constitutional identity) control of the CJEU’s judgment.

[9]The petitioner takes the view that the exercise of EU competence under Article E (2) of the Fundamental Law, in conjunction with the last sentence of Article XIV (4) of the Fundamental Law, cannot restrict the inalienable right of Hungary to determine its population.

[10] In summary, the implementation of the CJEU judgment (in [Case C-808/18](#)) raises the following specific constitutional issue, and in this respect the petitioner request the Constitutional Court to interpret Articles E (2) and XIV (4) of the Fundamental Law: Is Hungary allowed to implement an EU legal obligation which, in the absence of the full effect utile of EU legislation could lead to a situation in which a foreign national illegally staying in Hungary continues to stay in the territory of the Member State for an indefinite period of time and, *de facto* becomes a part of the country’s population?

We would like to emphasize that the Hungarian Government in its defence before the Court of Justice did not rely on constitutional constraints concerning its legislation and practice made questionable by the European Commission, while, as we could see above, the relevant provisions were in force.

The Minister of Justice included in her motion the PSPP decision of the German Constitutional Court<sup>39</sup>, and concluded as follows:

The referred judgment of the Federal Constitutional Court is also an example that from the time when the [Decision 22/2016](#) (XII.5.) AB (the quota decision- EV) was adopted, the reservoir of the relevant international examples increased. In my opinion this is a circumstance the consideration of which is mandatory in the framework of the interpretation of the Fundamental law.

The Constitutional Court once again adopted a Salamonic decision.  
In the operative part of the Decision the HCC declared:

...on the basis of the interpretation of Article E (2) of the Fundamental Law, the Constitutional Court hereby hold as follows: Where the joint exercise of competences specified in this paragraph is incomplete, Hungary shall be entitled, in accordance with the presumption of reserved sovereignty, to exercise the relevant non-exclusive field of competence of the EU, until the institutions of the European Union take the measures necessary to ensure the effectiveness of the joint exercise of competences.<sup>40</sup>

This statement is very close to the Government’s suggestion; in other words the Constitutional Court seems to fulfil the Government’s expectation. But this reading reflects only one side

<sup>38</sup>[Decision 32/2021](#). (XII.20.) AB on the interpretation of the provisions of the Fundamental Law allowing the joint exercise of powers – hereinafter: the asylum judgment decision (The English version of the decision is accessible on the Constitutional Court’s website at [link5](#)).

<sup>39</sup>Urteil des Zweiten Senats vom 05. Mai (2020), 2 [BvR 859/15-](#), Rn. 1–237.

<sup>40</sup>Asylum judgment decision paragraph 1) of the operative part.



of the coin. This is only an abstract interpretation, without any legal consequence in the case at hand, especially for the constitutionality of the ECJ judgment:

An abstract constitutional interpretation may not become a statement of position applicable in the specific case on which the petition is based. Nor it is possible to provide an answer, appropriately abstract and binding for every future case, to a question which is closely related to the specific problem. *The Constitutional Court considers that the question in the present case requiring the interpretation of the Fundamental Law can be separated from the judgment of the CJEU presented in the petition.* (italics by EV) Therefore, in the present procedure, the Constitutional Court has only dealt with genuine issues of constitutional interpretation that may be directly derived from the question. Thus, the Constitutional Court interpreted Article E (2) of the Fundamental Law in the light of the specific issue of constitutional law identified in the petition. The Constitutional Court did not, however, assess whether the conditions set out in the petition were fulfilled in the specific case, that is, whether the incomplete effectiveness of the joint exercise of the competences was realised, nor could it take position on the question of whether the petitioner's argument that as a consequence of the CJEU judgment a foreign population may de facto become part of the population of Hungary is correct; this is a matter to be judged by the body applying the law (and not by the Constitutional Court).<sup>41</sup>

The HCC refers to the PSPP judgment,<sup>42</sup> but we could not identify any consequence of it in the reasoning or in the tenor of the Decision. Maybe this is a gesture towards the Government, or a contribution to the background of the anti-migration conclusion in the operative part. At this point we note that the HCC did not refer to the famous judgment of the Polish Constitutional Tribunal adopted on 7 October 2021,<sup>43</sup> which may be read as an open opposition to the judgment of the CJEU.<sup>44</sup>

We may say that – at least until now – the Hungarian Constitutional Court, while overwhelmingly loyal to the Government's orientation, in concrete cases has avoided any declaration of a conflict between the Fundamental Law and EU law, or undertaking a direct constitutional control of the judgment of the European Court of Justice.<sup>45</sup> Its proceeding reminds us of the 'la Quadrature du Net' case before the French Conseil d'État. In its recent decision the supreme administrative court – while invited by the Prime Minister to declare ultra vires the judgment of the ECJ<sup>46</sup> – confirmed the supremacy of the French constitution on the Union law, and the existence of the control of constitutionality on the application of secondary law as it is

<sup>41</sup>Asylum judgment decision paragraph [21].

<sup>42</sup>Asylum judgment decision paragraph [70].

<sup>43</sup>[The Constitutional Trybunal, K 3/21, Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union. Link6.](#)

<sup>44</sup>Maybe it is worth noting, that on 9 October 2021, the Hungarian Government adopted a Government decree, in which it paid tribute to the decision of the Constitutional Court of the Republic of Poland relating to the relationship between the national law and the Union's law, and invited the Minister for Justice to this position known to the Member States and Institutions of the European Union. Government Decree of 17/2021. (X.9).

<sup>45</sup>Chronowski and Vincze (2021).

<sup>46</sup>Case C-511/18, *La Quadrature du Net and Others* (ECLI:EU:C:2020:791).



interpreted by the ECJ, but refused to use the ultra vires control in the case at hand.<sup>47</sup> So far the pessimist expectation of Sarmiento and Utrilla – that the PSPP judgment of the German Constitutional Court may be followed in Budapest – has not become reality.<sup>48</sup>

Both in the quota decision case and the asylum judgment case the petitioners (the Commissioner for Fundamental Rights echoing the position of the Government, and the Government itself) incited the Constitutional Court to declare the Union’s legal acts (Council Decision, ECJ judgment) unconstitutional, or to establish a clear standard on the basis of which the unconstitutionality of the acts in question is obvious.

Therefore, we are suggesting that the loyalty of the Hungarian Constitutional Court towards the Government (parliament) has its limits. While it declared its competences regarding the fundamental rights- sovereignty- and constitutional identity reviews, it did not use these weapons against EU law. It clearly refused to conduct a direct sovereignty-identity review of EU acts.

We can only speculate on the reasons for this caution vis-à-vis direct constitutional control of EU law. The positions explained in the concurring opinions reveal a certain disagreement amongst the judges. In case of the quota decision Judge Dienes-Oehm and Judge Stumpf expressed their reluctance concerning the exercise of the new competences. Judge Pokol warned of the economic and political consequences of direct constitutional control and advocated the Government’s exclusive right to initiate this kind of procedure. On the other side of the bench, Judge Juhász and Judge Salamon defended the exercise of the control of constitutionality of the EU act at hand.<sup>49</sup> We can observe the same division of positions amongst the judges when looking at the concurring opinions attached to the asylum judgment decision. While Judge Czine, Judge Dienes-Oehm and Szabó argue for the supremacy of EU law over national law and the authority of the ECJ<sup>50</sup>, Judge Horváth and Judge Salamon were of the opinion that the HCC should have been more explicit in its opposition to the judgment of the ECJ.<sup>51</sup>

<sup>47</sup> *Conseil d’État Décision* No 393099 (ECLI:FR:CEASS:2021:393099.20210421 Decision adopted on 21 April 2021 The Conseil d’État even declared: ‘...contrairement à ce que soutient le Premier ministre, il n’appartient pas au juge administratif de s’assurer du respect, par le droit dérivé de l’Union européenne ou par la Cour de justice elle-même, de la répartition des compétences entre l’Union européenne et les États membres. Il ne saurait ainsi exercer un contrôle sur la conformité au droit de l’Union des décisions de la Cour de justice et notamment, priver de telles décisions de la force obligatoire dont elles sont revêtues.’ (paragraph 8.) For comment, see Marie-Christine de Montecler, *Conservation des données: la guerre des juges n’aura pas lieu*. Dalloz Actualité Édition du 18 février 2022, Christakis (2021).

<sup>48</sup> ‘The BVerfG’s rebellion clears the way for the ultra vires test to become an ordinary part of the toolbox of every national court and instigates potential dissident behaviour in other member states. If Karlsruhe can defy the primacy of EU law, so can Warsaw or Budapest.’ Sarmiento and Utrilla (2020). The president of the French Conseil d’État also explained in a press conference following the La Quadrature du Net decision, ‘... it was impossible for the French High Court to ‘rebel’ against the Luxembourg Court. This would have opened a Pandora’s box and would have ‘encouraged resistance’ by ‘Eastern capitals’ which are currently in a dispute with the CJEU over rule of law problems. Christakis (2021).

<sup>49</sup> Quota decision paragraphs [83]–[88] and [116]–[121] respectively.

<sup>50</sup> Asylum judgment decision paragraphs [112]–[142], [143]–[149], [222] respectively.

<sup>51</sup> Asylum judgment decision paragraphs [150]–[157], [205]–[213] respectively.



It is also worth noting in the context of HCC-Parliament-Government relationships, that there are examples of deference from the HCC to the Government and/or the Parliament stating their ‘responsibility for integration.’<sup>52</sup>

In the quota decision the HCC declared, in connection with the *ultra vires* review, that:

With regard to the petitioner’s motion related to transgressing the scope of competences, the Constitutional Court notes that when the *ultra vires* nature of an EU law is present, - on the basis of Article 6 of the Protocol that forms an integral part of the Founding Treaties - the National Assembly and - in accordance with Article 16 (2) of TEU - the Government, representing Hungary in the Council empowered to adopt legislation in the Union, may take the steps available and deemed necessary in the given situation. Furthermore, according to Act XXXVI of 2012 on the National Assembly and the National Assembly’s Resolution No. 10/2014. (II.24.) OGY on certain standing orders, upon the initiative of the Committee of European affairs, the National Assembly of Hungary or the Government of Hungary may file a claim with the Court of Justice of the European Union alleging the violation of the principle of subsidiarity by the legislative act of the European Union<sup>53</sup>

In the asylum judgment decision, the HCC also refers to the responsibility of the Hungarian constitutional organs:

...Hungary is only entitled to exercise a competence under Article E (2) of the Fundamental Law, which is to be exercised jointly (i.e. Union’s exclusive competence - EV.), until the European Union or its institutions have created the guarantees for the effectiveness of EU law; and only in a manner which is consistent with and aims at promoting the founding and amending treaties of the European Union (that is, contractual performance). The Member State’s exercise of the competence to be exercised jointly under Article E (2) of the Fundamental Law is conditional *on Hungary drawing the attention of the European Union or its institutions to the need to exercise the competence (italics - EV)*, which is to be exercised jointly, and the European Union or its institutions failing to do so.<sup>54</sup>

### 3. THE CONTENT AND NATURE OF THE HUNGARIAN CONSTITUTIONAL IDENTITY

#### 3.1. The content of constitutional identity

If we take the possible use of the constitutional identity review of EU law acts seriously, we may have to consider the substance of the concept, as a standard against which the constitutional control would be exercised. In the European judicial space there is no generally accepted list of components of national constitutional identity. In some cases the core values and principles

<sup>52</sup>We may not exclude the ‘inspiration’ the HCC gained from the German Constitutional Court’s jurisprudence. In its Lisbon decision the Bundesverfassungsgericht speaks about the responsibility for integration of the legislative bodies (BVerfGE 123, 267 - Lisbon Decision (Lissabon - Urteil) 2.d) and - concerning the bridging clause - it stated the obligations of the Government and the two houses of the legislation (BVerfG, Judgment of the Second Senate of 30 June 2009 - 2BvE 2/08 (Lissabon-Urteil) 3. a) cc). [Link7](#).

<sup>53</sup>Quota decision paragraphs [50]-[51] As far as the legal protection against the *ultra vires* acts of the Union is concerned, one can rightly ask why the HCC does not mention the most adequate procedure offered by the EU law itself, i.e. the annulment procedure under Article 263 TFEU, which is available to the Government.

<sup>54</sup>Asylum judgment decision paragraph [81].



of the constitution form part of the concept, while in others it is the elements which distinguish the identity of the State or its constitution from other states.<sup>55</sup>

In its quota decision the HCC declared that it unfolds the content of the concept of constitutional identity (the interpretation of which is Hungary's self-identity) case by case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Article R(3) of the Fundamental Law.<sup>56</sup>

In the subsequent points of the reasoning the Constitutional Court added:

[65] 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 division of powers,
- republic as the form of government,
- respect of autonomies under public law,
- the freedom of religion,
- exercising lawful authority,
- parliamentarism,
- the equality of rights,
- acknowledging judicial power,
- the protection of the nationalities living with us.

These are, among others, the achievements of our historical constitution, and the Fundamental Law and the whole Hungarian legal system is thus based upon them.

[66] The protection of constitutional self-identity may be raised in cases having an influence

- on the living conditions of individuals, in particular their privacy protected by fundamental rights,
- on their personal and social security, and
- on their decision-making responsibility, and
- when Hungary's linguistic, historical, and cultural traditions are affected.<sup>57</sup>

We consider that the vision of Hungarian constitutional identity (in the words of the HCC 'Hungary's constitutional self-identity') is extensively developed by Judge Varga. In his concurring opinions he contributed in a decisive manner what the HCC should understand by the content and nature of Hungary's constitutional identity. We may have an insider view to this approach in his concurring opinion to [Decision 2/2019](#). (III.5.) AB:

<sup>55</sup>Burgorgue-Larsen (2011), Spieker (2020).

<sup>56</sup>Quota decision paragraph [64].

<sup>57</sup>Concerning the last paragraph, Judge Stumpf rightly points out that 'This statement has been taken without examination from the decision of the German Federal Constitutional Court quoted earlier in the reasoning (BverfG, 2 BvE 2/08, 30 June 2009), in the absence of any argument based on [the Fundamental Law of Hungary](#).' Quota decision paragraph [108].



[72] Thus the constitutional identity of Hungary is a legal fact, but it is neither static nor closed. It is a legal fact, i.e. it is not a theoretical framework to be freely filled as it is based on laws, namely on the ineffective but valid rules of our historical constitution and on the Fundamental Law. It is a legal fact, which cannot be changed retroactively: everything incorporated into it shall remain there as a part of it. At the same time, it is not a static or closed catalogue of values, i.e. with a sovereign decision its content may be modified for the future. These modifications shall be added to our identity and they themselves shall become legal facts that cannot be modified retroactively. This is what makes the Fundamental Law a living framework.

[73] For example, the refusal of Ottoman occupation and the fight for the restitution of the constitutional independence of the country torn into three parts are such subsequently unmodifiable elements of our constitutional identity. Also our common constitutional statehood with Austria, enjoyed in its last phase as a part of the Austro-Hungarian Monarchy, is such a subsequently unmodifiable element of our constitutional identity. And also the fact that *Hungary has been, since 1 May 2004, a member of the European Union is such a subsequently unmodifiable element of our constitutional identity*. The fact that at different times Hungary has been subject to various rights and obligations based on different international treaties is such a subsequently unmodifiable element of our constitutional identity.<sup>58</sup>

As far as the content of the CI is concerned in this vision, we may identify the following characteristics:

In order to find the elements of the CI one must first turn to Hungarian history as far as it manifested in legal documents. These legal documents may contain ‘ineffective but valid’ acts, but also legal documents in force (e.g. the Fundamental Law, the founding treaties of the European Union).

One also must take into consideration historical facts having a decisive effect on the country’s (non)existence as a state (e.g. its common constitutional statehood with Austria).

In addition to legal and historical acts and facts, this approach – and this may be the strangest aspect of Varga’s vision for constitutional lawyers – also includes activities related to the ‘constitutional’ existence of the country (e.g. the ‘refusal’ of the Ottoman occupation, the ‘fight’ for the restitution of the constitutional independence).

Interestingly, in the most recent asylum judgment decision the HCC - without Judge Varga at the bench - added a new element to the content of Hungary’s constitutional identity, in exactly the same sense as the last dimension (i.e. that not only legal and/or historical facts but also activities form part of the CI):

On the basis of a combined interpretation of Article E) (2) and Article XIV (1) and (4) of the Fundamental law, the Constitutional Court finally holds as follows. The protection of the inalienable right of Hungary to determine its territorial unity, population, form of government and State structure shall be part of its constitutional identity.<sup>59</sup>

The statement that the *protection* itself is part of the Hungarian CI is perfectly in line with elements in Varga’s construction, such as the ‘*refusal* of the Ottoman occupation’ and the ‘*fight* for constitutional independence’.

<sup>58</sup>Decision 2/2019 (III.5.) AB paragraphs [72]–[73]. (The characters and numbers in italics are added by the author).

<sup>59</sup>Decision 32/2021. (XII.20.) AB paragraph 3 of the operative part.



The HCC arrived at this statement after taking a look at several elements of the legal history of Hungary,<sup>60</sup> starting from the Golden Bull of 1222, through the charter of March 1440 in which King Ulászló declared, in Krakow, that Hungary and Poland would unify their forces against the Turks, a citation from the prologus (!) of the Tripartitum about Hungary as ‘the bastion of Christianity’, Act XVI of 1790/91 in which the protection of linguistic, historical and cultural traditions were mentioned as an achievement of the historical constitution ‘and thus part of our constitutional identity’. The HCC also reminded us of the 1848–1849 Revolution and War of Independence which led to the extension of freedoms, a centralised State organisation and a national government accountable to the National Assembly. The restoration of Hungary’s sovereignty after the defeat of the War of Independence occurred in the acts of the Austro-Hungarian Compromise in 1867. The HCC concluded that

(T)he listed elements of the historical constitution relating to sovereignty, population, linguistic, historical and cultural traditions are considered to be achievements (*acquis*) with respect to Hungary’s constitutional identity, pursuant to article R (3) of the Fundamental law.<sup>61</sup>

Looking at the content of the constitutional identity expressed in the three decisions, we can only conclude that ‘il souffre d’une surabondance’, and that it is ‘trop plein and indéterminés’.<sup>62</sup> We share the opinions of Hungarian constitutional lawyers who maintain that on the basis of elements of the CI so far included in the HCC’s decisions, it is almost impossible to exercise any meaningful constitutional control of EU law.<sup>63</sup>

### 3.2. The nature of Hungarian constitutional identity

Perhaps the most striking feature of the nature of the Hungarian constitutional identity (‘Hungary’s self-identity’) is that in the Constitutional Court’s explicit interpretation the CI does not mean the identity of the constitution, but the CI of Hungary.<sup>64</sup> The legal (?) basis of the constitutional review mechanisms in the HCC’s reasoning is not given in the constitution but is justified by the relevant jurisprudence of other Member States’ constitutional courts or supreme courts. In this understanding the narrow relationship between the CI and national identity and national sovereignty is a logical consequence.

The examples of the elements of the Hungarian CI in the quota decision are labelled as ‘identical with the constitutional values generally accepted today’, but the language of these values deviates from ‘generally accepted’ constitutional language.<sup>65</sup>

Instead of rule of law, we read ‘exercising lawful authority’, and ‘division of powers’. In this language ‘freedoms’ does not necessarily mean ‘fundamental rights’ as generally used in modern constitutional vocabulary. It is curious that the word ‘democracy’ is constantly lacking in the decisions under scrutiny. Behind this special language – as is explained in Judge Varga’s

<sup>60</sup>Asylum judgment decision paragraphs [102]–[105].

<sup>61</sup>Asylum judgment decision paragraph [106].

<sup>62</sup>Burgogue-Larsen (2011) 161.

<sup>63</sup>Blutman (2017) 2–14, Chronowski, Vincze, Szentgáli-Tóth (2022) 451–52, Orbán (2020) 81.

<sup>64</sup>Quota decision paragraph [64]. Critically see Drinóczi (2017) 14.

<sup>65</sup>Quota decision paragraph [65].



concurring opinion – lie special elements of the ‘achievements of the Hungarian historical constitution’:

[110] Constitutional self-identity is not a universal legal value, it is a feature of specific States and of their communities, of the nation, that does not apply (in the same way) to other nations. In the case of Hungary, national identity is in particular inseparable from constitutional identity. 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 in the times when the whole or the majority of the country was occupied by foreign powers. This legal value has been manifested and presented in legal regulations:

- freedoms and the limitation of power (the Golden Bull – *Royal Decree 1222*),
- respect for autonomies under public law (*Tripartitum - collection of customary law 1517, in use until the middle of the XIX century*),
- freedom of religion (the Laws of Torda – *Transylvania - 1568*),
- lawful exercising of power (*Pragmatica Sanctio - 1723*),
- parliamentarism, equal rights (Laws of April 1848 – *under the 1848–1849 Revolution and War of Independence*),
- separation of powers, acknowledging judicial power, protection of minorities (Laws of the Austro-Hungarian Compromise - *1867*).<sup>66</sup>

These are the achievements of our historical constitution, and thus the Fundamental Law and the whole Hungarian legal system is based upon them. Since the values that make up this self-identity have come into existence on the basis of historical constitutional development, they are legal facts that cannot be waived, neither by way of an international treaty nor with the amendment of the Fundamental Law, because legal facts cannot be changed through legislation.<sup>67</sup>

Maybe the most questionable statement of the HCC on the (legal?) nature of the Hungarian CI is the following:

[67] The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law...

The declaration above is further explained by Judge Varga in his concurring reasoning:

These (the laws mentioned as elements of Hungary’s constitutional identity) in are the achievements of our historical constitution, the Fundamental Law and thus the whole Hungarian legal system is based upon. Since the values that make up the self-identity have come into existence on the basis of historical constitutional development, they are legal facts that can be waived neither by way of an international treaty nor with the amendment of the Fundamental Law, because legal facts cannot be changed through legislation. [112]<sup>68</sup>

Judge Stumpf in his concurring opinion to the quota decision opposed this kind of understanding of constitutional identity:

This approach would actually tear Hungary’s constitutional identity away from the text of the Fundamental Law, creating a kind of invisible Fundamental Law to be protected by the Constitutional

<sup>66</sup>The characters and numbers in italics are added by the author.

<sup>67</sup>Quota decision paragraph [110].

<sup>68</sup>He repeated this concept in point [70] in his concurring opinion to [Decision 2/2019 \(III.5\) AB](#).





Court – with a content interpreted according to an uncertain methodology, even by referring to imported foreign legal products – independently from the Fundamental Law. That would be contrary to the Fundamental Law. I am firmly convinced that the Constitutional Court should enforce Hungary’s constitutional identity on the basis of, and faithfully to the Fundamental Law, within the limits specified therein.<sup>69</sup>

Based on this statement, Spieker qualifies the Hungarian constitutional identity review mechanism as ‘idiosyncratic’. He notes that

Such points of reference beyond the constitutional text are not alien in Hungarian constitutional jurisprudence. After the fall of communism, Chief Justice Sólyom advanced the idea of an ‘invisible constitution’ as an underlying system of constitutional principles and values for the interpretation and application of the 1989 transitional constitution. The constitutional identity as interpreted by the Alkotmánybíróság (Constitutional Court – EV) resembles this ‘invisible’ concept but takes it one step further by anchoring it in a historic narrative.<sup>70</sup>

In our understanding, the two ‘invisible concepts’ (that of the ‘invisible constitution’ and Hungarian constitutional identity) differ dramatically in their content and by their ‘finalité’. Whereas the concept of ‘invisible constitution’ developed primarily under the presidency of Sólyom László (1989–1998) contained an effort to express the principles generally accepted in liberal constitutional democracies on which the constitution and the rights within it are based, the ‘invisible constitutional identity of Hungary’ reflects a certain vision of Hungarian history, emphasizing national independence and national sovereignty. Whereas the first wished to build a modern, European constitutionality in Hungary, the second is a sword against the law of the European Union, a supranational entity founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.<sup>71</sup>

The elements (parts) mentioned above of the CI reveal an intimate relationship between Hungary’s self-identity and its sovereignty or independent statehood.

In the quota decision the relation between the two kinds of control is explained as follows:

... Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore, the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State. *Accordingly, sovereignty and constitutional identity have several common points; thus their control should be performed with due regard to each other in specific cases.*<sup>72</sup>

In his concurring opinion Judge Varga further explains the overlap between sovereignty and constitutional identity:

Based on the said legal nature of self-identity, the protection of Hungary’s sovereignty is also the protection of self-identity at the same time. With regard to the European Union, one may conclude

<sup>69</sup>Quota decision paragraph [107]. For similar comments in the Hungarian literature, see [Blutman \(2017\)](#) 2–14. [Orbán \(2020\)](#) 81.

<sup>70</sup>[Spieker \(2020\)](#) 369.

<sup>71</sup>Article 2 of the Treaty on the European Union.

<sup>72</sup>Quota decision paragraph [67].



that Hungary's constitutional self-identity had existed even before our accession to the Union as a Member State. Accordingly, the accession treaty cannot be interpreted as a waiver by Hungary of its constitutional identity. The reasoning refers to this by establishing in Section III.7.1 that 'the maintenance of Hungary's sovereignty should be presumed when judging upon the joint exercising of further competences additional to the rights and obligations provided in the Founding Treaties of the European Union (the principle of maintained sovereignty)<sup>73</sup>

In the asylum judgment decision, the HCC went even further:

...in the interpretation of the Constitutional Court, *constitutional identity and sovereignty are not complementary concepts, but are interrelated in several respects*. On the one hand, the safeguarding of Hungary's constitutional identity, also as a Member State within the European Union, is fundamentally made possible by its sovereignty (the safeguarding thereof). On the other hand, constitutional identity manifests itself primarily through a sovereign act, adopting the constitution. Thirdly, taking into account Hungary's historical struggles, the aspiration to safeguard the country's sovereign decision-making powers is itself part of the country's national identity and, through its recognition by the Fundamental Law, of its constitutional identity as well. Fourthly, the main features of State sovereignty recognised in international law are closely linked to Hungary's constitutional identity due to the historical characteristics of our country.<sup>74</sup>

Some statements by the HCC are able to associate the Hungarian CI with some sort of eternity clause. Drinóczy suggests that the HCC – especially if it shares Judge Varga's understanding of the nature of the CI

(Since the values that make up the self-identity have come into existence on the basis of historical constitutional development, they are legal facts that can be waived neither by way of an international treaty nor with the amendment of the Fundamental Law, because legal facts cannot be changed through legislation.)<sup>75</sup>

- created an implicit eternity clause and opened up the Hungarian constitutional system to the constitutional review of unconstitutional amendments.<sup>76</sup> Considering that the Fundamental Law explicitly prohibits the substantial control of amendments to the constitution by the Constitutional Court<sup>77</sup>, we are rather uncertain whether this conclusion would turn into reality in the HCC's jurisprudence.

Another interesting – albeit individual – remark comes from Judge Márki, who, in his concurring opinion to the asylum judgment decision maintains:

...I consider that the formula in the second sentence in Article E) (2) '(Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and) shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.' *is a statement which is the declaration of all of the indispensable (and inalienable) conditions of every statehood, and consequently an eternity clause*

<sup>73</sup>Quota decision paragraph [113]. In an extrajudicial study he maintains that 'the principle on which the protection of constitutional self-identity is based is the maintenance of sovereignty'. *Varga Zs. (2021) 266*.

<sup>74</sup>Asylum judgment decision paragraph [99].

<sup>75</sup>Quota decision paragraph [112].

<sup>76</sup>Drinóczy (2020) 124.

<sup>77</sup>Article 24 (5) of the Fundamental Law.



We believe that the cited provision of the FL may not qualify as an eternity clause. An eternity clause of a constitution contains references to particular provisions of the constitution which are protected from any constitutional amendment. (We do not think that the state structure of Hungary<sup>78</sup> could not be altered via constitutional amendment.)<sup>79</sup>

## 4. CONSTITUTIONAL DIALOGUE

As we have mentioned above, one way of avoiding conflict between the Member States' constitutions and Union law is the constitutional dialogue between the final arbiters of the two constitutional orders i.e. the Member States' constitutional (supreme) courts and the European Court of Justice.<sup>80</sup>

The Hungarian Constitutional Court in its quota decision – in which it ‘discovered’ the constitutional dialogue – even declared that ‘...the Constitutional Court considers the constitutional dialogue within the European Union to be of primary importance...’<sup>81</sup>

Concerning the use of constitutional review mechanisms, it expresses that it is intended that they be applied ‘...in exceptional cases and as a resort of ultima ratio, i.e. along with paying respect to the constitutional dialogue between the Member States...’<sup>82</sup>

As far as the constitutional identity review is concerned, the HCC explains that

(T)he protection of constitutional identity should be granted in the framework of an - informal cooperation with ECJ (European Court of Justice- EV) based on the principles of equality and collegiality, with mutual respect to each other, similarly to the present practice followed by several other Member States' constitutional courts and supreme judicial bodies performing similar functions.<sup>83</sup>

All of these statements indicate a sort of openness towards the Member States' constitutional courts and the European Courts of Justice.

### 4.1. What does the HCC understand by European constitutional dialogue?

Based on the texts of the decisions under scrutiny there are two different understandings of the term ‘constitutional dialogue’:

- incorporation of other Member States' Constitutional Courts' (Supreme Courts) decisions in its own reasoning; a kind of horizontal cooperation or dialogue (3.1.1.)

<sup>78</sup>Article F of the Fundamental Law.

<sup>79</sup>The idea of core constitutional provisions as controls vis-a-vis the Union law was first raised by Judge Trócsányi in his concurring opinion to *Decision 143/2010. (VII.14.) AB* (Constitutionality of the Lisbon Treaty). He proposed as untouchable provisions the election of the members of parliament, the mandate of the parliament (e.g. dissolution, termination of the mandate), the mandate of the Government and the judiciary.

<sup>80</sup>Amongst others see *Cartabia (2007)*, *Claes, de Visser, Popelier and Van de Heyning (eds) (2012)*, *Claes (2013)* 134–39, *Burgorgue-Larsen (2015)*, *Arroyo Jiménez (2018)*, *Fichera and Pollicino (2019)*, *Spieker (2020)* footnote 16, 380–97.

<sup>81</sup>Quota decision paragraph [33].

<sup>82</sup>Quota decision paragraph [46].

<sup>83</sup>Quota decision paragraph [63].



- the actual or desirable dialogue between the Member States' constitutional courts and the European Court of Justice; a kind of 'vertical dialogue' (3.1.2.)<sup>84</sup>

**4.1.1. 'Horizontal dialogue'.** The extensive reference to the jurisprudence of other Member States' constitutional courts or supreme courts in the quota decision served as the basis for the declaration of the HCC's competences regarding fundamental rights, sovereignty and constitutional identity reviews (in other words courts' decisions expressing some limitations to the absolute primacy of EU law over Member States' legal orders [constitutions]).<sup>85</sup>

The mention of the Solange II decision of the German Constitutional Court served as a ground for the 'restrained' application of the fundamental rights control vis-a-vis the Union law.<sup>86</sup>

In the name of 'its practice on the constitutional dialogue' in its [Decision 3/2019](#). (II.7.) AB – the petitioner questioned the constitutionality of the criminalisation of organising activities designed to facilitate the opening of an asylum procedure by persons who cannot obtain refugee status under the criteria laid down by its national law – the HCC, in order to justify the constitutionality of the attacked legislation, referred to the decision of the French Conseil constitutionnel on a statutory definition similar to that of the Criminal Code.<sup>87</sup>

The reference to the PSPP judgment of the German Constitutional Court served as a background for a declaration that – in principle - Hungary may have the right to display the judgment of the European Court of Justice.<sup>88</sup> (By contrast it did not refer to the 'La Quadrature du Net Case' before the French Conseil d'État, which would certainly not be in line with its argumentation.)

**4.1.2. 'Vertical dialogue'.** The vertical dimension of the European constitutional dialogue means a conversation with the European Court of Justice. This kind of 'dialogue' may take different forms with different degrees of intensity.

Maybe the most superficial vertical relationship is when the Member State's constitutional court justifying its decision refers to the jurisprudence of the ECJ. This is what the HCC did in the quota decision:

'Within the framework of the European constitutional dialogue, the Court of Justice of the European Union also pays respect to the competences of Member States and takes account of their constitutional demands [C-376/98, Germany versus Parliament and Council (Tobacco advertisement judgment), 2000, ECR I-2247.; C-36/02., OMEGA Spielhallen- und Automatenaufstellungs-GmbH versus Oberbürgermeisterin der Bundesstadt Bonn; C-404/15 Aranyosi and Căldăraru ECLI:EU:C:2016:198].'<sup>89</sup>

<sup>84</sup>The two dimensions of judicial dialogue has been put forward by [Slaughter \(1995\)](#). For an account of the Hungarian experience see [Chronowski \(2021\)](#).

<sup>85</sup>The long list includes, among others, decisions by the Danish Højesteret, the Estonian Riigikohus, the [French Conseil Constitutionnel](#) and [Conseil d'État](#), the Irish Supreme Court, the Italian Corte Costituzionale, the Polish Trybunał Konstytucyjny, the Czech Ústavní Soud, the Spanish Tribunal Constitucional, the Latvian Satversmes tiesa, the High Court and the Supreme Court from the United Kingdom. (paragraph [34]) In paragraphs [35]–[43] one can read citations from different decisions expressing limitations based on Member States' sovereignty, constitutional identity, and the supremacy of the constitution.

<sup>86</sup>Quota decision paragraph [49].

<sup>87</sup>[Decision 3/2019](#). (II.7.) paragraph [84].

<sup>88</sup>Asylum judgment decision paragraph [70].

<sup>89</sup>Quota decision paragraph [45].



In the asylum judgment decision, the HCC declared:

... In line with the requirement of constitutional dialogue, the Constitutional Court accepts that the interpretation of European Union law is a competence of the Court of Justice of the European Union (and not the Constitutional Court). However, the European Court of Justice itself has ruled that a reference for a preliminary ruling is not necessary where ‘the correct application of Community law is so obvious as to exclude all reasonable doubt’ [Case C-283/81 CILFIT, paragraph 21, ECLI:EU:C:1982:335], which the Constitutional Court also took into account in considering its decision.<sup>90</sup>

The Grad and the Simmenthal cases were needed for the HCC to establish the legal justification of the national legislation breaching the ‘ineffective’ EU law.<sup>91</sup>

The next level of vertical dialogue is when the HCC takes directly into account the ECJ’s decision when deciding the case before it.

This kind of dialogue has been adopted by the HCC in the ‘suspension cases’.

While in the quota decision the constitutional dialogue with the CJEU is merely a reference to the examples in which the ECJ respected the ‘constitutional demands’ of the Member States’ courts, or an abstract commitment to a conversation, in 2018 the HCC adopted several decisions creating genuine relationship with the ECJ.<sup>92</sup>

The common feature of these decisions was that the constitutional issue before the HCC was at the same time the subject of a procedure before the ECJ.<sup>93</sup> The HCC repeated its conviction regarding the ‘outstanding importance of the constitutional dialogue within the European Union’, and considered that in order to be able to pay attention to the jurisprudence of the ECJ (Court of Justice of the European Union – EV) it is necessary to wait for the closing of the procedure before the ECJ. Consequently, it ordered the suspension of its own procedures. In this way the HCC made the ECJ’s procedure a quasi part of its own proceedings.

The most intensive category of dialogue with the ECJ – perhaps dialogue in the narrow sense of the term - is the preliminary ruling procedure under Article 267 TFEU. The dialogue becomes even more effective if the Member State’s constitutional court includes its own understanding in the reference, giving an opportunity for the ECJ to react, and for itself to take the answer of the ECJ into consideration.<sup>94</sup>

<sup>90</sup>Asylum judgment decision paragraph [64].

<sup>91</sup>Case C-9/70. Franz Grad v. Finanzamt Traunstein (ECLI:EU:C:1970:78), Case C-106/77 Simmenthal (ECLI:EU:C:1978:49) Asylum judgment decision paragraphs [67]–[68].

<sup>92</sup>Ruling 3198/2018. (VI.21.) AB, Ruling 3199/2018. (VI.21.) AB, Ruling 3200/2018. (VI.21.) AB, Ruling 3220/2018. (VII.2.) AB.

<sup>93</sup>Ruling 3198/2018. (VI.21.) AB: Case C-78/18, Commission v Hungary (Transparency of associations) [ECLI:EU:C:2020:476], Ruling 3199/2018. (VI.21.) AB and Ruling 3200/2018. (VI.21.) AB: Case C-66/18, Commission v Hungary (Enseignement supérieur ‘lex CEU’) [ECLI:EU:C:2020:792], Ruling 3220/2018. (VII.2.) AB: Case 13/18, Sole-Mizo [ECLI:EU:C:2019:708].

<sup>94</sup>Take, as an example, the Gauweiler (OMT) case. The German Constitutional Court asked for a preliminary ruling from the European Court of Justice, in which it explained its position on the correct interpretation of the Union act in question. (Order of 14 January 2014 -2 BvR 2728/13) The ECJ delivered its preliminary ruling (C-62/14, Gauweiler and Others [ECLI:EU:C:2015:400] with its own interpretation. Then the German Constitutional Court adopted its final decision (Judgment of the Second Senate of 21 June 2016 – 2 BvR 2728/13), accepting in substance the ECJ’s judgment. A dialogue between the two courts with an opposite outcome occurred in the PSPP (Weiss) case. Bobić and Dawson (2020).



Until the time of writing this article the HCC had not referred a question for preliminary ruling to the ECJ.<sup>95</sup>

The argumentation cited above in the asylum judgment decision concerning the preliminary ruling procedure – including the reference to the CILFIT case – served merely to justify the non-reference. If we take this passage seriously, we may conclude that the HCC – for the first time in its decision<sup>96</sup> – considered the possibility of making a reference.

Decoding the meaning of the phrase ‘informal cooperation with the European Court of Justice’ in the quota decision has turned out to be an impossible task for the present author (On the other hand, in the Landtová case<sup>97</sup> the Czech Constitutional Court’s attempt to turn to the ECJ in a preliminary ruling procedure initiated by the Czech Supreme Administrative Court, was firmly refused.<sup>98</sup>).<sup>99</sup>

#### 4.2. Cooperative constitutional adjudication with the ECJ - sincere cooperation?

In the suspension cases the HCC declared the importance of the dialogue with the ECJ. It seemed to be ready to take into account the judgment of the ECJ. Is the HCC’s attitude sincere? Should we expect a constructive dialogue between the two courts, as far as the HCC is concerned?

We are suggesting that there are no clear answers to these questions.

We have seen in part (1) concerning the quota decision, that on the very same day as the Commissioner for Fundamental Rights initiated a procedure before the HCC, the Government brought an action for annulment before the ECJ. The HCC – perfectly aware of the identical nature of the subject matter of the two procedures - delivered its decision well before the judgment of the European Court of Justice. (For the sake of objectivity: the case arose before the ‘invention’ of the suspension technique, and the HCC did not answer the question which had been put also before the ECJ.)

In the ‘lex CEU’ case the HCC suspended its procedure, waiting for the judgment of the ECJ in the same subject matter. After the judgment, delivered on 6 October 2020<sup>100</sup>, on 27 May 2021 the General Assembly adopted an act implementing it. The HCC reopened its procedure, and on 6 July 2021 delivered the final decision. In the ruling it declared the petition as irrelevant because the new act – adopted in order to comply with the ECJ judgment – contains a completely different regulatory regime from that in the contested Act.<sup>101</sup> One may ask, why did the HCC

<sup>95</sup>For the period 2004–2015 see Gárdos-Orosz (2015).

<sup>96</sup>In concurring reasonings or dissenting opinions Judges argued for the possibility of making reference to the ECJ; Judge Kiss and Judge Lévy in their dissenting opinion to the Decision 142/2010. (VII.14.) AB, Judge Dienes-Oehm in his concurring opinion to the quota decision paragraph [76], and Judge Stumpf in his concurring opinion to the same decision paragraph [103].

<sup>97</sup>Case C-399/09, Landtová (ECLI:EU:C:2011:415).

<sup>98</sup>Zbiral (2012) 1483.

<sup>99</sup>Unfortunately we are facing a double inconsistency concerning the term ‘informal’ (‘informális’ in Hungarian). While the Hungarian version of the quota decision does not contain the word ‘informális’ [63] the English version does [63]. On the contrary, the Hungarian version of the concurring opinion by Judge Dienes-Oehm uses the term ‘informális’ concerning the judicial dialogue with the ECJ [76], but the English one does not [76].

<sup>100</sup>Case C-66/18, Commission v Hungary (enseignement supérieur) (ECLI:EU:C:2020:792).

<sup>101</sup>Ruling 3319/2021. (VII.23.) AB adopted on 6 July 2021.



wait a half a year after the publication of the ECJ judgment, instead of deciding the case on its merit (i.e. judging the constitutionality of the contested law taking into consideration the judgment of the ECJ) and not waiting for the publication of the new law?

Another failed case of sincere cooperation with the ECJ arose in the ‘Criminal Code case’.

On 2 July 2018 the General Assembly adopted the act introducing Article 353/A into the Criminal Code, criminalising the organisation of activities designed to facilitate the opening of an asylum procedure by persons who cannot obtain refugee status under the criteria laid down by Hungarian law.

On 19 July the European Commission sent a letter of formal notice claiming in practice the non-compliance of the criminal offence with EU law. On 26 October 2018 the petition, claiming the unconstitutionality of the new Article arrived at the HCC. Three months later, the European Commission sent its reasoned opinion, in which it maintained its legal position, and gave two months to Hungary for compliance. Without waiting for the expiry of this period of time, on 25 February 2019 the HCC delivered its decision.<sup>102</sup> In the reasoning, it noted that it is aware of the fact that there is an infringement procedure pending against Hungary, but given that ‘it has not yet proceeded into the Court phase, it held that “this was not a cause to prevent the assessment of the constitutional complaint’ (i.e. the suspension of the case is not required – EV).<sup>103</sup> The HCC declared the complaint unfounded, albeit somewhat limiting the scope of application of the attacked article.

On 8 November 2019 the European Commission brought an action before the ECJ against Hungary, alleging that the criminal offence was in breach of EU law.<sup>104</sup>

The Hungarian Government referred to this containment in its defence before the ECJ<sup>105</sup>, but the ECJ was not convinced,<sup>106</sup> finally declaring the Hungarian legislation contrary to EU law. The two courts gave another example of diverging approaches. While the HCC examined the case exclusively in the light of the Hungarian constitution, the Court of Justice argued in an EU law context.

## 5. CONCLUSIONS

The ideological orientation of the HCC is perfectly in line with that of the Government and the governing coalition in the National Assembly. The declaration of the competences regarding a fundamental rights-sovereignty-constitutional identity review in the quota decision was a response to the Government’s failed initiative to amend the Fundamental Law. When re-introducing the proposal for constitutional amendment before the parliament, the Government could refer to the HCC’s quota decision. In the asylum judgment case, the Government relied on the relevant provisions of the FL. The HCC accepted the reasoning of the Government and declared in principle that Hungary has the right to legislate in breach of the Union law, if the effective application of the Union law is not guaranteed.

<sup>102</sup>Decision 3/2019. (III.7.) AB.

<sup>103</sup>Decision 3/2019. (III.7.) AB paragraph [49]. As we have seen above, the HCC, in justifying its decision relied on the decision of the French Conseil constitutionnel, paragraph [84].

<sup>104</sup>C-821/19, [European Commission v Hungary](#) (ECLI:EU:C:2021:930) (Incrimination de l’aide aux demandeurs d’asile).

<sup>105</sup>C-821/19, [European Commission v Hungary](#) (ECLI:EU:C:2021:930) paragraph [61].

<sup>106</sup>C-821/19, [European Commission v Hungary](#) (ECLI:EU:C:2021:930) paragraphs [102]–[104].





In both cases the Constitutional Court – albeit loyal to the Government – refused to control the constitutionality of the Union law acts (the Council relocation Decision, the ECJ judgment). It did so despite the clear encouragement from the petitioners. We suggest that the loyalty of the HCC vis-a-vis the Government has its limits. The HCC wishes to avoid overt conflict between the Union law and the Fundamental Law and between itself and the ECJ.

Furthermore, concerning the protection of the constitution against the Union law the HCC refers to the responsibilities of the Government and the National Assembly.

Considering the HCC's jurisprudence, we have a large number of elements of the content of the Hungarian CI. Some of these are identical or similar to generally accepted values in modern constitutional democracies, some come from the legal history, as 'acquis of the historical constitution', others indicate the endeavours made by Hungary (Hungarians?) to achieve independent statehood. Because of the overabundance, uncertainty and openness of the content of the Hungarian CI, the Constitutional Court could hardly use it for a legally meaningful constitutional control of EU law.

The language of these elements differs from that used in the European constitutional discourse. The relationship between the CI and the Fundamental Law is very complicated ('the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law') and is not easy to translate into traditional legal interpretation. This is so because the Hungarian CI in the Constitutional Court's understanding is not the identity of the constitution, but Hungary's constitutional self-identity. Albeit the country's 'European identity' is also mentioned, the general attitude is decisively souverainiste, opposing the supremacy of EU law.

The HCC expressed its commitment to 'European constitutional dialogue'. We could identify two meanings of the term; a kind of 'horizontal dialogue' with other Member States' constitutional (supreme) courts, and a kind of 'vertical dialogue' between Member States' constitutional courts and the European Court of Justice.

In the HCC's decisions, references to the jurisprudence of other Member States' courts served to justify its own interpretations. The references to the ECJ's judgment served the same instrumental purpose.<sup>107</sup> Although the HCC suspended some procedures in order to be able to take into account the ECJ's position on the same subject matter, we cannot conclude that it is really ready for a sincere cooperation with the European Court of Justice.

## LITERATURE

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Arroyo Jiménez, L., 'Constitutional Empathy and Judicial Dialogue in the European Union' (2018) 24 *European Public Law* 57–72 <<http://dx.doi.org/10.2139/ssrn.3211817>>.

Besselink, L.F.M., 'National and Constitutional identity before and after Lisbon' (2010) 6 *Utrecht Law Review* 36–49.

<sup>107</sup>We share Szente's conclusion concerning the use of foreign courts' precedents in the jurisprudence of the Hungarian Constitutional Court: 'It is certain that the Hungarian Constitutional Court has not evolved a coherent theory on a way of using foreign judicial precedents and practices. ... There is no rule regarding when and in which cases foreign precedents should be cited, as these references have no clear function in legal reasoning. The conclusion.' Szente (2013) 271–72.





- Blutman, L., 'Szürkületi zóna: az Alaptörvény és az uniós jog viszonya' (The grey area: the relationship between the Fundamental Law and EU law) (2017) 1 *Közjogi Szemle* 1–14.
- Bobić, A. and Dawson, M., 'Making sense of the „incomprehensible”: The PSCP Judgment of the German Federal Constitutional Court' (2020) 57 *Common Market Law Review* 1953–1998.
- Burgogues Larsen, L., 'L'identité constitutionnelle en question(s)' in Burgogues-Larsen, L. (ed), *L'identité constitutionnelle saisie par les juges en Europe* (A. Pedone 2011) 155–168.
- Burgogues-Larsen, L., 'The Constitutional Dialogue in Europe: A “political dialogue”' (2015) 21 *European Journal of Current Legal Issues* <<https://webjcli.org/index.php/webjcli/article/view/412/526>> accessed 10 May 2022.
- Cartabia, M., "“Taking Dialogue Seriously” The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union' (2007) 12/07 *Jean Monnet Working Papers* <<https://jeanmonnetprogram.org/wp-content/uploads/2014/12/071201.pdf>> accessed 10 May 2022.
- Christakis, T., 'French Council of State discovers the 'philosopher's stone' of date retention', about:intel (23 April 2021) <<https://aboutintel.eu/france-council-of-state-ruling/>> accessed 10 May 2022.
- Chronowski, N., 'Promises and practice: European judicial dialogue in the case law of the Hungarian Constitutional Court' in Kruzsliz, P., Sulyok, M. and Szalai, A. (eds), *Liber Amicorum Trócsányi László* (University of Szeged, Faculty of Law 2021) 287–297.
- Chronowski, N. and Vincze, A., 'Full Steam Back: The Hungarian Constitutional Court Avoids Further Conflict with the ECJ', *VerfBlog* (15 December, 2021) <<https://verfassungsblog.de/full-steam-back/>> accessed 10 May 2022.
- Chronowski, N., Vincze, A. and Szentgáli-Tóth, B., 'Decision 22/2016. (XII.5.) Constitutional Self-identity of Hungary' in Gárdos-Orosz, F. and Zakariás, K. (eds), *The main lines of the jurisprudence of the Hungarian Constitutional Court (1990 to 2020) 30 case studies from the 30 years of the Constitutional Court (1990–2020)* (Nomos 2022) 441–458.
- Claes, M., 'National identity: trump card or up for negotiation?' in Saiz Arnaiz, A. and Alcobero Llivina, C. (eds), *National constitutional identity and European integration* (Law and Cosmopolitan Values no. 4, Intersentia 2013) 109–140.
- Claes, M., de Visser, MCBF., Popelier, P. and Heyning, C., *Constitutional conversations in Europe - Actors, topics and procedures* (Intersentia 2012).
- Drinóczi, T., 'A 22/2016. (XII.5.) AB határozat: mit (nem) tartalmaz és mi következik belőle - Az identitásvizsgálat és az ultra vires közös hatáskörgyakorlás összehasonlító elemzésben' (AB Decision 22/2016 (XII.5.): what it does (not) contain and what it implies - A comparative analysis of the identity test and the ultra vires joint exercise of powers) (2017) 2017/1 *MTA Law Working Papers* <[https://jog.tk.hu/uploads/files/2017\\_01\\_Drinoczi.pdf](https://jog.tk.hu/uploads/files/2017_01_Drinoczi.pdf)> accessed 10 May 2022.
- Drinóczi, T., 'Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach' (2020) 21 *German Law Journal* 105–130.
- Fraguna, P., 'Constitutional Identity in the EU – A Shield of a Sword?' (2017) 18 *German Law Journal*, Special Issue: Constitutional Identity in the Age of Global Migration, 1617–1640.
- Fichera, M. and Pollicino, O., 'The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?' (2019) 20 *German Law Journal* 1097–1118.
- Gárdos-Orosz, F., 'Az Alkotmánybíróság szerepvállalása és annak kötöttségei az uniós jog, valamint az alkotmány kapcsolatának meghatározásában' (The role of the Constitutional Court and its constraints in defining the relationship between EU law and the Constitution) in Chronowski, N. (ed), *Szuverenitás és államiság az Európai Unióban: Kortárs kérdések és kihívások* (ELTE Eötvös 2017) 75–92.



- Gárdos-Orosz, F., 'Preliminary Reference and the Hungarian Constitutional Court: A Context of Non-Reference' (2015) 16 *German Law Journal* 1569–1590.
- Gárdos-Orosz, F., 'The reference to constitutional traditions in populist constitutionalism – The case of Hungary' (2020) 61 *Hungarian Journal of Legal Studies* 23–51.
- Halmi, G., 'Abuse of constitutional identity: the Hungarian constitutional court on interpretation of Article E (2) of the fundamental law' (2018) 43 *Review of Central and East European Law* 23–42.
- Kelemen, RD. and Pech, L., 'The uses and abuses of constitutional pluralism: Undermining the rule of law in the name of constitutional identity in Hungary and Poland' (2019) 21 *Cambridge Yearbook of European Legal Studies* 59–74.
- Kovács, K., 'The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts' (2017) 18 *German Law Journal* 1703–1720.
- Orbán, E., *Alkotmányos identitás az Európai Unióban* (Constitutional identity in the European Union) (MTA JTI 2020).
- Pozsár-Szentmiklósy, Z. and Kéri, V., 'The Decision of the Hungarian Constitution Court on Constitutional Identity (Decision 22/2016. (XII.5.) CCJ.)' (2018) 9 *Romanian Journal of Comparative Law* 299–327.
- Saiz Arnaiz, A. and Alcobero Llivina, C. (eds), *National constitutional identity and European integration (Law and Cosmopolitan Values no. 4, Intersentia 2013)*.
- Sarmiento, D. and Utrilla, D., 'Germany's constitutional court have gone nuclear. What happens next will shape the EU's future Euronews', Euronews (22 May, 2020) <<https://www.euronews.com/2020/05/15/germany-constitutional-court-gone-nuclear-what-happens-next-will-shape-the-eu-future-view>> accessed 10 May 2022.
- Slaughter, A.-M., 'A Typology of Transjudicial Communication' (1995) 29 *U. Rich. L. Rev.* 99–137.
- Spieker, L.D., 'Framing and managing constitutional constitutional conflicts: How to stabilize the modus vivendi between the Court of Justice and national constitutional courts' (2020) 57 *Common Market Law Review* 361–398.
- Szente, Z., 'Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Foreign Judicial precedents in the Jurisprudence of the Constitutional Court, 1999–2010' in Groppi, T. and Ponthoreau, M.-C. (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013) 253–272.
- Szente, Z., 'The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014' (2016) 1 *Constitutional Studies* 123–149.
- Varga Zs., András, 'Az alkotmányos önazonosság doktrínájához vezető út' (The road to the doctrine of constitutional self identity) in Kruzslicz, P., Sulyok, M. and Szalai, A., *Liber Amicorum László Trócsányi* (University of Szeged, Faculty of Law 2021) 261–267.
- Zbiral, R., 'Czech Constitutional Court, judgment of 31 January 2012, Pl. US 5/12 - A Legal revolution or negligible episode? Court of Justice decision proclaimed ultra vires' (2012) 49 *Common Market Law Review* 1475–1491.

## LEGAL REFERENCES

---

- Act CLXXV of 2016 on the action for the protection of Hungary and Europe against the mandatory installation quota.
- BVerfG, Judgment of the Second Senate of 30 June 2009 – 2BvE 2/08 (Lissabon-Urteil).
- BVerfG, Order of the Second Senate 2 of 18 July 2017 – 2 BvR 859/15.
- Case 9/70, Franz Grad v Finanzamt Traunstein (ECLI:EU:C:1970:78).
- Case C-106/77, Simmenthal (ECLI:EU:C:1978:49).



- Case C-399/09, Landtová (ECLI:EU:C:2011:415).
- Case 643/15 and C-647/15, Slovak Republic and Hungary v Council of the European Union (ECLI:EU:C:2017:631).
- Case 13/18, Sole-Mizo (ECLI:EU:C:2019:708).
- Case C-66/18, Commission v Hungary (Enseignement supérieur-“lex 2006CEU”) (ECLI:EU:C:2020:792).
- Case C-78/18, Commission v Hungary (transparency of associations) (ECLI:EU:C:2020:476).
- Case C-511/18, La Quadrature du Net (ECLI:EU:C:2020/7919).
- Case C-808/18, Commission v Hungary (Accueil des demandeurs de protection internationale) (ECLI:EU:C:2020:1029).
- Case C-821/19, Commission v Hungary (Incrimination de l’aide aux demandeurs d’asile) (ECLI:EU:C:2021:930).
- Case C-156/21, Hungary v European Parliament (ECLI:EU:C:2022:97).
- Conseil Constitutionnel (français) cons.cons. n°2006-540, 27 juillet 2006 R.
- Conseil d’État (français) Décision No 393099 (ECLI:FR:CEASS:2021:393099.20210421).
- Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures around international protection for the benefit of Italy and Greece. Official Journal of the European Union L 280/80, 24.9.2015.
- Constitutional Trybunal (Polish), K3/21 Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union.
- Hungarian Constitutional Court (HCC).
- Decision 143/2010. (VII.14.) AB (Constitutionality of the Lisbon Treaty).
- Decision 22/2016. (XII.5.) AB (on the interpretation of Article E (2) of the Fundamental Law – “the quota decision”).
- Decision 2/2019.(III.5.) AB.
- Decision 3/2019. (II.7.) AB.
- Decision 32/2021. (XII.20.) AB (Interpretation of the provisions of the Fundamental Law allowing the joint exercise of powers – “the asylum judgment decision”).
- Ruling 3199/2018. (VII.2.) AB.
- Ruling 3200/2018. (VI.21.) AB.
- Ruling 3319/2021. (VII.23.) AB.
- The Fundamental Law of Hungary.
- Treaty on European Union.

## LINKS

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- Link1: The English version of Decision 22/2016. (XII.5.) AB on the interpretation of Article E) (2) of the Fundamental Law – „the quota decision”) <[http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/\\$FILE/EN\\_22\\_2016.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/$FILE/EN_22_2016.pdf)> accessed 10 May 2022.
- Link2: <Diary of the National Assembly, 8 November 2016 <<https://www.parlament.hu/documents/10181/56618/ny161108/d5ec6b24-a928-4b89-b4c6-57e749c4318a>> accessed 10 May 2022.
- Link3: Operative part of the decision Official translation on the Hungarian Constitutional Court’s home page. <[http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/\\$FILE/EN\\_22\\_2016.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/$FILE/EN_22_2016.pdf)> accessed 10 May 2022.



Link4: Author's translation the two final sentences are identical with sentences in paragraph [67] of the „Quota decision” of the HCC. <<https://www.parlament.hu/documents/10181/1569934/ny180605.pdf/d50a7db1-ed3a-7574-c1e0-4a7747f2e81e>> accessed 10 May 2022.

Link5: The English version of Decision 32/2021. (XII.20.) AB on the interpretation of the provisions of the Fundamental Law allowing the joint exercise of powers – hereinafter: the asylum judgment decision <[http://hunconcourt.hu/uploads/sites/3/2021/12/x\\_477\\_2021\\_eng.pdf](http://hunconcourt.hu/uploads/sites/3/2021/12/x_477_2021_eng.pdf)> accessed 10 May 2022.

Link6: The Constitutional Trybunal, K 3/21 Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union <<https://trybunal.gov.pl/s/k-3-21>> accessed 10 May 2022.

Link7: BVerfGE 123, 267 – Lisbon Decision (Lissabon -Urteil) <<https://germanlawarchive.iuscomp.org/?p=1179>> accessed 10 May 2022.

## Appendix

Recently the Hungarian Government used the Hungarian sword of national identity against an EU secondary law act. It attacked the ‘rule of law mechanism regulation’<sup>108</sup> before the European Court of Justice.<sup>109</sup>

We would like to note that in its application the Hungarian Government did not rely on one or more particular element(s) of the national (constitutional) identity. It argued in general for the diversity of national (constitutional) identities of the Member States which - in its view - makes impossible the uniform assessment of the rule of law questions, and consequently violates the principle of non-discrimination.<sup>110</sup> The Court – admitting the obligation of the European Union respecting the Member States national identities under 4(2) TEU, the particular features of the legal systems of the Member States and the discretion which the Member States enjoy in implementing the principles of rule of law - opposed this reasoning and argued for a European rule of law concept (value common to the constitutional traditions of the Member States) and the legal obligation of the Member States to respect it.<sup>111</sup>

<sup>108</sup>Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget OJ L 4331, 22.12.2020, 1–10.

<sup>109</sup>Case C-156/21, Hungary v European Parliament and Council of the European Union Judgment of the Court (Full court) 16 February 2022 (ECLI:EU:C:2022:97).

<sup>110</sup>Case C-156/21, Hungary v European Parliament and Council of the European Union Judgment of the Court (Full court) 16 February 2022 (ECLI:EU:C:2022:97), paragraph [222].

<sup>111</sup>Case C-156/21, Hungary v European Parliament and Council of the European Union Judgment of the Court (Full court) 16 February 2022 (ECLI:EU:C:2022:97) paragraphs [233]–[235].

