

CONSTITUTIONAL IDENTITY AND RELATIONS BETWEEN THE EUROPEAN UNION LAW AND THE HUNGARIAN LAW



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Abstract

In its Decision 22/2016. (XII. 5.), the Constitutional Court set several limits on the implementation of European Union (EU) acts that go beyond the scope of conferred or jointly exercised powers. The Constitutional Court has stated that, based on a motion to that effect, it could examine whether the joint exercise of powers infringes on human dignity and other fundamental rights or Hungary's sovereignty and identity based on its historical constitution. The decision introduced a new, previously unknown limit to the exercise of shared competence in constitutional dialogue by formulating the term constitutional identity.

The legal nature of Hungary's constitutional identity is the specificity of the communities that make up the state and nation, which does not apply to other nations in the same way or at all. In Hungary, national identity is inseparable from constitutional identity. The fundamental values that constitute identity have been established through the historical development of the Constitution, and the nation has always adhered to them. The values that constitute a country's identity are legal facts that cannot be renounced by either an international treaty or an amendment to Fundamental Law. The latest addition to the constitutional dialogue is Decision 32/2021 (XII. 20.). Its significance lies in the fact that the Constitutional Court was not reluctant to use the *Ultravires* argument against EU acts adopted in the absence of the unions' competence. In connection with this, this study provides an overview of the relationship between the EU and Hungarian law through the practice of the Constitutional Court. The chapters cover the constitutional issues of the incorporation of

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EU Law, its emergence in the practice of the Constitutional Court, and the various approaches, from staying away to developing control and emphasising constitutional dialogue as a means of avoiding conflict.

Keywords: constitutional identity, Constitutional Court of Hungary, sovereignty, EU law, *ultra vires*

1. Introduction

Throughout its history, the Hungarian State has been governed by its constitutional laws, later understood as the rule of law, which have been harmed only under the country's foreign occupations and during dictatorial regimes imposed on Hungary by foreign powers. For our country, the regime changes (transition) of the 1990s not only meant a return to our national and constitutional traditions but also the adoption of new approaches and a novel vocabulary from the West.

Standing at a crossroads, the Constitutional Court has opted for such a conception of the rule of law, which is usually characterised by an overemphasis on legal certainty, the synonymous use of legal certainty and the rule of law, and a focus on the formal rule of law. The Constitutional Court ruled that the transition was based on legality. When interpreting and applying the rule of law, law enforcement bodies acting under Fundamental Law must consider several circumstances. One is that Hungary is a member state of the European Union (EU); thus, it should apply where EU law is binding. In the absence of uniformly applicable legislation, Hungarian courts cannot disregard the national legal provisions in force. Neither EU law nor Fundamental Law empowers national courts to do so.

In contrast, according to Article R(4) of the Fundamental Law, all bodies of the state, including the courts, must protect Hungary's constitutional identity. Therefore, constitutional dialogue with the Court of Justice of the European Union (CJEU) is not based on the absolute and unconditional primacy of EU Law. In the absence of EU legal implications, the application of existing Hungarian legislation cannot be ignored. However, the Constitutional Court may examine, and has already examined, whether EU institutions have exceeded the limits on the exercise of their powers laid down in the relevant provisions of the Treaty on the European Union (Articles 1, 4, and 5) and in Article E(2) of the Fundamental Law.

In its Decision 22/2016. (XII. 5.), the Constitutional Court has set several limits on the implementation of EU acts that go beyond the scope of conferred or jointly exercised powers. The Constitutional Court has stated that, based on a motion to that effect, it could examine whether the joint exercise of powers infringes on human dignity and other fundamental rights or Hungary's sovereignty and identity based on its historical constitution.

The decision introduced a new, previously unknown limit to the exercise of shared competence in constitutional dialogue by formulating the term constitutional identity. Similarly, it has already been mentioned in parallel reasoning that the legal nature of Hungary's constitutional identity is the specificity of the communities that make up the state and the nation, which does not apply to other nations in the same way or at all. In Hungary, national identity is inseparable from constitutional identity. The fundamental values that constitute identity have been established through the historical development of the Constitution, and the nation has always adhered to them. The values that constitute a country's identity are legal facts that cannot be renounced by an international treaty or an amendment to Fundamental Law. The only way to deprive Hungary of these values is to deprive it of its sovereignty and status as an independent state. That is why Hungary's accession to the EU did not result in it renouncing its sovereignty or declaring its cessation. The founding treaties only allowed for the joint exercise of certain competencies, and any further joint exercise of competences must be presumed to respect the maintenance of Hungary's sovereignty.

In the absence of a specific competency, the EU does not have the power to adopt legal acts that have a binding force on Member States. Such *ultra vires* acts would disregard the principles governing the exercise of shared competencies, as laid down in Articles 4 and 5 of the Treaty on the European Union and in Article E(2) of the Fundamental Law, including the principles of proportionality and subsidiarity, by-passing the limits of competencies conferred by the Treaty on Member States (*Kompetenz-Kompetenz*). The implementation of *ultra vires* acts in national law violates Article B(1) of the Fundamental Law, according to which Hungary is an independent democratic state governed by the rule of law. Therefore, all state bodies are obliged to act against *ultra vires* following the requirement of the protection of sovereignty and constitutional self-identity.

The latest addition to the constitutional dialogue is Constitutional Court Decision 32/2021 (XII. 20.). Its significance lies in the fact that the Constitutional Court was not reluctant to use the *ultra vires* argument against EU acts adopted in the absence of the unions' competence. The conclusions of the dissenting opinion attached to the 2016 decision have been included in the new decision, which states that the exercise of power under Article E(2) of Fundamental Law must accord with fundamental rights and freedom. Furthermore, the new decision clearly considered constitutional identity as a limit to the joint exercise of powers. The firm stance of the Constitutional Court was not without precedent. The decision refers to several constitutional court decisions delivered in France, Poland, Germany, the Czech Republic, and Spain, whereby national constitutional courts examine whether the exercise of EU powers conforms to the constitutional rules of Member States. In line with the parallel reasoning attached to the 2016 decision, the Constitutional Court confirmed that the elements of the population, language, history, and cultural traditions—the achievements of our historical constitution—listed in documents defining the struggle to consolidate sovereignty are part of the country's constitutional self-identity. In this

context, the Constitutional Court referred to the Seventh Amendment to the Fundamental Law, according to which the joint exercise of powers may not restrict Hungary's inalienable right to dispose of its territorial unity, population, form of government, or state organisation. Moreover, the Seventh Amendment to the Fundamental Law explicitly builds on Article 4(2) of the Treaty on the European Union, which states that the Union shall respect the national identities of the Member States, including their political and constitutional organisation.

As such, the right of disposition is part of Hungary's constitutional identity as a historical constitutional achievement, and it is the task of the Constitutional Court to set limits on the exercise of shared powers and ensure the exercise of Hungary's right of disposition. However, this may be done only exceptionally if the exercise of shared competences is incomplete (*i.e.* if the institutions of the EU do not exercise the powers manifestly conferred on them or if the exercise of shared competences is only superficial such that it does not ensure the effective implementation of EU law).

In connection with this, this study provides an overview of the relationship between the EU and Hungarian law through the practice of the Constitutional Court. The chapters cover the constitutional issues of the incorporation of EU Law, its emergence in the practice of the Constitutional Court, and the various approaches, from staying away to developing control and emphasising constitutional dialogue as a means of avoiding conflict.

2. The relationship between European Union law and Hungarian law: How are European Union legal acts incorporated into national law?

As a starting point for the examination of the relationship between the law of the EU and the law of Member States, it is worth noting the existing reality that Hungary's legal system, in the most general sense, comprises three legal systems: domestic (internal, Hungarian) law, international law, and the legal system of the EU. Within the law of the EU, the primary sources of law are international, as they are created or at least recognised (see the general principles of law) by sovereign Member States. Hungarian law follows a dualistic approach as to how law not created by the Hungarian legislature becomes part of Hungarian law; therefore, given its international character, primary sources of law become part of Hungarian law as Hungarian sources of law through transformation and internal promulgation. However, secondary sources of law form independent legal orders that are not completely mixed with the internal law. The test of the full independence of the two legal systems is the constitution, which is at the apex of internal law, and which, although it 'supercedes' the EU legal system in certain respects, retains its independence in respect of its essential provisions (see the concept of an integration-resistant constitutional

core, familiar from German law). However, beyond this approach, the need to ensure that legal entities know which legal system they must follow must be emphasised. This is a crucial necessity arising from the requirement of legal certainty, which is a fundamental requirement of a uniform legal system into which various legal systems must be integrated.¹

Hungary applied for EU membership on 1 April 1994, and accession negotiations began at the end of March 1998. On 12 April 2003, a national referendum was held on accession to Hungary, which occurred on 1 May 2004. The accession process and preparation for accession were based on the adoption and harmonisation of the EU's legal system. In this process, the integration of EU Law into the national legal system and, in a broad sense, harmonisation, including the transmission and enforcement of EU Law to its addressees, had to be (and is) ensured.²

2.1. The question of a constitutional amendment on accession

One of the most important milestones of accession to the EU was the definition of the constitutional basis, during which a constitutional mandate established the division of competences between the EU and Hungary, which also served as the basis for the incorporation of EU law into the Hungarian legal system. Hungarian public law scholars have been relatively slow to address legal issues related to European integration, with sovereignty being the most prominent issue.³ These debates intensified as accession approached.

Until recently, there was no tradition in Hungary of questioning the Constitution as the main source of law or of treating it as mere law, as the Constitution defined the framework for the exercise of power and, thus, for law-making as the basis of sovereignty and legal order. From a functional perspective, the EU has substantial public powers governed by law, independent of the Member States that constitute it. There are also shortcomings in the EU's system of checks and balances in classical minimum standards, such as the separation of legislative, executive, and judicial powers.⁴ European integration is, indeed, changing traditional concepts of the state and law, and the development of the EU has obvious implications for the place and role of constitutions that do not recognise other sovereigns over themselves and has raised and continues to raise questions such as the relationship between EU institutions and national constitutions and the conflict and cooperation between the CJEU and the constitutional courts of the Member States⁵. These issues touch on fundamental questions of sovereignty,⁶ warranting the need for a constitutional amendment in Hungary.

1 Schanda and Varga, 2020, pp. 64–66.

2 Losoncz, 2004, pp. 24–29.

3 Kecskés, 2006.

4 Walker, 2004, pp. 123., 125.

5 Trócsányi, 2019, pp. 38–39.

6 Paczolay, 2004b, p. 7.

Even so, the question of whether an accession would require a constitutional amendment was a contentious issue.⁷ The Constitutional Court answered this question in Decision 30/1998 (VI. 25.)⁸, which addresses the applicability of EU law in detail. As it reflected a pre-accession situation, it did not raise several questions (e.g. the constitutional assessment of EU law after accession), but it clarified that an international treaty that imposes an obligation on Hungarian authorities to apply the public law rules of another system of public power (which will arise in the future and have not been promulgated in Hungarian law) cannot be concluded without a specific constitutional mandate.⁹ The source of the exercise of public power subject to democratic legitimacy must be public power under the Constitution or one of its institutions. In the case of a public law relationship involving sovereignty, subjection to foreign law requires a constitutional mandate. According to the decision, this is not the case because Hungary was not a member of the EU, and Community law criteria cannot be incorporated into the rules governing the application of international treaties.¹⁰

The Constitutional Court contacted the Minister of Justice and Minister of Foreign Affairs to obtain their views on the case. Both ministers thought there was no constitutional problem, the legislator had the constitutional authority to conclude international treaties with sovereignty limitations, and there was no sovereignty problem because, first, the application of foreign law in Hungary concerned a very narrow subject matter and a specifically defined area of regulation (competition law) (opinion of the Minister of Justice), and, second, the traditional interpretation of national sovereignty was no longer applicable in today's circumstances (opinion of the Minister of Foreign Affairs). The government, therefore, did not perceive the importance of sovereignty limitation in the specific context of this issue and probably did not consider it necessary to amend the constitution for accession.¹¹

However, Decision 30/1998 (VI. 25.), by placing the Accession Clause in the context of sovereignty,¹² became an important reference for the amendment of the Constitution, which was finally adopted in 2002.¹³ The amendment came into force on the day of its promulgation (23 December 2002). From that date, the Accession Clause (Article 2/A) became a part of the Constitution, according to which

The Republic of Hungary may, in order to participate in the European Union as a Member State, exercise certain powers deriving from the Constitution jointly with the other Member States, on the basis of an international treaty, to the extent necessary

⁷ Gombos and Sziebig, 2016, p. 162.

⁸ The decision examined the rules implementing the competition provisions of the association agreement.

⁹ Csuhány and Sonnevend, 2009, pp. 240–242.

¹⁰ Tóth, 2021, pp. 443–444.

¹¹ Balogh-Békesi, 2015, pp. 43–44.

¹² Vincze, 2009, p. 374.

¹³ Act LXI of 2002 amending Act XX of 1949 on the Constitution of the Republic of Hungary.

for the exercise of the rights and the fulfilment of the obligations arising from the Treaties establishing the European Union and the European Communities (hereinafter referred to as the European Union); this exercise of powers may be carried out independently, also through the institutions of the European Union.¹⁴

According to the explanatory memorandum, the law amending the Constitution¹⁵ was intended to align the Accession Treaty with the Constitution. The starting point was that the constitution created the possibility for the Accession Treaty to apply to Hungary. The founding treaties of the EU will ultimately be binding based on the Constitution's mandate; therefore, the Constitution will remain the basic rule of law in Hungary. Regarding the exercise of sovereignty, after accession, some public affairs will be conducted jointly with the other member states of the EU or through the institutions of the EU in accordance with the provisions of an international treaty ratified and proclaimed based on the Constitution. This concept was essentially taken over by the Fundamental Law, which came into force in 2012.

2.2. The question of the representation of European Union law at the constitutional level

The Accession Clause does not address the relationship between EU law and national law or the question of EU law becoming national law. Several ideas have been proposed to address this issue during the preparation of the constitutional amendment. These included the introduction of a provision in the Constitution, linked to the Accession Clause, stating that participation in the EU (in an international organisation) as a member (Member State) affects community law in accordance with the founding treaties and the principles derived from them. Another idea was that there should be no reference at the constitutional level to the principles governing the application of community law. It has also been suggested that, in the presence of an accession clause, the law proclaiming the Accession Treaty reflects the primacy of community law and the obligation of the legislator to interpret internal law in conformity with community law. It has also been argued that the Constitution should contain a reference to the primacy of community law without limiting the Constitutional Court's powers in a way that is compatible with community law.¹⁶

Until the adoption of the Lisbon Treaty, the principle of the primacy of EU law was not enshrined in primary (treaty) law but 'only' had a basis in the case-law of the European Court of Justice. Thus, there were hardly any countries that explicitly recognised the primacy of EU law over national law and, in particular, over national constitutions in their constitutions. Member States have not wished to enshrine the

14 Art. 2/A (1) of the Act XX of 1949 on the Constitution of the Republic of Hungary.

15 Act LXI of 2002 amending the Act XX of 1949 on the Constitution of the Republic of Hungary.

16 Paczolay, 2004a pp. 173–174.

principle of the primacy of EU law in the Treaties either.¹⁷ Although several countries have provided for the primacy of European Law in their constitutions, they do not explicitly recognise the primacy of EU Law over national constitutions.¹⁸ In Hungary, when the constitutional amendment was being prepared, the amendment proposal would have originally included a reference to community law and other *acquis* of the EU¹⁹, but regulating the relationship between community law and Hungarian law by reference to community law would have meant an explicit recognition of the autonomy of community law and its primacy of application over the Constitution; therefore, this provision was not included in the submitted proposal.²⁰ The deletion of this element of the proposal was essentially the result of political discussions and a compromise.²¹

Accession was not followed by the Act on Legislation; only the amendment introduced in 1994, when the Access Treaty was proclaimed, affected the issue, according to which the Government, when proposing a bill that affects the subject matter of the Access Treaty, is obliged to inform the Parliament whether the proposed legislation approximates the legislation of the European Communities or whether the legislation to be introduced will be compatible with the legislation of the European Community. The lack of an amendment also meant that the legislative act did not provide a clear answer to the positioning of EU Law in the legal system.

In its decision dated 30/1998 (VI. 25.), adopted before accession, the Constitutional Court considered EU law as foreign law and, therefore, included expectations related to international law. It interpreted the pre-accession situation; therefore, its findings are not relevant to the post-accession situation. However, the failure to clarify its relationship with EU law when the Constitution was amended resulted in an open situation. With accession, regulations, directives, various decisions, customary law, general principles of law, and *soft law* entered Hungarian law, the source of which—especially the regulation—had to be incorporated into the legal system through the Accession Clause and the transformation of the Accession Treaty²² because the Hungarian legal order was silent in the place of Community Law and did not clarify how and for how long its primacy would prevail.²³ From the law enforcement perspective, there is also some tension, as the application of the law is conducted within a national framework, essentially via the institutional system of the Member States, the regulating principle of which is the adherence to the constitution and compliance with constitutional requirements. Meanwhile, law enforcement

17 Trócsányi, 2017, p. 100.

18 Kovács, 2011, p. 4.; Trócsányi, 2014, pp. 476–477.

19 ‘Art. 2/A (2) *Community law and the other *acquis* of the European Union shall be applied in the Republic of Hungary in accordance with the founding Treaties of the European Union and the principles of law deriving therefrom*’.

20 Csupány and Sonnevend, 2009 pp. 243–244.

21 Paczolay 2004a, pp. 174.

22 Kende, 2004, pp. 130–131., Gombos and Sziebig, 2016, p. 162.

23 Nagy, 2004, p. 109.

authorities must interpret the law in an EU-compliant manner and courts must set aside national legislation (or judicial decisions that violate it), which is contrary to EU law.²⁴ However, it has also been suggested that this omission could significantly weaken the position of Hungarian legislation vis-à-vis EU legislation in the future exercise of parallel legislative powers by the EU and Member States.²⁵ At the same time, the absence of explicit provisions on community law in the Constitution did not raise its primacy at the constitutional level. Had this been the case, the conflict between national and community laws would have resulted in unconstitutionality, but this has not been the case, and the Constitutional Court has consistently avoided answering this question.²⁶

A rather paradoxical situation has, thus, arisen, during which time the Constitutional Court in its first years consistently avoided answering the question and only examined the constitutionality of the law implementing EU Law, ignoring the interpretation and subject of the examination of EU Law²⁷ while avoiding the use of the word sovereignty²⁸. In these proceedings, the Constitutional Court concluded that the question is not the validity of the rules of the EU or the interpretation of those rules, but the constitutionality of the Hungarian legislation implementing the regulation of the Union; that is, the norm in question is not EU law but Hungarian law, and the Constitutional Court is entitled to determine its validity, scope, and the constitutional conditions of its applicability. During this period, the body mostly found that it lacked competence regarding aspects of EU law or that the conflict of norms raised in relation to community law was not a question of constitutionality. Overall, the characteristics of EU Law regarding international and national laws have not been clarified.²⁹ The Constitutional Court could have determined the constitutional conditions for the primacy and applicability of EU Law in the proceedings before it in connection with the ratification of the European Constitutional Treaty (see below). However, here as well, it failed to examine the question. Thus, overall, from this period, it distinguished between European law and Hungarian legislation based on it, reserving the power to examine the latter's conformity with the Hungarian Constitution, irrespective of its EU legal origin.³⁰

As previously mentioned, the transposition and incorporation of EU law into Hungarian law have not been given special provisions in the Legislative Act; therefore, they were adopted under the general legislative procedure. In 2010, the Parliament adopted a new legislative act, which now provides that, when drafting legislation, it must ensure it complies with the obligations arising from EU law and that the explanatory memorandum of the draft legislation must contain information on the

24 Dezső, 2006, pp. 70., 79., Dezső and Vincze, 2006, p. 14.

25 Kecskés, 2006.

26 Csink, 2009, pp. 380–381.

27 Dezső, 2006, p. 77.

28 Vincze, 2009, p. 374.

29 Chronowski, 2019, [8].

30 Dezső and Vincze, 2006, p. 189.

compatibility of the proposed legislation with the obligations arising from EU law and on the obligation to consult EU institutions and Member States; the latter is also dealt with in a separate title. A separate Government Decree³¹ fulfils the preparatory tasks necessary to comply with EU law. This Regulation also stipulates that the Minister responsible for Justice is responsible for checking the conformity of draft legislation with EU law to fulfil harmonisation obligations.

2.3. Changes with the entry into force of the Fundamental Law (2012)

With the Fundamental Law entering into force in 2012, the Accession Clause³² underwent a slight shift in emphasis. In the 2010–2011 constitutional process, (still) no substantive debate emerged on the EU law provisions of the Fundamental Law. Thus, Article E(1) of the Fundamental Law was identical in substance to the provisions of the previous Constitution, but there was a minor difference in paragraph 2. The Constitution provided that Hungary could exercise certain powers arising from the Constitution jointly with other Member States and that the exercise of powers could be carried out independently through the institutions of the EU. Article E(2) of the Fundamental Law provides that power may be exercised jointly with other Member States through EU institutions. From this, the constituent power intended to narrow down the possibilities for the exercise of powers through the institutions of the EU, excluding the possibility of the EU institutions exercising their powers

31 Government Decree 302/2010 (XII. 23.) on the performance of the preparatory legislative tasks necessary to comply with European Union law.

32 Original text:

'Art. E (1) Hungary (1) In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity.

(2) 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.

(3) The law of the European Union may, within the framework set out in para. (2), lay down generally binding rules of conduct. (4) For the authorisation to express consent to be bound by an international treaty referred to in para. (2), the votes of two thirds of the Members of the National Assembly shall be required'.

The text currently in force following the Seventh Amendment of the Hungarian Constitution (2018):
'Art. E) (1) In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity.

(2) 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. Exercise of competences under this para. 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. (3) The law of the European Union may, within the framework set out in para. (2), lay down generally binding rules of conduct.

(4) For the authorisation to express consent to be bound by an international treaty referred to in para. (2), the votes of two thirds of the Members of the National Assembly shall be required'.

independently of the Member States and independent of Hungary's participation. However, there is no consensus in the literature on this topic. Paragraph 3 provides a new provision that the law of the EU may establish a generally binding rule of conduct within the framework of paragraph 2, which may also be interpreted as meaning that the Constitutional Court may take action against the application in Hungary of EU legal acts that are contrary to Fundamental Law or *ultra vires*.³³ The Constitution, thus, recognised the legal source nature of EU Law but did not provide for the primacy of the application of EU Law or its place in the hierarchy of legal sources. It only contains a procedural rule for primary law (founding treaties): the authorisation to recognise the binding force of such an international treaty requires two-thirds of the votes of the Members of Parliament.³⁴

Thus, the entry into force of Fundamental Law did not induce an immediate change in the constitutionality of EU Law, and the Constitutional Court maintained its previous practice. The following sections explain in-depth how this situation has changed since 2016. Here, we will only briefly refer to the fact that in the last seven years, the Constitutional Court has interpreted the Accession Clause [Article E] of the Fundamental Law in several cases, which was amended by the Parliament following the Constitutional Court's decision on 5 December 2016 (Decision 22/2016). In these decisions, the Constitutional Court has clarified the scope of the authorisation granted in Article E and created powers to examine the exercise of shared competence based on Article E(2), for which it has developed three elements of control—*control of fundamental rights, control of sovereignty, and identity control*—which introduced the presumption of maintained sovereignty, the possibility of examining *ultra vires* and ineffective exercise of powers, and the concept of constitutional dialogue and prevented an overly broad interpretation of the scope of the Court of Justice's rulings. It has also highlighted the recognition of the primacy of EU Law, the possibility of initiating a preliminary ruling procedure, and, in places, has incorporated the provisions of the Treaties and the rulings of the CJEU into its argumentation. It also stressed the exceptional nature of its intervention and repeatedly referred to the margin of manoeuvring of the Parliament and the Government.

Although these decisions do not provide a clear answer to the relationship between EU law and Hungarian law, they certainly show that the Constitutional Court can set limits on the enforcement of EU law in Hungary through its interpretation of Fundamental Law.³⁵

33 Szabó and Gyeney, 2020, pp. 168–170.

34 Chronowski, 2019, [13].

35 Chronowski, 2019, [28].

3. Distribution of powers between the European Union and the Member States: transferring additional powers relative to those conferred at the time of accession

Article E of the Fundamental Law sets out a framework for exercising powers between the EU and Hungary. Paragraph 2 states that

Hungary may, in order to participate in the European Union as a Member State, exercise certain of its competences under the Fundamental Law, in common with the other Member States, through the institutions of the European Union, on the basis of an international treaty, to the extent necessary for the exercise of the rights and the fulfilment of the obligations arising from the founding Treaties. The exercise of powers under this paragraph shall be in accordance with the fundamental rights and freedoms enshrined in the Fundamental Law and shall not restrict Hungary's inalienable right to dispose of its territorial unit, its population, its form of the government, and its organisation of the State.

In paragraph 4, *'The authorisation to recognise the binding force of an international treaty under para. (2) shall require a vote of two-thirds of the Members of Parliament'*. Formally, the answer to the post-accession transfer of power is that an international treaty must settle the issue, requiring a qualified majority vote. The Court confirmed Decision 22/2012 (V. 11.) that

Any treaty leading to the further transfer of Hungary's competences as defined in the Fundamental Law through the joint exercise of competences through the institutions of the European Union requires the authorisation of two-thirds of the members of Parliament. That is to say, Article E(2) and (4) apply not only to the Accession Treaty and the founding treaties or any amendment thereto, but also to any treaty in the drafting of which Hungary is already participating as a Member State in the reform of the European Union (...) The question of which treaty is to be regarded as such can be determined on a case-by-case basis on the basis of the subjects and subject matter of the treaty and the rights and obligations arising from it.³⁶

Article E of the Fundamental Law, however, approaches the question of the exercise of powers mainly from a procedural perspective, formally providing its guarantee rules, but does not explicitly state how the 'stealthy' extension of powers, which has appeared in recent criticisms, is manifested and how the Constitution can constitute a barrier to it. The conditions for a formal delegation of powers are, therefore, set out, while the Constitutional Court has attempted to provide a constitutional answer to the question of exercising powers without delegation.

36 Reasoning [50]-[51].

The question of *ultra vires* jurisdiction has not been raised for a long time in Hungarian legal literature or in the practice of the Constitutional Court. As there was no reference to EU Law in the Constitution, the Constitutional Court could avoid assessing the constitutional implications of a possible conflict between EU and Hungarian Law. This was particularly true for questions of jurisdiction. However, after the Lisbon Treaty came into force, certain jurisdictional disputes appeared, both at the political level and in the practice of some member states' constitutional courts, which later impacted the Hungarian Constitutional Court. For the control of EU law from a constitutional perspective, three types of standards have emerged in the European integration process, based primarily on and influenced by German constitutional court practice: the fundamental rights standard (EU law must ensure the same level of protection of fundamental rights as the national constitution), the sovereignty protection standard (which aimed at controlling the exercise of delegated powers and identifying the *ultra vires* exercise of powers by the EU), and the protection of the constitutional identity of the Member States.³⁷ The Hungarian Constitutional Court has incorporated these criteria into its practice.

The *ultra vires* test arises essentially in the context of the protection of sovereignty in the practice of the Constitutional Court because although participation in the integration process is not a transfer of sovereignty but a joint exercise of powers, the manner and limits of such participation may affect the exercise of state sovereignty. The Constitutional Court rarely examines the possible limits to sovereignty, and of the three controls mentioned, it has focused mainly on the protection of identity (as discussed in detail in the following chapters).

Several questions can be raised about the exercise of powers in the integration process (and in relation to international organisations), including who should be the guardian of powers, whether and who has the ultimate right of control over the exercise of delegated powers, whether there is an internal legal remedy for any perceived or actual overstepping of powers, whether the delegating act can be revoked in general, what are the substantive conditions for the delegation of powers, are there minimum requirements in relation to the recipient international organisation or institution, and whether certain powers have essential content, the autonomous delegation of which is not voluntarily possible for a given state. The consideration and answering of these questions typically presupposes the competence of a (constitutional) court; however, the topos of sovereignty alone are not suitable answers.³⁸ Although these are important questions for the constitutional development of the state and the exercise of its sovereignty as a whole, the Hungarian Constitutional Court has only dealt with a fraction of these issues in a rather abstract manner.

In two decisions [Decision 22/2016 (XII. 5.), Decision 32/2021 (XII. 20.)], the Constitutional Court explicitly addressed the *ultra vires* exercise of power in the context of EU integration. In the case of Decision 22/2016 (XII. 5.) (Quota Decision),

³⁷ Chronowski, 2019, [26].

³⁸ Chronowski and Petrétai, 2020, [73].

the petitioner expressly made the *ultra vires* act as the subject of the proceedings.³⁹ In the decision, the Constitutional Court reserved the *ultra vires* examination for itself, apart from the possibilities of action being open to Parliament and the Government.⁴⁰ In this context, it formulated two limits based on the National Avowal Article E(2) and Article 4.2 of the Treaty on European Union (TEU): the joint exercise of powers must not infringe on the sovereignty of Hungary (*sovereignty control*), and it must not result in a violation of constitutional self-identity (*identity control*). Respect for and protection of Hungary's sovereignty and constitutional identity are binding to all (including the Parliament and the Government directly involved in the decision-making mechanism of the EU), and the Constitutional Court is the main guardian of

39 Citing the motion from the Quota Decision:

'[17] In the opinion of the petitioner, 'on the basis of Art. E) (2) of the Fundamental Law, the Hungarian constitutional institutions and bodies are only bound to implement the legal acts of the European Union if those acts are based on the authorisation of the Founding Treaties of the European Union. Accordingly, the Hungarian institutions and bodies are not constitutionally obliged to obey the so-called *ultra vires* regulations, directives and decisions, i.e. the ones that go beyond their scope of competences, as they transgress the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties'. The commissioner for fundamental rights holds that as it is unconstitutional when the European Union exercises a competence by going beyond the 'necessary extent' of the competences vested in the Union, it is indispensable to explore the substance of necessary extent. In the petitioner's opinion, the formulation of the *ultra vires* barrier in Art. E) (2) 5 makes it a question of constitutionality to establish whether the decisions or measures of the Union such as the EUC Decision go beyond the competences vested on the Union in the Founding Treaties. [18] In this context, the petitioner made a reference to the German and the Czech constitutional courts as well as to the Maastricht-judgement of the Supreme Court of Denmark, and to the fact that in 2014 the German Constitutional Court asked for a preliminary ruling by the Court of Justice of the European Union about the *ultra vires* nature of the decision by the Governing Council of the European Central Bank. [19] In the context of all the above, the commissioner for fundamental rights concluded that 'also the Hungarian constitutional institutions, first and foremost [...] the Constitutional Court' are 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 EUC Decision indicated in the first question. [20] As stated by the petitioner, the 'necessary extent' of the delegation of powers contained in Art. E) (2) is subject to debate, thus 'several potential and constitutionally acceptable forms of actions by the bodies of the State can be deducted from it, with regard to the joint exercise of competences embodied in a norm of the Union similar to Council decision 1601/2015'.

40 Reasoning '[50] 7. 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 act under EU law occurs, – on the basis of Art. 6 of the Protocol that forms an integral part of the Founding Treaties – the National Assembly and – in accordance with Art. 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.

[51] Furthermore, according to the Act XXXVI of 2012 on the National Assembly and the National Assembly's Resolution 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'.

this protection. However, the latter raises the question of the actual outcome of the examination, especially if the Court does not use a preliminary ruling procedure.⁴¹

In Decision 32/2021 (X II. 20.) the Constitutional Court did not define further conditions for the exercise of *ultra vires* powers but confirmed its previous findings. It referred to the fact that, in the Quota Decision, it had examined several Member States' practices concerning *ultra vires* acts and the reservation of fundamental rights and that there had been further cases since the decision was taken.

Both decisions, through *ultra vires* control, have unpacked the essence of sovereignty control, which can serve as a reference point for defining the scope of the Constitutional Court's intervention. The essence of this is that the source of public power is the people whose sovereignty cannot be discharged by the EU clause, Hungary's sovereignty must be presumed to be maintained in relation to the rights and obligations laid down in the founding treaties of the EU when the joint exercise of additional powers is being considered and that the joint exercise of powers cannot result in people losing their ultimate control over the exercise of public power.

4. The impact of the Constitutional Treaty and the Lisbon Treaty on national law: constitutionality tests

4.1. *The Constitutional Treaty before the Constitutional Court*

Hungary was one of the countries where the Constitutional Treaty was not put to a referendum but was ratified by the Parliament, second after Lithuania. Hungary was actively involved in the work of the Convention preparing the European Constitutional Treaty, and at the time was perceived to be closer to the 'federalist' than the 'sovereign' camp but consistently stressed the importance of the principle of equality of Member States. The general impression was that the Convention was a success for Hungary, where, for the first time, old and new Member States were on an equal footing, and small and medium-sized Member States could cooperate effectively.⁴² Perhaps this is also connected to the fact that Hungarian politicians consistently praised the Constitutional Treaty, and there was no particular dialogue on the method of ratification, which was essentially limited to a parliamentary debate on a parliamentary resolution authorising the government to sign the treaty but did not attract much attention. Ratification by referendum was raised as a proposal by one opposition politician, but the speakers in the parliamentary debate all argued in favour of ratification by the parliament and against a referendum. After less than three hours of general debate and approximately three-quarters of an hour of detailed

⁴¹ Drinóczi, 2017a, pp. 12–13.

⁴² Grüber, 2005, pp. 155., 157–159.

debate, the debate was closed, and the decision authorising the Government to sign the Constitutional Treaty was adopted by 276 votes in favour, 19 against and 16 abstentions.⁴³ Hence, the problems that had arisen in some Western European countries (see, for example, the symbol of the ‘Polish plumber’ who takes jobs away from the French people or the concept of the European Constitution, its possible implications, and the question of the EU becoming a federation) and had become or could have become part of the referendum campaign did not directly arise.⁴⁴

This case was brought before the Constitutional Court in 2003 to validate the referendum question. On 29 September 2003, an NGO that regularly organised protests against Hungary’s accession to the EU submitted a signature collection form to the National Electoral Committee, claiming that it wished to initiate a national referendum on the matter. The question was, ‘Do you want the Republic of Hungary not to recognise the binding force of the international treaty establishing the Constitution of the EU on the Republic of Hungary?’ In decision 122/2003 (X. 27), the National Election Committee refused to certify the signature collection form on the grounds that, according to Article 28/C of the Constitution⁴⁵, a referendum cannot be held on the obligation arising from an international treaty in force, as the question put to the referendum conflicts with the commitment contained in the Act concerning the conditions of accession of the Republic of Hungary and the adjustments to the Treaties on which the EU is founded. The proposers of the referendum question subsequently (now in 2004) appealed to the Constitutional Court, which, on 13 December 2004,⁴⁶ annulled the National Election Committee’s decision and ordered it to conduct a new procedure.

The Constitutional Court began its reasoning by stating that the legal environment had changed fundamentally since the referendum initiative, and the objection to the rejection of the National Election Committee decision was submitted. At the end of November 2003, it still seemed realistic that the Constitutional Treaty would be adopted and signed before the accession of the new Member States. On 29 October 2004, the Prime Minister and Minister of Foreign Affairs of the Republic of Hungary, based on the authorisation granted by Parliament in Resolution 105/2004 (X. 20.), signed the Constitutional Treaty, the ratification of which falls within the competence of Parliament. Referring to the Vienna Convention on the Law of Treaties, the Constitutional Court has ruled in several decisions that the Republic of Hungary must refrain from any action that would thwart the objective and purpose of an already signed international treaty. However, this obligation does not affect

43 Parliament Decision 105/2004 (X. 20.) on the signing of the Treaty establishing a Constitution for Europe
Rózsa, 2004.

44 Arató and Lux, 2012, pp. 195–197., Angyal 2007, pp. 180–182.

45 ‘§ 28/C (5) National referendum may not be held on the following subjects:

b) obligations set forth in valid international treaties and on the contents of laws prescribing such obligations’;

46 Decision 58/2004. (XII. 14.).

the right of the parliament to decide freely whether to ratify an international treaty. The prohibition contained in Article 18(a) of the Vienna Convention means that a referendum on a specific international treaty already signed but not yet ratified by the Parliament cannot be held based on citizen initiative. Article 28/C(5)(b) of the Constitution, however, prohibits referendums on international treaties that have already been ratified, promulgated, and entered into force, and not on international treaties that have been signed but not yet ratified. Therefore, the Constitutional Court has taken the view that a referendum is not *a priori* excluded regarding international treaties already signed but not yet ratified by Parliament. The signing of a treaty makes it likely that the state wishes to be a party to the treaty in question but does not imply an obligation to be a party to it. Thus, Parliament has a real choice as to whether to ratify the treaty. Hence, the question of whether Parliament should ratify an international treaty is itself a referendum that can be initiated and held.

In repeated procedures, the National Electoral Committee, having confirmed the validity of the signature form, refused to validate it. The Constitutional Court upheld the National Electoral Committee's decision in Decision 1/2006 (I. 30.).

According to the explanatory memorandum, by ratifying the Constitutional Treaty and depositing the accession instrument, the Republic of Hungary expressed its acceptance of the Constitutional Treaty as an international treaty and the obligations arising from it. The existence of this international commitment is not affected by whether the international treaty has already entered into force. Ratification is a single legal act, and once the instrument of ratification has been deposited, there is no possibility of withdrawing from it in accordance with the practice generally accepted in international law, but only in certain cases, subject to certain conditions, of withdrawing from the treaty, or, in a limited number of cases, of invoking its invalidity. However, a successful referendum held based on the referendum initiative, which would have resulted in a majority in favour of the question, would force the Parliament to take a decision of such a nature—to change the decision recognising the binding force of the treaty on the Republic of Hungary and, consequently, withdraw the instrument of ratification already deposited, which it cannot take, as the international treaty in force on the conclusion of international treaties does not recognise this type of international legal instrument. Thus, at the time of examination of the objection, the condition laid down in Article 28/B(1) of the Constitution that the subject of the referendum may be a matter falling within the competence of parliament is no longer fulfilled. Once the binding force of an international treaty has been recognised, a referendum on the recognition or non-recognition of its binding force cannot be held under Hungarian legislation. The process of drafting the Constitutional Treaty coincided with Hungary's accession to the EU, but did not, in principle, give rise to any major public law controversy. The question could have been raised as to the extent to which a new role concept towards federalism regarding the EU would be compatible with the Accession Clause, especially regarding the issue of granting or transferring powers. However, as we have seen, the debate has not started in this direction. The Constitutional Court itself examined

the binding force of international law and the competence of the National Assembly regarding referendums in both procedures, the nature of which – the certification of a referendum question – did not allow for the condition of more far-reaching questions.

4.2. The ex-post control procedure for the Lisbon Treaty

Contrary to the above, constitutional court proceedings in the 2010 Lisbon Treaty can be seen as a paradigm shift. The Hungarian pattern was similar to the procedure for the Constitutional Treaty: the Treaty of Lisbon was promulgated by the Parliament on the fourth day after its signature, the President of the Republic did not veto its constitutionality, and neither the Parliament nor the Government, which is also entitled to review the preliminary provisions, initiated the procedure of the Constitutional Court. Thus, unlike in other Member States, no constitutionality review was carried out. Hungary was the first country to ratify the Lisbon Treaty, and as with the Constitutional Treaty, there was no particular public law debate. Similarly, in 2007, an attempt was made to put the issue into a referendum. The question was, *‘Do you want the Republic of Hungary not to recognise the binding force of the EU Treaty on the Republic of Hungary, as agreed by the Heads of State and Governments of the Member States of the European Union at their meeting in June 2007?’* The National Electoral Committee saw a deficiency primarily in the clarity of the question and refused to certify it. They concluded that a national referendum on the recognition of the binding force of a treaty could not be held in the future. In its decision, the Constitutional Court⁴⁷ considered the fact that the Lisbon Treaty had been recognised as binding in the meantime such that the Parliament could not decide on this issue again, that it no longer had the power to ratify it, and that a referendum could not be held on this issue. Therefore, the Constitutional Court upheld the National Election Committee’s decision.

This was followed by a petition to the Constitutional Court for an ex-post review of the law proclaiming the Lisbon Treaty, which raised the issue of the infringement of the country’s sovereignty. The Constitutional Court decided on the issue two years later in Decision 43/2010 (VII. 14.). As the Constitutional Court, from the perspective of its exercise of jurisdiction, excluded EU law from the rule of the Constitution on international law [Article 7(1)] by treating it as part of national law,⁴⁸ and, thus, the possible conflict between Hungarian law and EU law did not become a constitutional issue, the question of why the Constitutional Court could still examine the constitutionality of the Lisbon Treaty required separate justification in 2010.⁴⁹ The petitioner claimed that the sovereignty of the country had been violated; however, he noted that the Lisbon Treaty would also require a reinterpretation of the Accession Clause.

47 Decision 61/2008 (IV. 29.).

48 Decision 1053/E/2005, Decision 72/2006 (XII.15.).

49 Chronowski, 2019, [18] – [20], [24].

In his view, accession to the EU was authorised by the referendum before accession and in knowledge and within the framework of the conditions then in force. Even so, the Lisbon Treaty was incompatible with this. The Court dismissed the petition in Decision 143/2010 (VII. 14.).

The Constitutional Court addressed this jurisdictional problem by formally incorporating the Lisbon Treaty into Hungarian law. It was found that this could be examined on the basis that the legislature had not amended the Accession Treaty but had promulgated it by a separate law (Article 2 of the law promulgating the Lisbon Treaty), including the Charter of Fundamental Rights and its commentary. Consequently, from a formal perspective, the Act proclaiming the Lisbon Treaty was a law in force, a ‘law with substantive content in the national legal system’, which could be examined by the Constitutional Court.⁵⁰ Before reaching this conclusion, the Constitutional Court briefly indicated that it was aware several member states’ constitutional courts had conducted or were conducting proceedings and also noted that, in Hungary, however, none of the parties entitled to initiate a preliminary review had made use of this possibility.

Although the Constitutional Court established its jurisdiction in this case, it also stated at the beginning of its reasoning that, if it were to declare the law promulgating the treaty amending the founding and amending treaties of the EU unconstitutional, its decision would not have any effect on the commitments of the Republic of Hungary’s membership in the EU. According to the judgement, this contradiction can be resolved by requiring the legislature to create a situation in which the Republic of Hungary can fully comply with its obligations under the EU without prejudice to the Constitution. Moreover, it stressed that the authentic interpretation of the founding and amending treaties of the EU and the so-called secondary or derived law, regulations, directives, and other European law rules adopted based on these treaties fell within the jurisdiction of the CJEU. However, there is no obstacle to the Constitutional Court referring to the specific rules of the founding and amending treaties of the EU without giving or requiring an independent interpretation. However, the decision did not address whether the Constitutional Court could request an interpretation of EU law in the context of a preliminary ruling procedure. Moreover, regarding the content of EU law, the decision only refers to ‘fundamental facts’ that are ‘generally known’ or ‘do not require independent interpretation’ and does not even answer the question of whether it can refer to EU law with a content that is not entirely clear in its decisions.⁵¹

In this framework, decisions address sovereign issues in detail. In interpreting the Accession Clause, it was stated that if, in the course of the development of the

50 This finding was criticised in two parallel opinions and one dissenting opinion. If the Constitutional Court had consistently adhered to its previous practice, it would have had to hold that the Treaty of Lisbon, which had already entered into force at the time of the judgement of the petition, was in fact and without doubt part of EU law and, therefore, had no jurisdiction to rule on the petition. Szabó, 2021, p. 187.

51 Kiss, 2022, p. 164.

EU, it should appear necessary to exercise additional powers derived from the Constitution, either jointly or through the institutions of the EU, the transfer of such powers to the extent necessary and based on a new international treaty is constitutionally possible. Therefore, the decision rests with the legislature, as the exerciser of state sovereignty, to decide whether it can accept complex institutional reforms on behalf of the Republic of Hungary.⁵² However, the Constitutional Court has reserved the right to exercise control over any further transfer of powers that it will do alone, independent of any other national or EU body. It concluded that the Treaty of Lisbon had transferred sovereignty to the extent necessary, did not create a European super-state, did not fundamentally change the EU, and ensured the exercise of control by national parliaments by applying the principles of subsidiarity and proportionality to a greater extent than before. Moreover, the National Assembly could play an active and proactive role. However, the decision did not provide a substantive answer to the question of whether the constitution of Member States could limit the exercise of powers and, if so, by what standard this could be decided.⁵³ This did not cause much excitement in the literature, and the reactions were critical. Among these, it is worth highlighting that although Decision 143/2010 (VII.14.) was an indirect check on sovereignty, little can be deduced from the Accession Clause, as it is a procedural enabling rule and is not a suitable standard for constitutionality on merits.⁵⁴ Indeed, the significance of the decision lies in the fact that it clarified that the Accession Clause could not supersede the sovereignty clause of the Constitution.⁵⁵

4.3. Have these procedures provided an answer to the relationship between EU law and national law?

Overall, the Hungarian Parliament played a learning-by-doing role regarding the Constitutional Treaty and the Lisbon Treaty, ratifying them without any major public debate, while a small number of critics tried to achieve what they could not achieve in the Parliament via referendums and ex-post control of norms: to conduct a constitutional-sovereignty debate on the documents that shaped the future of the EU and within its Member States.

The Constitutional Court, however, has consistently avoided raising EU Law issues to the level of constitutionality, and the procedures related to the validation of referendum questions have not provided an opportunity for this because they are subject to a petition. In fact, the decision on the Lisbon Treaty did not provide an answer to the relationship between the Hungarian Constitution and EU Law nor did it examine in-depth the impact of the Lisbon Treaty on the competences of the Member States. Although the decision paved the way for the incorporation of sovereignty

52 Trócsányi, 2023, p. 258.

53 Balogh-Békesi, 2021, p. 808.; Balogh-Békesi, 2015, p. 131.

54 Blutman, 2017, p. 4.

55 Kukorelli, 2013, p. 5.

control into the Constitutional Court argument, the Constitutional Court did not take this path until a few years later, in 2016. The possibilities, at least in Hungary, were, therefore, limited if we considered the impact of the documents on the internal legal order and the exercise of powers, including the Accession Clause of the Constitution, the practice of the Constitutional Court, and the passivity of Parliament. This change came first with the Constitutional Court's decision of 22/2016 (XII. 5.) (the so-called Quota Decision), and with the reaction of the Constitutional Court, which amended the Accession Clause of the Constitution, incorporating the sovereignty and identity control elaborated in the Quota Decision, thus allowing for a deeper substantive examination than before for the future.

5. The limits of intervention by the Constitutional Court: avoiding intervention

As already mentioned, the Constitutional Court has been ambivalent about EU Law. Before the Fundamental Law came into force, it only examined the constitutionality of legislation implementing EU law, treating it as national law. Thus, the Constitutional Court had conducted an examination of the constitutionality of the challenged legislation but had only compared it to the Constitution and had not addressed the impact of EU law on Hungarian law.

In its Decision 17/2004 (V. 25), the Constitutional Court concluded that the question at issue in the contested provisions was not the validity or interpretation of the rules of the EU but the constitutionality of the Hungarian legislation implementing EU regulation.⁵⁶ The decision avoided an examination of the interpretation and validity of EU Law; its findings were limited to the most necessary ones, which are routine of the Constitutional Court's practice; that is, the reasoning does not contain anything new regarding the relationship between the rules of the EU and the Constitution. One year later, the constitutionality of the transposition of the directives was examined. Decision 744/B/2004 examined whether the Court had jurisdiction to examine the constitutionality of the law transposing the Directive. However, it concluded that it could examine the constitutionality of Hungarian legislation based on the Directive without examining the validity of the Directive or the adequacy of its implementation. The decision did not consider the fact that the transposition of the directive into national law is based on an obligation, did not contain any principles on how the body views the constitutionality of secondary community acts, and did not indicate what should be done in that case; if it finds that the law transposing the directive is unconstitutional, what the limits are on

⁵⁶ The case was a prior checking procedure in the context of the Law on measures relating to commercial surplus stocks of agricultural products. The law was aimed at implementing Community law.

the exercise of jurisdiction, whether and how this procedure differs from the ex-post review procedure, and no reference to the relationship of the Constitutional Court with the CJEU. Decision 1053/E/2005 raised the question of how to rule when national law (a statute in this case) was contrary to the Treaty of Rome, as promulgated by the Act Promulgating the Accession Treaty. The petitioner invoked a breach of the Accession Clause but sought a declaration of unconstitutionality in the form of a failure to act under the Treaty of Rome. However, the decision held that the Accession Clause provisions did not impose any specific legislative obligations. Therefore, the substantive assessment was again based on the Constitution and not on the Treaty of Rome. Decision 72/2006 (XII. 15.) examined the rules governing on-call doctors' fees. The regulation was found to be in breach of an EU directive, and there was a related case law from the CJEU, which ruled that the rules of the directive were directly applicable, but the Constitutional Court almost ignored EU aspects. It did not see any substantive unconstitutionality in its conflict with the Directive and did not examine the merits of the issue. Decision 32/2008 (III. 12.) was issued on the subject of the European Arrest Warrant—an issue which, in the case of a possible transfer of criminal jurisdiction, was of far-reaching relevance to the question of sovereignty. In this decision, however, the Constitutional Court separated the constitutional problem raised from the constitutional issues of sovereignty: Articles 2/A and 7(1) of the Constitution. The Decision 142/2010 (VII. 14.) examines the unconstitutionality of the law in a single agricultural support scheme. According to the decision, the challenged legislative provision was enacted by the parliament in its competence, not in the implementation of a community legal obligation, thus avoiding the examination of the question of the infringement of community law. However, the Constitutional Court, although in its previous decisions, had left the interpretation of EU Law entirely to the CJEU, in this decision, it interpreted the relevant Council Regulation, albeit in a reserved manner. Moreover, there have also been cases⁵⁷ where secondary law or the case law of the CJEU has been invoked as an additional argument in favour of the constitutionality argument.⁵⁸

For the 2004–2010 period, it is not necessarily possible to identify the reasons the Constitutional Court avoided answering the questions raised in the petitions, including the question of the infringement of EU Law or the limits on the exercise of EU powers. It is self-evident that in the absence of an explicit constitutional provision, it was not a situation of necessity regarding the assessment and application of EU Law nor was it a court or tribunal regarding which the obligation to initiate a preliminary ruling procedure would have arisen. However, it can only be assumed that it wished to avoid the question of who had the final say in cases involving the EU. For all such reasons, the grounds on which the national constitutional court refused to intervene to protect national law and competence cannot be answered, if only because it could settle issues within the framework of its national law.

57 e.g. Decision 74/2006 (XII.15.), Decision 766/B/2009, Decision 23/2010 (III. 4.).

58 Balogh-Békesi, 2015, pp. 75, 77, 84–85, 89, 93–94, 114, 117–118, 120, 122.

The practice changed with the Lisbon Decision, which has been described above. Since then, but especially since the 2016 Quota Decision, the Constitutional Court has been more active in cases involving the EU. Consequently, the avoidance of this issue was most typical for the period before 2016. The period shows a varied picture. In cases related to student contracts⁵⁹ and slot machines,⁶⁰ the Constitutional Court considered EU law and referred to the decisions of the CJEU; Decision 3255/2012 (IX. 28.) on criminal cooperation with the Member States of the EU was not mentioned. The proceedings were initiated based on the Ombudsman's petition, which did not address EU law. Decision No.3144/2013 (VII. 16.) on a similar subject was adopted, which, although it did not deal with jurisdictional issues, referred to the relevant EU law (framework decision) and the case law of the CJEU in the context of the examination of the infringement of the Fundamental Law; that is, it remained formally on the grounds of the internal legal examination but filled the content of the Fundamental Law with EU law. However, during this period, several proceedings were pending before the Constitutional Court, in which parallel infringement proceedings were also pending against Hungary, but the Constitutional Court did not consider this fact and did not necessarily await or consider their outcomes. These include the retirement of judges⁶¹ and quota decisions on the distribution of refugees⁶².

Third, considering the cases where petitioners invoked EU law, most decided to refuse admission. Two solutions can be found in relevant rulings. As a general rule, the argument that the grounds of the petition did not allow for a substantive constitutional examination—for example, that the petition did not raise a question of fundamental constitutional importance or a question that would have a substantial impact on judicial decisions—could be considered. Accordingly, the Panel did not need to consider the consequences of involvement in EU law.⁶³ Another solution was to state that a constitutional complaint cannot be directly based on Article E of the Fundamental Law per se without further elaboration or showing a connection with the right guaranteed by the Fundamental Law.⁶⁴ The reference to Article E is not widespread in itself; petitioners refer to EU law or the case law of the CJEU in the context of a violation of specific fundamental rights.

Looking at the practice presented in the other chapters, the Constitutional Court has typically followed three different approaches to the questions of national law and EU law, Fundamental Law and EU law, and the exercise of EU powers: it has not examined the questions; it has made substantive findings, typically in connection with abstract questions; and it has used EU law on the government's motion, or it

59 Decision 32/2012 (VII. 4.).

60 Decision 26/2013 (X. 4.).

61 Decision 33/2012 (VII. 17.).

62 Várnay, 2019, p. 67.

63 e.g., Ruling 3009/2013 (I. 21.), Ruling 3031/2013 (II. 12.) (here the petitioner's statement does not mention that the principle of direct effect was violated), Ruling 3126/2013 (VI. 24.).

64 Ruling 3140/2013 (VII. 2.), Reasoning [17] – [18], Ruling 3041/2014 (III. 13.), Reasoning [25], Decision 3003/2022 (I. 13.), Reasoning [17].

has used EU law to strengthen its constitutional argument. Therefore, the latter is the more common of the two types of intervention, which can be attributed partly to the constitutional tradition of avoiding the issue and partly to the question of jurisdictional limits. It should also be pointed out, however, that even in the case of intervention, the Constitutional Court has placed itself within strong limits; its proceedings are not directly concerned with the EU Act or its interpretation; it does not rule on its validity, invalidity, or its primacy in the application; and it consistently refers to the need to resolve the conflict within the framework of constitutional dialogue.

6. The limits of Constitutional Court intervention: intervention in defence of national law and powers

Regarding the Accession Clause and the relationship between EU law and national law, the case law of the ordinary courts has held that Hungary undertook an obligation to apply the rules of Community Law in accordance with the interpretation of the European Court of Justice and that the provisions of Community Law form an integral part of the Hungarian legal order, which the national court is obliged to take into account.⁶⁵ The Constitutional Court, as we have pointed out previously, did not touch upon this issue, and from 2016 onwards, it incorporated the narrative of sovereignty and constitutional self-identity into its own practice to protect national law and competences. For this decision to be worthwhile, in addition to the change in the external political environment (which presented the Constitutional Court with certain problems), it was necessary for the Constitutional Court to change its previous position, which was essentially based on the avoidance of EU-law issues, aided by the identity-forming role of Fundamental Law.

6.1. The importance of the identity-building role of the Fundamental Law

With the adoption and enforcement of Fundamental Law, Hungary has a different constitution that emphasises identity creation. The identity-creating instruments of the Fundamental Law, the National Avowal (i.e. the preamble to the Constitution), and the achievements of our historical Constitution as a framework of interpretation laid the foundations for the Constitutional Court to adopt the reference to constitutional identity years later.⁶⁶ With these two solutions, the Constitution departed significantly from the previous one. The preamble to the Constitution, called the National Avowal, is voluminous, its style is neither sentimental

⁶⁵ Gombos and Sziebig, 2016 pp. 167–168.

⁶⁶ Trócsányi, 2019, pp. 34–35.

nor poetic, and it is politically committed to identity building. In this way, it fits with the trend of post-1989 constitutional preambles in Central Europe and the Baltic States, whose main function is identity building. These constitutional preambles typically sought to provide a substantive answer to the question of why the new socio-political order was ‘better’ than the previous one based on socialist foundations. Typically, they place the change of regime in the context of the struggle for national independence, highlighting the most important historical events in the life of the country, especially its ‘glorious’ periods. In other words, these introductions seek to establish the most basic narratives of a qualitatively new political community, emphasising the values of democracy and the rule of law and embedding them in a self-reliance and independence-centred reading of national history.⁶⁷

Another new means of identity creation refers to the achievements of historical constitution. Fundamental Law states that its provisions must be interpreted in accordance with their purposes, the National Avowal, and the achievements of the historic Constitution.⁶⁸ Inextricably linked to this is the statement in the preamble that affirms that the protection of our identity, rooted in our historic constitution, is the fundamental duty of the state.

This has led the Constitutional Court to emphasise national specificities in its practice and to identify and protect legal institutions that have developed organically over history and are part of our constitutional culture.⁶⁹ Thus, the Constitution laid the foundation for a paradigm shift in thinking. However, it is slow to take root. Although Article R(3) of the Fundamental Law, through the interpretation of the Constitution, gives normative character to the National Avowal and the achievements of our historical Constitution; in reality, neither has become a normative obligation.

In fact, National Avowal is a decorative element of the practice of the Constitutional Court. One reason for this is that every legally relevant element is clearly elaborated in the constitutional text in a legal nature; therefore, it has not become the basis for judgements of legal development and activist nature. Additionally, its treatment as a normative introduction is inherently alien to the Hungarian constitutional judiciary and Hungarian legal culture. In contrast, reference to the achievements of the historical constitution appears sporadically, albeit not as a stand-alone argument, but as a strengthening argument.⁷⁰ It is not possible to determine *a priori* what is included in the achievements of the historical constitution.⁷¹ There is no established methodology for its application, nor is there a clear pattern of when the Constitutional Court feels the need to use it to reinforce its arguments. What has

67 Berkes and Fekete, 2017, pp. 15–16.

68 ‘Art. R (3) *The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution*’.

69 Trócsányi, 2014, p. 481.; Trócsányi, 2019, pp. 35–37.

70 Berkes and Fekete, 2017, p. 16.

71 Varga, 2016, p. 89.

served as a starting point is that Fundamental Law does not call for the application of the historical Constitution but provides for its acquisition as a framework for interpretation. The *acquis*—at least this appears to be the case from the practice of the Constitutional Court⁷²—carry the essential content of fundamental rights that cannot be limited by law and which, in principle, cannot be limited by the Constitution itself.⁷³ In fact, the reference to the acquisition of the National Avowal and the historic Constitution serves to identify Hungary through them. The emphasis should not be on specific legislative provisions, but on the spirit that permeates our historical constitution⁷⁴, through which the application of the law can return to constitutional tradition⁷⁵.

The values named by the Constitutional Court as achievements of our historic constitution are essentially universal and not exclusively Hungarian. It is also noticeable that the decisions in which references were made to the achievements of our historical Constitution or the National Avowal were not made on the subject of state sovereignty, the powers of the Member States, or the conflict between international law, EU law, and national law. However, it is significant that the Constitutional Court has highlighted this *acquis*; by doing so, it has reviewed and made it aware of the legal and state-historical traditions. This logical process is at stake in the call for constitutional self-identity. However, by the end of 2021, the two systems of reference were linked in a constitutional interpretation decision concerning the implementation of an ECJ judgement. In this decision, the Constitutional Court held that the values constituting Hungary's constitutional identity were created over the course of historical constitutional development. In the context of the manifestation of Hungary's national identity, the protection of its linguistic, historical, and cultural traditions is a constitutional achievement of history. As such, they are legal facts that cannot be waived not only by an international treaty but also by an amendment to Fundamental Law, as legal facts cannot be changed by legislation.⁷⁶ This decision sharply contrasts with Decision 143/2010 (VII. 14.), which, in its *ex-post* examination of the Lisbon Treaty, stated that there are constitutional limits to deeper integration, the most important aspect of which is sovereignty, though it did not develop a sovereignty test.

72 The historical constitutional achievements include the independence of the judiciary, the achievements of religious freedom, the obligation to protect state and private forests, the creation of a Court of Accounts independent of the government, the establishment of a parliament, the national role and the definition of its functioning by the Constitution, and the freedom of the press. The National Avowal's themes of helping the destitute and the poor, responsibility for our descendants, and the fulfilment of the good life as the common goal of citizen and state are reflected in the decision on parental care. The former also appeared in the decision on foreign currency loans. In other cases, the reference to the achievements of our historic constitution or to a theme of the National Avowal appears only in passing, without elaborating on the content.

73 Varga, 2016, p. 88–89.

74 Kurunczi and Varga, 2013, p. 133.

75 Csink and Fröhlich, 2012, p. 12.

76 Decision 32/2021 (XII. 20.).

6.2. The Constitutional Court's Quota Decision: fundamental rights control, sovereignty control, and identity control

The protection of national law and national competencies was the forerunner of Decision 143/2010. (VII. 14.) (Lisbon Decision), in which the Constitutional Court opened the way for sovereignty control to be incorporated into its reasoning. The decision itself, however, remained on the path laid down by the Constitutional Court, did not provide an actual answer to the relationship between the Hungarian Constitution and EU law, did not examine the impact of the Lisbon Treaty on the competences of Member States in-depth, and did not even discuss the standard by which this could be done. In the years that followed the decision, the Constitutional Court avoided the issue of *sovereignty control* until 2016. Despite several cases pending before the Constitutional Court in this period in which infringement proceedings were pending against Hungary, the Constitutional Court did not address these issues and examined only the question of the infringement of the Fundamental Law. Therefore, the question of the relevance of EU Law has not yet become a part of constitutional discourse. This raises the question of whether the encounter between the EU legal order, which is considered a *sui generis* or part of national law, and the Hungarian legal order is not a constitutional issue, and in which sphere can it be classified? In addition to examining questions of constitutionality, the practice of the Constitutional Court rejects questions of pure legality and, by implication, the examination of governmental and political decisions. Questions of EU law could, therefore, fall somewhere within these spheres.

However, 2016 was a strong turning point in the practice of the Constitutional Court, as it was the year when *sovereignty control*, which was not included in 2010, was developed, and *identity control* was introduced as a new aspect of the examination. Following the Quota Decision, the Constitutional Court was more courageous in identifying possible points of friction between the two legal orders and in defining the limits of the delegation of powers and the specificity of the Member State to be protected. The period is characterised by the Constitutional Court's search for a way forward: defining its position regarding transnational courts and exploring the possibility of acting against any potential threat to the Constitution and national traditions to be protected. Thus, whereas the previous 20 years had been characterised by a reticence to engage with EU law and institutions, the Constitutional Court entered a space from which it had previously shied away by defending sovereignty and identity. However, the search for a way forward was not a one-way process as the foundations for constitutional dialogue (described in detail below) were also laid.

The tasks of the Constitutional Court and, where appropriate, of ordinary courts regarding the protection of sovereignty and identity can also be understood as the result of the historical development in which the protection of the rule of law and the emphasis on legality became increasingly the task of the courts and was embodied in their judgements and decisions. The concepts of common European tradition and national identity, thus, appeared for the first time in judicial decisions (see

the Internationale Handelsgesellschaft case, in which the CJEU had already referred to the ‘constitutional tradition common to the Member States’, or the Solange decisions). The defence of common traditions as international and supranational values and hence the emphasis on the primacy of EU law over national constitutions and the notion that a common European tradition cannot be set against national constitutional identities, and vice versa, are corollaries of the Lisbon Treaty. Therefore, the two sets of values must be balanced. This also implies that the constitutional identity of each nation cannot be dissolved through artificially created common imperial approaches. Common values include what is common and national values include what is not. However, non-common values are also European values at that point; therefore, they must also be protected by the courts. This protection can be provided for by the constitutional courts of Member States.⁷⁷ It was, therefore, inevitable that the Hungarian Constitutional Court, like many national constitutional courts, would take on the task of participating in the EU law-national law-national constitution dynamic that has changed since the Lisbon Treaty.

The procedure underlying Decision 22/2016 (XII. 5.) (the so-called Quota Decision) was initiated in the Ombudsman’s motion and concerned the distribution of refugees within the EU, which Hungary did not support.⁷⁸ According to the decision, the Constitutional Court may, in exceptional cases and as a matter of *ultima ratio* (i.e. in compliance with the constitutional dialogue between the Member States) examine whether the exercise of powers based on Article E(2) of Fundamental Law⁷⁹ infringes on human dignity, the essential content of other fundamental rights, Hungary’s sovereignty (including the scope of the powers conferred on it) or constitutional identity.⁸⁰

The Constitutional Court identified the main question to be answered as the assessment of the *reservation of fundamental rights* (i.e. whether an EU Act may violate fundamental rights) and the *ultra vires* of EU acts as specific constitutional problems, ‘which must be examined by the Constitutional Court, directly at the level of the Fundamental Law, which is the basis of the Hungarian legal system’. This categorical

⁷⁷ Varga, 2018, pp. 22., 26–27.

⁷⁸ The Ombudsman asked for an interpretation of the Fundamental Law, partly regarding the ban on collective expulsions and partly regarding the possible unconstitutional involvement of Hungarian state bodies in the implementation of EU decisions. With regard to the latter, he also asked which legal institution is entitled to declare this, whether the exercise of powers relating to the founding treaties can restrict the implementation of an act that is not based on powers conferred on the EU, and whether the provisions of the Fundamental Law can be interpreted as authorising or restricting the transfer by Hungarian bodies and institutions, as part of cooperation within the legal framework of the EU, of a significant group of foreign nationals legally resident in an EU Member State, following an institutional procedure and without objectively prescribed criteria.

⁷⁹ ‘Art. E (2) 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’.

⁸⁰ Decision 22/2016 (XII. 5.), Reasoning [33], [43]–[46].

statement clearly indicates a radical change in the constitutional court's conception of its role and foreshadows its irreversibility.

The decision does not refer to the Lisbon Decision, and the issue of sovereignty or identity is primarily addressed through foreign constitutional court decisions. The decision refers to the practices of the Estonian, French, Irish, Latvian, Polish, and Spanish constitutional courts and Supreme Courts, with the strongest echo being the Solange decisions of the German Constitutional Court. It highlights arguments in favour of the protection of sovereignty and identity. This approach is methodologically criticisable, as it presents only a small slice of the practice of the cited courts and does not place it in a comparative context. In terms of its function, this section mainly intends to show that the Hungarian Constitutional Court's decision is not unprecedented, as these questions have been raised throughout Europe and answered in similar ways by judicial fora. However, it is not accompanied by any further independent reasoning on the part of the Constitutional Court but merely refers to the fact that it has reviewed this practice, followed immediately by the conclusion that the power of investigation exists, subject to conditions.

Accordingly, an investigation into the exercise of power may be conducted based on Article E(2) of the Fundamental Law:

- on a motion to that effect,
- in exceptional cases,
- *ultima ratio*,
- while respecting the constitutional dialogue between Member States.

The content of this assessment may be whether there is a breach:

- *the essential content of human dignity, other fundamental rights, or*
- Hungary's *sovereignty* (including the extent of the power it transferred) and
- *constitutional identity*.

This is followed by an interpretation of the content of each of the elements mentioned here: *fundamental rights control, sovereignty control, and identity control*.

Regarding the *reservation of fundamental rights*, the Constitutional Court held that any exercise of public power in Hungary (whether it is a joint exercise of powers with other Member States) is subject to fundamental rights. It was also the case at the time of accession to the EU, and the level of constitutional protection of fundamental rights already achieved was not affected by accession. As the protection of fundamental rights is a primary obligation of the State, it cannot be exempted from this responsibility even when it is implementing EU law. The framework for examining whether the maintenance of fundamental rights is affected is the duty to cooperate and to ensure that European law is enforced as far as possible, while the *ultima ratio* protection of human dignity and the essential content of fundamental rights is also a matter of concern.⁸¹

81 Reasoning [46]–[67].

In the context of the *ultra vires* nature of the EU Act, the decision first referred to the possibilities granted to the Parliament and the Government, and only then expanded the interpretation of Article E(2) of the Fundamental Law. In such cases, the intervention and initiation of proceedings by public authorities (e.g. in the European Council or before the CJEU on the grounds of subsidiarity) is considered necessary and justified rather than intervention by the Constitutional Court.

Based on this Decision, Article E(2) ensures the validity of EU law for Hungary and constitutes a limit on the powers conferred or exercised jointly. These limits—based on the National Avowal (the preamble) of the Fundamental Law and through Article E(2) and Article 4(2) of the Treaty on the European Union—posit that the joint exercise of powers must not infringe on the sovereignty of Hungary (sovereignty control) and must not result in a violation of constitutional identity (identity control). The main guardian of respect and the protection of sovereignty and constitutional identity is the Constitutional Court. The far-reaching nature of this statement was, however, immediately clarified by the Constitutional Court, first by pointing out that the subject of the sovereignty or identity test is not directly the EU Act or its interpretation and that it does not, therefore, rule on its validity, invalidity, or primacy in the application. Later in the decision, the possibility of interference is further qualified by referring to constitutional dialogue.

Regarding *sovereignty control*, the following observations are recorded:

- As long as Fundamental Law enshrines the principle of independent, sovereign statehood and identifies people as the source of public power, the EU clause cannot supersede them.
- By joining the EU, Hungary did not renounce its sovereignty but only made possible the joint exercise of certain competences; therefore, Hungary's sovereignty must be presumed to be maintained when assessing the joint exercise of additional competences to the rights and obligations laid down in the founding treaties of the EU (*presumption of sovereignty maintained*).
- Sovereignty is enshrined in the Constitution as the ultimate source of power and not as competence. Therefore, the joint exercise of power should not result in people losing their ultimate control over the exercise of public power (whether joint or individual in the form of Member States).

According to the concept of *constitutional identity*, the decision of the Constitutional Court referred to Hungary's constitutional identity, the content of which was determined on a case-by-case basis. Defining the content of constitutional identity considers the whole of Fundamental Law and its individual provisions, its purpose, the National Avowal, and the achievements of our historical constitution as a basis. The resolution also contains an open list of constitutional values that fall within this scope: freedoms, separation of powers, the republican form of government, respect for public autonomy, freedom of religion, the legitimate exercise of power, parliamentarianism, equality of rights, recognition of the judiciary, and the protection of nationalities living with us. These fundamental values are not created by

Fundamental Law; they are only recognised by Fundamental Law. Therefore, they cannot be renounced by an international treaty, and only the permanent loss of sovereignty of independent statehood can deprive Hungary of them. As sovereignty and constitutional self-identity are intertwined at several points, the two checks must, in some cases, be carried out regarding each other.⁸² With this decision, the Constitutional Court has effectively created conditions for examining whether EU acts are in breach of Fundamental Law.⁸³

The high degree of abstraction in the explanatory memorandum has made it difficult to determine how the Constitutional Court will solve more concrete constitutional problems in the future using the test set out in the Quota Decision.⁸⁴ The survival of the Quota Decision also indicates that the tests were applied to mixed cases.

6.3. *Establishment of the Unified Patent Court as a jurisdictional issue*

The first decision in which the findings of the Quota Decision were substantially invoked concerned the establishment of the Unified Patent Court. The proceedings were initiated by the government, which sought to interpret Articles E(2) and (4), Q(3), and 25 of the Fundamental Law.⁸⁵

In its Decision 9/2018 (VII. 9.), the Constitutional Court held that an international treaty concluded in the framework of enhanced cooperation, which transfers jurisdiction to rule on a group of private law disputes within the meaning of Article

82 Reasoning [64]–[65], [67].

83 In its subsequent decisions, the Constitutional Court has also stated that this examination provides for three types of control: in exceptional cases and as a *last resort* (i.e. in compliance with the constitutional dialogue between Member States), it can carry out *fundamental rights check* (whether the exercise of joint competences infringes the essential content of a fundamental right), a *sovereignty or ultra vires check* (whether Hungary's sovereignty, including the scope of the competences it has transferred, is infringed), and an identity check (whether Hungary's constitutional identity is infringed). e.g. Decision 32/2021 (XII. 20.), Reasoning [24].

84 Kelemen, 2017, 6.

85 The essence of the initiative for the interpretation of the Fundamental Law was whether the proclamation of an international treaty on the basis of Art. E(2) and (4) of the Fundamental Law, which (a) is not one of the founding treaties of the European Union or is not a legal act of the Union but to which only the Member States of the European Union may be parties, (b) is a condition for the effective implementation of enhanced cooperation established under Union law; and (c) establishes an international judicial organisation which (ca) has exclusive competence in a specific group of matters, partly defined by EU law and partly by other international agreements through which it is established, (cb) in its proceedings, it shall also be entitled to interpret and apply Union law, other international agreements concluded by or with non-party Member States and national law; and (cc) appeals against its decisions shall be available only within the organisation of the court to be set up.

If the international treaty cannot be proclaimed under Art. E(2) and (4) of the Fundamental Law, what are the conditions for its proclamation under the second sentence of Art. Q(3) of the Fundamental Law, in particular Art. 25 of the Fundamental Law on the judicial power.

25(2)(a) of the Fundamental Law, to an international institution not included in the founding treaties of the EU. Thus, the ruling on these disputes and the judicial decisions made in them are contrary to Article 24(2)(c) and (d) of the Fundamental Law and cannot be declared under the provisions of the Fundamental Law in force.

Regarding the *control of sovereignty*, the explanatory memorandum states that the presumption of sovereignty requires a restrictive interpretation: as long as an international treaty concluded by the Member States does not become part of the *acquis communautaire*⁸⁶, it is necessary to examine whether Articles Q or E of the Fundamental Law provides a constitutional legal basis for the international agreement that Hungary intends to conclude. The norms, principles, and fundamental values of *ius cogens* constitute a benchmark that all subsequent constitutional amendments and constitutions must meet; however, beyond that, the sovereignty-limiting effect of international law is not achieved by a supranational legal order but by the self-limitation of the state. *Identity control* was not interpreted further nor was it fundamentally involved in this case.

6.4. Nuances of control

In 2019, a Constitutional Court decision was handed down to examine the relationship between EU and Hungarian laws. In its Decision 2/2019 (III. 5.), the Constitutional Court ruled that the Constitutional Court is the authentic interpreter of Fundamental Law and that this interpretation cannot be distorted by any interpretation given by another body that must be respected by all. In its interpretation of the Fundamental Law, the Constitutional Court has considered the obligations membership in the EU entails and the obligations incumbent on Hungary under international treaties.

The Constitutional Court's proceedings concerning the interpretation of the Fundamental Law were initiated by the government. The petition raised questions such as whether the Fundamental Law was the source of legitimacy for all sources of law, including the rights of the EU under Article E of the Fundamental Law and whether it follows from it that the interpretation of the Fundamental Law by the Constitutional Court cannot be undermined by the interpretation of another body. The background to the application was that the European Commission had sent a formal notice stating that, according to its interpretation, Article XIV of the Fundamental Law on Asylum, as amended, infringed certain Arts of Directive 2011/95/EU of the European Parliament and of the Council on 13 December 2011 on standards for the qualification and status of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons granted subsidiary protection, and for the content of the protection granted. This was the first case in

⁸⁶ According to the decision, enhanced cooperation has a specific public law meaning and can be part of EU law and international law. The decision did not in fact decide the legal nature of the Unified Patent Court Agreement but left room for the Government and Parliament to treat it as international law. Gombos and Orbán, 2021, p. 833.

which the Constitutional Court had to address the possible consequences of a conflict between Fundamental Law and a directive.

The decision harks back to the Lisbon Decision, which is based on the premise that Article E(1) of the Constitution enshrines participation in the building of European unity as a state objective, but participation is not an end in itself but must serve to extend human rights, prosperity, and security.

Regarding *identity control*, the resolution does not contain any further elements, nor does it detail or mention national specificities to be protected. However, it emphasises our European identity (alongside the call for national avoidance). Accordingly, the Hungarian nation first expressed its European identity when it became a state, and this identity matured into a firm national conviction given situations that arose in the course of history. It was a direct consequence of this European identity that after the change in regime, Hungary continuously sought to participate in European integration, which was approved by a nationwide case-by-case referendum. This part of the decision is a pro-EU counterpoint to justification elements concerning the conflict between EU law and the Constitution. However, it does not answer the question of how European identity, which is part of national identity, relates to other elements of identity that are also treated as part of our constitutional identity.

EU law was first established by the Decision as being directly applicable in the territory of Member States and as creating rights and obligations directly for legal entities. However, this specificity and binding nature are based on a constitutional command in the Fundamental Law (Article E) that the Constitutional Court has no power to annul. There is also a brief reference to the fact that EU law takes precedence over national law, as made by domestic legislators. No further statement is made regarding the primacy of EU Law and no general conclusion can be drawn from this, although the Constitutional Court has already clarified its position on this point in its later decision, 32/2021 (XII. 21.). The decision also laid down the obligation for the cooperative interpretation of the law. Overall, the decision does not treat EU law as supranational law, but uses the terminology of ‘the coexistence of the EU and the domestic system of norms’.

These open justifications for EU law are followed by the section on the exercise of *sovereignty control*, which stipulates that the exercise of powers through the institutions of the European Union may not exceed what is necessary under an international treaty and ‘may not be directed to more powers than those which Hungary otherwise has under the Fundamental Law’. It may also emphasise the principle of maintained sovereignty. In line with its previous decisions, it also stresses that the joint exercise of powers must not restrict Hungary’s inalienable right to dispose of its territorial unit, population, form of government, and organisation of the state and that the joint exercise of powers may be limited to the extent necessary. Reference is also made here to the responsibility of the Parliament and the Government, subsidiarity and proportionality tests, and the possibility of initiating annulment proceedings. The decision concluded by stating that the coexistence of the EU and national systems of rules does not, in most cases, give rise to a constitutional dilemma,

as the two systems of rules are based on a common set of values. However, different standards may lead the Constitutional Court and the CJEU to different conclusions regarding the adequacy of national standards, but this contradiction can be resolved by respecting constitutional dialogue. This is also in line with a brief reference at the end of the decision to consider the commitment to the completion of European unity (*Europafreundlichkeit*) arising from Article E(1) of the Fundamental Law.

6.5. Human dignity at the centre

Most recently, the Constitutional Court recalled its decisions on identity and sovereignty control in Decision 32/2021 (X II. 20.). Here as well, the procedure was aimed at the interpretation of the Fundamental Law and was initiated by the government.⁸⁷

These two aspects of the decision were different and novel from those previously established. It expanded the content of fundamental rights control: fundamental rights control has been associated with sovereignty and identity control from the outset, but it had not been the focus of previous decisions. However, for the first time, the Constitutional Court has conducted its analysis along these lines, which also means that it has approached the issue from a fundamental rights perspective (how uncontrolled immigration affects culture and can be protected through human dignity). Further, it is a novelty in that it links constitutional identity in this decision to the requirement to respect the achievements of the historic constitution.

In its *review of fundamental rights*, it concluded that the failure to exercise joint powers, as provided for in Article E(2) of the Fundamental Law, could result in the permanent and mass residence of foreign populations in Hungary without democratic authorisation, which could violate the Hungarian people's right to self-identity and self-determination, stemming from their human dignity. Given the lack of exercise of power, the traditional social environment of persons living in the territory of the State of Hungary may change without democratic authority or any influence on the persons concerned and without any control mechanisms on the part of the state. This may lead

⁸⁷ The Government requests the Constitutional Court to interpret Art. E(2) and XIV(4) of the Fundamental Law. In its application, it referred to the judgement of the CJEU in Case C-808/18, according to which a foreign national illegally staying in Hungary cannot be escorted across the border but must instead be subject to asylum or expulsion proceedings. Given that the effectiveness of the EU rules on expulsion is not guaranteed, the implementation of the CJEU judgement may lead to a situation where a non-Hungarian national illegally staying in Hungary, whose identity is sometimes unknown, remains in Hungary for an indefinite period of time, thus becoming de facto part of the Hungarian population. In the view of the Minister of Justice, until such time as effective readmission is achieved by the EU, compliance with the obligation under the judgement will lead to a change in the population, which will directly affect Hungary's sovereignty, as enshrined in the Fundamental Law, its identity based on its historical constitution, and its inalienable right to dispose of its population. In the context of the constitutional problem presented, it is, therefore, essential to interpret Art. E(2) and XIV(4) of the Fundamental Law: can the said provisions of the Fundamental Law be interpreted in such a way that Hungary may enforce an EU obligation which, in the absence of effective enforcement of European legislation, may lead to the situation that a foreigner illegally residing in Hungary becomes de facto part of the country's population.

to a process which is beyond the control of the state, leading to a forced change in the traditional social environment of the person concerned. It should be stressed that the decision emphasised the existence or otherwise of State control rather than the relationship between settlement and identity, in which it emphasised that the obligation on the State should not, even exceptionally, result in any distinction between the human dignity of individuals, nor should it affect the State's obligation to ensure full protection of the human dignity of all persons present in its territory, including asylum seekers.

Regarding the *control of sovereignty*, the decision clarified the previous decision by referring to the Treaty on the Functioning of the European Union (TFEU). The presumption of sovereignty applies without doubt to all powers not considered by the TFEU to be exclusive EU powers, as, in these cases, not only the Fundamental Law but also the TFEU itself provides that Member States are entitled to exercise a certain scope of powers even after the entry into force of the TFEU. This focus on the Fundamental Law has been combined with the degree of consideration of the TFEU. It also invokes *the principle of effet utile* and the primacy of EU Law while noting that it is not unprecedented in the practice of national constitutional courts to question the applicability of a CJEU decision.

The novelty of the decision in this context is that, based on the presumption of maintained sovereignty, it also stated that the EU and its institutions exercise not only the powers conferred on them for their joint exercise in accordance with the objective of the founding and amending treaties of the EU if they create secondary sources of law but also that the exercise of powers is conditional on ensuring the effective implementation of the secondary sources of law created. It cannot be assumed that Hungary has definitively ceded the right to exercise a given power to the institutions of the EU if such institutions manifestly disregard their obligation to exercise that power or if that joint exercise of power is only ostensibly carried out in such a way that it does not ensure the effective application of EU law. In this case, therefore, there is no proper exercise of power by the EU; it is essentially acting outside the scope of the powers conferred on it (*ultra vires*), and, consequently, Hungary is allowed to act unilaterally if

- A lack of competence must affect fundamental rights or limit the discharge of public duties.
- The European Union places the necessary safeguards to ensure that EU rules are effectively enforced.
- Unilateral action is only possible in accordance with the founding treaties and in the furtherance of their objectives.
- Hungary must call on the EU to exercise its powers jointly.⁸⁸

However, it has also stressed that this application of the presumption of sovereignty may be made exceptional and only in cases where the lack of exercise of the common powers concerned or their incomplete exercise in a manner that manifestly

⁸⁸ Blutman, 2022, p. 10.

does not ensure the effective application of EU law could lead to a breach of fundamental rights or a limitation of the fulfilment of the obligations of the state.

Regarding *identity control*, the decision stated that constitutional identity and sovereignty are not complementary but are interrelated concepts in several respects:

- Hungary’s preservation of its constitutional identity, as a member state of the EU, is essentially made possible by its sovereignty (the preservation of its sovereignty),
- constitutional identity is manifested primarily through a sovereign act – constitution-making,
- Considering Hungary’s historical struggles, the aspiration to preserve the country’s sovereign decision-making powers is part of the country’s national identity and, through its recognition in the Constitution, its constitutional identity,
- The main features of state sovereignty recognised in international law are closely linked to Hungary’s constitutional identity because of the country’s historical characteristics.

The decision reviews the achievements of the historical constitution the Constitutional Court has made part of the constitutional interpretation, which includes the protection of the values that constitute the constitutional identity of the country (including linguistic, historical, and cultural traditions and certain steps in the struggle for the sovereignty and freedom of the country).⁸⁹ The identity has been created in the course of the historical development of the Constitution and comprises legal facts that cannot be renounced by an international treaty and by an amendment to the Fundamental Law, as legal facts cannot be changed by legislation. This part of the reasoning was first presented in the Quota Decision, but only in parallel reasoning later in Decision 2/2019. (III. 5.).⁹⁰ While this argument has moved from parallel reasoning to the main text, the reasoning elements of the Quota Decision also appear in the operative part, which shows the Constitutional Court’s determination to treat constitutional identity as an important cornerstone of the future.

The Constitutional Court has previously recognised the primacy of EU Law, and this decision does not depart from it, although the content of the decision does not suggest that it has confirmed it. However, strengthening the control of fundamental rights also means that the state has a constitutional obligation to act, albeit in exceptional cases and under specific conditions, to protect human dignity, including against EU acts that threaten it, thus ultimately extending the constitutional mandate under which the state may disregard the implementation of EU law. In places, it sticks to more abstract reasoning (e.g. it does not clarify certain aspects of the lack of exercise of competence) and the criteria set out in the decision are rather loose.⁹¹

89 Reasoning [102]–[107].

90 Both parallel reasoning were written by judge András Zs. Varga {Decision 22/2016 (XII. 5.), Reasoning [112], Decision 2/2019 (III. 5.), Reasoning [70]–[72]}.

91 Blutman, 2022, p. 10.

6.6. Extension of the jurisdiction in judicial practice and the Constitutional Court's response

The Constitutional Court typically examined the Accession Clause and the relationship between EU and Hungarian laws in the context of abstract issues on the motion of the Government or the Ombudsman, while the proceedings underlying Decision 11/2020 (VI. 3.) were initiated by a judicial initiative; that is, they were based on concrete cases. During the procedure, the Constitutional Court found a constitutional requirement,⁹² as it found that the legal provision challenged in the petition (relating to the land-use rights of legal persons) was inextricably linked to the Administrative Decisions of Principle by the Kúria (5/2019 and 11/2019). It stated that as a consequence of the principle of the primacy of European Union law, a statutory provision contrary to EU law must be set aside and may not be applied, thus extending the application of the statutory provision to situations not even covered by EU law. The Decisions of the Principle by Kúria are binding on all courts. The Constitutional Court referred to the judgement of the CJEU in the SEGRO case, which led to the amendment of the legal provisions under review. It stressed that the judgement was delivered in a case in which the free movement of capital between Member States was an essential element and that a foreign company was involved in the case. The issue of the right of use at stake in the case pending before the Constitutional Court was not the subject of the SEGRO case, but was extended to other types of disputes by the Administrative Decision of Principle 11/2019, which was issued after the judgement and referenced.⁹³ The principal decided on a dispute that did not involve EU elements. The Constitutional Court, however, considered it inescapable that the applicability of a valid and effective Hungarian law with effect for all could only be terminated by a decision of the Constitutional Court annulling it per the Fundamental Law. To give effect to an act of the EU against a Hungarian act in conflict with it, the court is entitled, in the specific case before it, which is of relevance to EU law, to apply the act of the EU, setting aside the application of the Hungarian act, with legal effect only for the parties concerned based on Article E(1)–(3) of the Fundamental Law. In the absence of a specific legal act uniformly applicable to the member states of the EU, the court may not disregard the law in force through an expansive interpretation of a judgement of the CJEU. Neither the law of the EU nor the Fundamental Law empowers it to do so.

92 *'The Constitutional Court, acting on its own motion, finds that Act CCXII of 2013 No 108. § In applying paras (1), (4) and (5) of Art. 108(1), (4) and (5) of the Act on the Protection of the Rights of Persons under State Law on the Protection of the Rights of the Child, it is a constitutional requirement of Art. B, Art. E(2) and (3) and Art. R(1), (2) and (4) of the Fundamental Law that the court may not disapply Hungarian law in the absence of involvement of European Union law'.*

93 *'In the case of the applicant, reverse discrimination can only be avoided if – as in the case of legal entities subject to EU law – the Kúria follows the judgement of the CJEU in this case and waives the application of Section 108 (1) of the Fétv. and Section 94 of the Inyvtv. on the automatic cancellation of the beneficial ownership'.*

The decision was not taken up by the legal literature; however, the following year, a decision was handed down, annulling court judgements along the lines set out in the decision. In Decision 16/2021 (V. 13.), the Constitutional Court derived these requirements in detail. As a starting point, it stated, with reference to the Simmenthal judgement, that the requirement of the effective enforcement of EU law requires that where a directly applicable EU legal rule conflicts with the provision of the law of a Member State (in this case, Hungarian law), the court of the Member State must act by setting aside the rule of national law and applying the provisions of EU law. It then sets the limits of the obligation to be set aside, including the presumption of maintaining sovereignty. According to this provision, first, in the event that it cannot be established that a matter is not affected by EU law, it is not conceptually possible to set aside a rule of Hungarian law and apply EU law to the case in question, as that would be contrary to the principle of restrictive interpretation and the principle of maintained sovereignty and would also go beyond the powers conferred by Article E of the Fundamental Law. Even so, even if it is possible to establish the involvement of EU law in an individual case, the rule of Hungarian law may be set aside only if (regarding the principle of indirect effect under EU law and the obligation to interpret Article 28 of the Fundamental Law) the rule of Hungarian law in question cannot be interpreted in a manner consistent with the Fundamental Law and the provisions of EU law. Article E(2) and (3) of the Fundamental Law do not even provide an exceptional constitutional possibility to extend the scope of EU Law to cases that are not affected by EU Law (so-called purely national situations).

6.7. Reflections on the paradigm shift of the Constitutional Court

In the legal literature, it has been criticised in connection with the decisions that the Constitutional Court does not make clear exactly what powers it has interpreted for itself, what it means by the joint or incomplete exercise of powers, how its powers extend, what the constitutional roots of the concept of constitutional identity are, and what constitutional identity—detached from its German roots—has been presented as an explanatory principle of national self-serving.⁹⁴ A rather ambivalent relationship also emerges regarding the practice of the CJEU: although the Constitutional Court is not entitled to interpret EU law according to its practice, it quoted the CJEU's decision at length in its decision on the Unified Patent Court (one dissenting opinion even noted that these arguments were indifferent); it did not draw any conclusions from it.⁹⁵ Meanwhile, Decision 11/2020. (VI. 3.) sought to avoid a broad interpretation of CJEU practice. There is also some criticism of the growing use of the concept of constitutional identity, which is of questionable utility but has the

94 Chronowski, Vincze and Szentgáli-Tóth 2021, pp. 654–664.

95 Chronowski and Vincze, 2018, pp. 480–481.

disadvantage of being indefinite, generating conflicts with the EU or even confusing the internal logic of constitutional law, thus leading to abuse.⁹⁶

At the same time, beyond the emphasis on sovereignty and identity, there is also openness to dialogue (see below) and a desire to ensure the widest possible application of EU law. This is reflected in the emphasis on the requirement of cooperative interpretation of the law, the importance of the state objective of European cooperation, the common values of the EU and the domestic legal system from 2019,⁹⁷ and the reference to the derivability of the preliminary ruling procedure from the Fundamental Law from 2020. Moreover, although only tangentially, since 2010 there has also been an emphasis on the possibility for the Parliament and the Government to take action against acts that restrict the interests of the country, its sovereignty, or constitutional identity through various procedures and instruments, from which, and, in practice, from the fact that the new tests are confined within a multi-layered framework, it can be concluded that the Constitutional Court is still not open to the possibility of greater intervention beyond the abstract definition of principles and limits.

The extent to which this was a defence against national law is open to question. Case law has formulated abstract answers in the context of constitutional interpretation, oscillating between Fundamental Law and the obligations arising from EU membership, and these abstract requirements are of little use as a guide for the interpretation of specific legal provisions. Consequently, they can be understood more as defences related to the exercise of competence, but this is not the level at which issues are decided. This seems to have been considered by the Constitutional Court, and it is no coincidence that references to the functions of various public bodies are made. The protection of national law is most evident in the noted constitutional complaint procedures, but it is questionable to what extent this approach will become common practice and whether the problems that are evident in these procedures will arise in the future.

7. The Treaty on European Union in the practice of the Constitutional Court: references to Article 2 (in particular the rule of law) and Article 4 (in particular respect for national identity)

The concerns regarding Articles 2 and 4 of the TEU first arose in the context of examining the constitutionality of the law on cooperative credit institutions. In that case, the petitioners argued that several provisions of the contested law were discriminatory and, therefore, contrary to Articles 2–3 TEU and far removed from

⁹⁶ Szente, 2022, p. 17.

⁹⁷ Chronowski, 2019, [23].

community law, and, therefore, also in breach of the loyalty clause in Article 4(3) TEU. This was a breach of Article E(3) of the Fundamental Law. However, per its previously stated practices, the Constitutional Court ruled that Article E(3) cannot be considered a right guaranteed by Fundamental Law, and no concrete violation of fundamental rights can be established based on this provision.⁹⁸

The Quota Decision refers to Article 4 TEU in two ways: first, in the cited parts of foreign Polish and, indirectly, Spanish Constitutional Court decisions, and, second, as a basis for the control of the exercise of shared competences. The Constitutional Court did not make a specific observation regarding the former. In the case of the latter, the TEU and Article 4(2) have been referred to as one of the international treaties in Article E(2) of the Constitution.⁹⁹ The decision later added that the protection of the constitutional identity under Article 4(2) TEU ‘*should be ensured in the framework of a form of cooperation with the CJEU based on the principles of equality and collegiality, in mutual respect, similar to the practice currently followed by the Constitutional Courts of many other Member States and by the supreme judicial fora of the other Member States with a similar function*’.¹⁰⁰ The decision did not define the content and invocability of constitutional identity from an EU perspective but from a national perspective. Thus, the TEU does not play any role in the decision beyond what is quoted.

However, the parallel explanatory memoranda for the decision were more verbose. One of the parallel explanations highlighted the limitations of the Constitutional Court’s procedure: once an EU law has been adopted, any related legal dispute, including the legal interpretation of its scope as exceeding the EU’s competence, ultimately falls exclusively within the competence of the CJEU; thus, the role of the constitutional courts or supreme courts of the Member States is limited to preventing the scope from being exceeded in a preliminary ruling procedure or when they attempt to resolve their *ultra vires* problems, also in advance, in the informal framework of the European constitutional dialogue by invoking, among other things, the recognition of national identities in the treaty.¹⁰¹ Another pointed out that although the resolution ‘would also infer from Article 4(2) TEU’ that respect for and protection of Hungary’s sovereignty and constitutional identity is binding on all (including the Parliament and the Government directly involved in the decision-making mechanism of the EU), Article 4(2) TEU does not impose an obligation on all nor on Hungarian state bodies but protects Member States from interference by

98 Decision 20/2014 (VII. 3.), Reasoning [17], [53].

99 ‘By interpreting the Fundamental Law’s National Avowal and its Art. E) (2), with due account to Art. 4 (2) of one of the international treaties referred to in Art. E) (2), the TEU, the Constitutional Court establishes two main limitations upon the joint exercising of competences. On the one hand the joint exercising of a competence shall not violate Hungary’s sovereignty (sovereignty control), and on the other hand it shall not lead to the violation of constitutional identity (identity control)’. Decision 22/2016. (XII. 5.), Reasoning [54].

100 Reasoning [62]–[63].

101 Reasoning [76].

the Union. In contrast, the above obligation (and the entire Fundamental Law) is binding to the Parliament and the Government, but the fact remains that it is binding regardless of any provision of the TEU.¹⁰² Regarding the latter statement, because of the specific methodology of the decision, the call of the TEU is so sporadic that it cannot be stated with great certainty that the obligation of respect for constitutional self-identity for individual public bodies is explicitly based on Article 4(2) of the TEU and not directly on the Fundamental Law.

In a tax case,¹⁰³ the petitioners invoked the principle of cooperation enshrined in Article 4(3) of the TEU, which, in their view, implies that it is the responsibility of the courts of the Member States to ensure that legal persons have judicial protection of rights derived from EU law. However, the Constitutional Court found that it did not have jurisdiction to assess the compatibility of Hungarian law with EU law; therefore, there was no room to examine the merits of this part of the petition. It also emphasised that, in the case of a legal interpretation by a legal practitioner, it can only define the constitutional framework of the scope of interpretation and that the interpretation of the legislation in technical law is not a matter within the competence of the Constitutional Court¹⁰⁴; that is, it effectively implied that the conformity of the legislation with EU law and its proper interpretation is a technical legal issue that cannot be subject to constitutional review.

Finally, Decision 32/2021 (XII. 20.) referred to Article 4 of the TEU in more detail. The function here was similar to that of the Quota Decision, showing that its reasoning was based on EU law. The decision states that the obligation to protect the fundamental right to institutional protection must be assessed in the context of Hungary's constitutional identity, and it must be considered a fundamental state function affecting Hungary's public order, which, *inter alia*, Article 4(2) of the TEU states that the EU must respect. It also incorporates the principle of subsidiarity under Article 5(3) TEU, from which it is concluded that, in certain areas, the EU (and its institutions) is entitled to act only if and to the extent that the exercise of competence is more effective at the EU level than at the Member State level.

One of the conclusions of the decision in this context is that the 'institutions and bodies of the Hungarian State have a duty under Article E(2) of the Fundamental Law to ensure that, when drawing up national legislation on asylum applications and asylum seekers, these provisions are formed in accordance with the principles of solidarity and sincerity laid down in Article 4 (3) TFEU, considering the provisions under Article 4 (2) TFEU on the essential functions of the State, the territorial integrity of the State, and the maintenance of public order, including the provisions on the protection of national security and the rules of the 1951 Convention relating to the status of refugees and its additional protocol, as reflected in the legal provisions of the Union. The *effet utile* of the EU law should be presumed when designing

102 Reasoning [105].

103 Decision 3334/2019 (XII. 6.).

104 Reasoning [38], [86], [97].

these rules. The decision to grant or refuse asylum was Hungary's sovereign national act. The second conclusion of the decision, which is related to TEU, is based on the finding that Article 4 of the TEU does not apply to the right of asylum. Article 4(2) TEU, by stipulating that the Union respects the national identities and fundamental functions of the Member States, protects Member States from interference by the Union in certain matters, imposes limits on the exercise of Union competences, and, with these norms, on the side of Hungary, the obligation of the State to protect its 'constitutional identity' (identity) [National Avowal, Article R(4)] and the inalienability of Hungary's 'inalienable right of disposal' (sovereignty) in certain matters (in the exercise of its powers through the institutions of the EU) can be compared, in the sense of the Fundamental Law. The right to dispose of the essential attributes of statehood—a permanent population, defined territory, government, and the capacity to interact with other states—and the ability to exercise that right effectively and efficiently are among the functions of the State, which the Union respects in accordance with Article 4(2) of the TEU.¹⁰⁵

In Hungary, for the reasons described in the previous chapters, the Constitutional Court avoids direct reference to and interpretation of EU Law. Similar to the relatively short history of raising questions about jurisdiction, it cannot be clearly stated that Article 2 and 4 TEU are explicitly recalled in practice, nor can they be treated as practice, especially given that the former did not even appear in the reasoning of the Constitutional Court decisions. Regarding the latter, only Decision 32/2021 (XII. 20.) contains the findings on its merits. A similar conclusion can be drawn from the practice of ordinary courts. Though the parties to the dispute referred to Articles 2 and 4 of the TEU in their arguments, the courts do not provide any separate justification for the principle of the rule of law or the protection of national identity.¹⁰⁶

8. Constitutional dialogue as a bridge

In Hungary, Drinóczy dealt with the topic of constitutional dialogue most comprehensively in the form of an MTA doctoral thesis and monograph. In her monograph, she presents the conceptions of constitutional dialogue in detail, ranging

105 Reasoning [43], [71], [87], [97]–[98], [100].

106 Regarding Art. 2 TEU: in social security cases, the ruling of the Kúria (Kfv. 37.882/2020/3.) and the judgement of the Kúria (Mfv. 10.185/2019/7.); in a labour law case the judgement of the Metropolitan Court of Appeal (Mf. 31.265/2021/8.) and in the cases of general contract terms (Gf. 40.140/2015/5., Gf. 40.607/2014/4.); the judgement of the Metropolitan Court of Appeal in the case of general contract terms, Gf. 40.140/2015/5 and Gf. 40.607/2014/4, and in the case of personal rights, the judgement of the Metropolitan Court in the case of personal rights (P. 21.215/2020/7.). Regarding Art. 4 TEU, the reference to the principle of loyal cooperation under para. 3 is common when the courts interpret the related case-law of the CJEU in the context of a specific case.

from the theory of institutional dialogue through the theory of multi-stakeholder dialogue to extended dialogue constructs focusing on the legislator to the theory of federal dialogue. In his view, constitutional dialogue is a flexible system in which the communication underlying the dialogue means that the opinion of the sender of the message—the form in which it is presented as irrelevant—is considered by the receiver of the message, and this consideration is reflected in the response that influences the sender's decision. This consideration can range from mere acknowledgement to genuine consideration and is manifested in legislative or judicial activities. In a constitutional democracy, dialogue is 'constitutional' if it takes place between constitutional or non-constitutional actors in a constitutional procedure (i.e. a procedure that is constitutional in one of its elements). The procedure is 'constitutional' if its elements are regulated at the level of the constitution. This process aims to identify constitutional content as precisely as possible.¹⁰⁷ The author follows a flexible conception of constitutional dialogue and includes legislative reactions to constitutional court decisions and legislative proposals by ombudsmen.

This study follows a narrower interpretation based on the concept of dialogue that can be drawn from the practice of the Constitutional Court. In this context, this study first reviews the practice of the Constitutional Court, focusing on decisions that explicitly mention this legal instrument and its function in the decision. This research intends to examine which cases and for what reasons the Constitutional Court makes constitutional dialogue part of its reasoning. Finally, it concludes by examining the impact of these references on the Constitutional Court. There are two main forms of constitutional dialogue in the Constitutional Court's practice of the Constitutional Court: *the inter-judicial dialogue* and *European constitutional dialogue*.

8.1. Dialogue between courts

This dialogue, in the sense that the Constitutional Court is actively involved, was explicitly introduced in the practice of the Constitutional Court in 2011 as 'dialogue between courts'.¹⁰⁸ In this decision, the Constitutional Court stated that the judge was obliged to bring his constitutional concerns regarding the applicable law to the attention of the Constitutional Court, which was obliged to rule on the merits of the constitutional issue brought before it. It considered this as a manifestation of mutual obligation and responsibility, called a dialogue between courts, and established it as a constitutional requirement; that is, imposed as an obligation on the courts. According to the decision, the only way to ensure this 'dialogue' is to bring a judicial

¹⁰⁷ Drinóczy, 2017b, p. 32.

¹⁰⁸ The decision basically examined the procedural rules of judicial initiatives and the procedural consequences of the prohibition of application of the prohibition ruled in previous decisions. In this context, it dealt with the question of what a judge should do if he finds that he should base his decision on an unconstitutional law. The procedure was initiated under the old Constitutional and Constitutional Court Act (these issues are settled in the current legal environment) and was based on hundreds of judicial initiatives.

initiative before the courts. At one point, the decision refers to the decision of the European Court of Justice in Case C-210/06, based on a Hungarian initiative, by drawing a parallel between the procedural rules of the preliminary ruling procedure and the initiative procedure and by contrasting the two in the matter of the remedy against the suspensory order.

For this study, however, it is worth highlighting the recital in the explanatory memorandum of the European Court of Justice's ruling on the dialogue between courts, according to which the legal instrument of the preliminary ruling procedure is based on 'dialogue between courts' to ensure a uniform interpretation of Community law and is available to all national judges.¹⁰⁹ In the reasoning of the Constitutional Court, this element is only present in passing; it is not a source of inspiration; it has no role in the decision beyond that of a source of inspiration. Therefore, it does not go to the heart of the dialogue. Regarding its consequences and functions, it justified the judge's referral to the Constitutional Court. It is also worth noting that, in 2011, although the decision clearly indicated that the preliminary ruling procedure constituted the dialogue between courts at the EU level,¹¹⁰ in the 12 years since then, despite numerous references to the importance of constitutional dialogue, the Court has never taken advantage of this possibility.

The idea of inter-judicial dialogue has not been explicitly mentioned in any other Constitutional Court decision following this decision, and although the 2011 decision referred to it as an obligation, this understanding of the decision has not been followed in practice based on the new Constitutional Court Act.¹¹¹ Although this should, in principle, mean that the dialogue between the courts and the Constitutional Court has been weakened, the Constitutional Court Act and the procedural codes that entered into force in 2012 provided for more detailed regulation of the institution of judicial initiative than before and even regulated it at the level of the Fundamental Law,¹¹² which has led to a significant increase in the number of judicial initiatives. However, the position of the Constitutional Court has also changed. It also positioned itself much more prominently than before regarding the courts by becoming a specialised body for dealing with constitutional complaints.¹¹³

109 Decision 35/2011 (V. 6.), Reasoning IV.3.2.–3.3.

110 Trócsányi, 2022, p. 17.

111 Berkes, 2022a, p. 253.

112 'Art. 24 (2) The Constitutional Court:

(...)

b) shall, at the initiative of a judge, review the conformity with the Fundamental Law of any law applicable in a particular case as a priority but within no more than ninety days;'

113 Under the new regulatory framework, a judge may refer to the Constitutional Court not only as a violation of a right guaranteed by the Fundamental Law but also a violation of other provisions of the Fundamental Law against the person who indirectly lodged a constitutional complaint against the legislation. The judge's initiative, therefore, has a double effect: the Constitutional Court exercises a control of the norm, as it examines the constitutionality of the applicable law, thereby also protecting the Fundamental Law, and the result of the procedure, by imposing a prohibition of application, has an impact on the underlying individual case. In this context, the submission of such

Therefore, the precursor of dialogue exists at the regulatory level and in practice, although it is sometimes surrounded by mistrust.¹¹⁴ From the perspective of the Constitutional Court, however, this dialogue works through judicial initiatives and constitutional complaints. In the view of the President of the Constitutional Court, these links have been strengthened by the institution of ‘genuine’ constitutional complaints against judicial decisions, as, in these cases, the Constitutional Court’s fundamental rights messages are essentially indirect, filtering through the case-law of the courts in the context of a structured and interactive fundamental rights adjudication.¹¹⁵ However, this also shows the specific nature of the dialogue between the Constitutional

petitions has become much more widespread (i.e. judges have actively sought and requested the opinion of the Constitutional Court). This is also linked to the fact that the Fundamental Law has substantially redefined the role of the courts and the Constitutional Court and, thus, the examination of individual or normative acts. Whereas under the Constitution, the Constitutional Court examined only normative provisions, and the courts decided all individual cases; the Constitutional has changed this division of labour. According to the Constitution, all questions of constitutionality are the responsibility of the Constitutional Court: in addition to examining the constitutionality of legal rules (normative provisions), the Constitutional Court may also examine the conformity of judicial decisions with the Constitution on the basis of a constitutional complaint. Meanwhile, the Fundamental Law gives the supreme judicial body the possibility of reviewing the law: the Kúria can examine the legality of municipal decrees and, in the event of a breach of the law, annul them. However, Art. 28 of the Fundamental Law imposes a constitutional requirement on judges to recognise the fundamental rights implications of the case before them and to interpret the applicable legislation in a manner that is in conformity with the Fundamental Law. Berkes, 2022a, pp. 254–255, Balogh, 2011, p. 134.

114 This form of a dialogue between the courts is, therefore, guaranteed, but the question is that while the Constitutional Court basically expects judges to initiate proceedings, if they cannot resolve the violation of the constitution by interpreting the law, how much willingness is there for this among judges themselves. Extensive research has been carried out on this issue, in which the judges interviewed gave two main reasons for not having recourse to the Constitutional Court. One group of these reasons had a technical basis: the party had applied to the court for a judicial initiative as part of a tactic to draw the case, the Constitutional Court had already examined the issue and there was in fact a question of interpretation of the law, not of constitutional law, the initiative was irrelevant to the resolution of the dispute, or the possibility of rejection was given. In these cases, there is in fact no need for dialogue between the courts. There were also arguments that weakened the credibility of the dialogue: the failure to refer the case to the Constitutional Court was also justified by the lack of clarity of the infringement, the preference for the higher court to decide, and the lack of confidence in the correct decision of the Constitutional Court. Beznicza et al., 2019, pp. 326., 335–336. The decision taken is binding on the judge, but in many cases, it does not lead to the desired result. The Constitutional Court does not, for example, take it upon itself to interpret vague or uncertain rules: as long as they are not completely uninterpretable, it is up to the judge hearing the case to determine the content of the law. Berkes, 2022a, 261.

115 Sulyok and Deli, 2019, pp. 57–59. The decisions of the Constitutional Court may have had several effects: they may have had a liberating effect on judges (‘extensional effect’), they may have provoked resistance from judges (‘confrontational effect’), they may have overruled restrictive judgements (‘restrictive effect’), and they may have led to the adaptation of judges (‘adaptive effect’). In the vast majority of cases, judges have followed the criteria set out by the Constitutional Court and have sooner or later incorporated them into their judgements in individual cases. Hörcherné Marosi, 2022, pp. 81–82.

Court and the courts: the parties are not equal, as the Constitutional Court's power to annul court decisions ultimately puts it in a position of strength vis-à-vis the courts. Perhaps this is also why this kind of dialogue has not become part of the standard vocabulary of decisions.

8.2. Emergence of the European constitutional dialogue in the practice of the Constitutional Court

A constitutional dialogue on specific EU issues has been initiated. Not only did the Constitutional Court have to position itself relative to domestic courts, but the growing importance of cases in the EU context also made it necessary for it to interpret its own place and role in this context. Constitutional courts were typically seen as institutions that were the ultimate guardians of the Constitution and constitutionalism in their respective countries—the bodies that had the final say on these matters (the same was true of the Supreme Court). However, there have been an increasing number of global and regional developments that have impacted the activities of these supreme bodies, resulting in a discernible change in the way in which the supreme forum has become less 'supreme'.¹¹⁶ This change includes the emergence of supranational and international adjudication and the intensification of their activities. Thus, the supreme judicial and constitutional courts must pay increasing attention to issues that were previously within their sovereign discretion in interpreting legal (constitutional) norms, paying attention to the relevant case law of supranational courts in addition to their own case law.¹¹⁷ The Hungarian Constitutional Court has been slow and incremental in opening up in this direction and has consistently sought to maintain its supreme position.

When the Constitutional Court interprets its own place and role in the EU, the starting point is that the requirement for a conforming interpretation of EU Law is part of the Fundamental Law and the practice of the Constitutional Court. Based on a combined interpretation of Articles R(3)¹¹⁸ and E(1)¹¹⁹, when interpreting the provisions of the Fundamental Law, the Constitutional Court must bear in mind that its aim is to create European unity, from which the obligation to interpret them in conformity with EU Law can also be derived. Consequently, the essence of the Constitutional Court's position is that it seeks to establish consistency between the Hungarian and EU legal orders while preserving the domestic constitutional tradition.¹²⁰ As it has recognised or been confronted with the fact that certain conflicts cannot be

¹¹⁶ Trócsányi and Sulyok, 2020, pp. 229–230.; Trócsányi, 2023, p. 260

¹¹⁷ Uzelac, 2019, p. 127.

¹¹⁸ 'Art. R) (3) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution'.

¹¹⁹ 'Art. E) (1) In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity'.

¹²⁰ Sulyok, Csillik and Deli 2022, pp. 119–120.

resolved by interpretation of the law, it has invoked the instrument of constitutional dialogue as a subsidiary principle in several cases.

8.3. *Constitutional dialogue in the Quota Decision*

The first decision in which the Constitutional Court called for a constitutional dialogue was adopted in 2016. The decision can be seen as the beginning of a period in which the Constitutional Court, in contrast to the cautious silence of previous years,¹²¹ began to identify conflicts between the powers, laws, and decisions of the EU and the Fundamental Law and the way it operates. This period is characterised by an emphasis on the defence of the Fundamental Law, but there is also a counter-balance in each of the decisions concerned, with the body forming a bridge between the two by recognising the law of the EU and calling for a constitutional dialogue. Thus, decisions are characterised by the fact that, ultimately, everyone finds a set of arguments that they can support: the Constitutional Court can take or leave, give, or take. By calling for constitutional dialogue, it effectively postponed a final conclusion. Perhaps, this is why, unlike the Polish example, there has been essentially no reaction at the EU level to Hungarian decisions. However, these decisions do not change the balance of power, they do not have a direct impact, they are mainly intended to draw attention to them, and there is no need to respond to them because they were not adopted as part of the formal procedure of the CJEU.

As mentioned above, the procedure underlying the Quota Decision was initiated in the Ombudsman's motion and concerned the distribution of refugees within the EU, which Hungary did not support. The decision considered constitutional dialogue within the EU to be an institution of utmost importance and examined the practice of the constitutional courts and supreme courts of Member States regarding *ultra vires* acts and the maintenance of fundamental rights. It also stressed that within the framework of constitutional dialogue, the CJEU respects the competences of Member States and considers their constitutional needs.¹²² However, in the decision, the Constitutional Court also immediately stressed that the subject matter of the sovereignty or identity test is not directly the EU Act or its interpretation and, therefore, does not rule on its validity, invalidity, or primacy in the application. However, it also noted that any dispute over an EU Act, once it has been adopted, including any

121 Prior to the entry into force of the Fundamental Law, the Constitutional Court had jurisdiction to interpret decisions, but only in relation to the ex-post control of Hungarian legislation transposing a law or a directive and, generally, not in relation to the exercise of joint powers nor to EU regulations, decisions, directives, or CJEU decisions. In most cases, the panel has rather examined the constitutionality of the Hungarian legislation and, as regards aspects of European Community law, has mostly found a lack of competence or held that the conflict of norms raised in relation to Community law is not a question of constitutionality. Chronowski, Vincze and Szentgáli-Tóth, 2021, pp. 645–646.

122 Cases C-376/98, *Germany v Parliament and Council (Tobacco advertisement judgement)* and C-36/02, *OMEGA Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* and C-404/15 *Aranyosi and Căldăraru*.

legal interpretation claiming that it exceeds EU competence, ultimately falls exclusively within the competence of the CJEU and that the constitutional courts or Supreme courts of the Member States no longer have any legal means to influence the dispute in the event of legal proceedings pending before the CJEU. In this context, he reiterated that they could, at most, try to resolve their *ultra vires* problems in the preliminary ruling procedure of the CJEU (Article 267 TFEU), or ex-ante, in the informal framework of the European constitutional dialogue, *inter alia*, by invoking the recognition of national identities in the treaty (Article 4(2) TEU).¹²³

The decision does not define the concept of constitutional dialogue in detail and acknowledges the limited role of national constitutional courts, leaving open the question of whether constitutional dialogue can be an effective instrument for the protection of national constitutions and constitutional traditions.¹²⁴ There have been several criticisms of the decision in the literature, but we will highlight the one concerning constitutional dialogue, which criticises the vague content of the concept and points out methodological flaws. Regarding the former, the question has been raised as to whether the Constitutional Court meant by this term that it should also examine the constitutional practice of the other Member States or whether it meant, in the words of the Constitutional Court decision, ‘cooperation with the CJEU based on the principles of equality and collegiality and mutual respect’.¹²⁵ According to this criticism, the latter can, at most, mean a preliminary ruling procedure which, contrary to what is stated in the Constitutional Court decision, is not based on the principles of equality and collegiality. Additionally, the Constitutional Court never used a preliminary ruling procedure. As for the methodology, criticism that the Constitutional Court has merely assembled decisions that fit its own system of reasoning and did not carry out a real comparative analysis of the law has been levelled.¹²⁶ Another criticism was that the Constitutional Court misunderstands the concept of constitutional dialogue, as it defines it as an obligation that does not exist. It ignores the fact that European judicial constitutional dialogue is linked to the globalisation of constitutional law and the specific nature of the functioning of the European judicial area and is mainly an inspiration and an application of the comparative law method.¹²⁷

123 Decision 22/2016 (XII. 5.), Reasoning [56], [76].

124 However, the possibility of using informal dialogue was also raised, but in light of the *Czech Landtová* case, the panel does not see any possibility for this, although the Hungarian Constitutional Court is trying to change this in a positive direction through its extensive international activities. Sulyok, Csillik and Deli, 2022, p. 112.

125 Ernő Várnay described the former as horizontal dialogue and the latter as vertical dialogue. Within the vertical dialogue, the most superficial form of dialogue is when the Constitutional Court refers to the case law of the European Court of Justice (this was done in the Quota Decision) and the next level is when it explicitly considers it (the suspension orders to be referred to later may be an example of this), while the strongest dialogue is within the framework of the preliminary ruling procedure (this has not yet been done in the practice of the Constitutional Court). Várnay, 2022, pp. 97–100.

126 Chronowski, Vincze, Szentgáli-Tóth, 2021, pp. 664–666.

127 Drinóczi, 2017a, pp. 10–11.

8.4. Suspension of proceedings as a practical expression of constitutional dialogue?

Following the Quota Decision, orders suspending the procedure in which the Constitutional Court took the preliminary ruling procedure of the CJEU as a preliminary question and decided to await the decision to be taken there can be understood as a practical expression of constitutional dialogue. In the context of proceedings pending before the institution of the EU, the Constitutional Court has stressed in several decisions that it considers the case law of the CJEU in its decision-making and attaches particular importance to constitutional dialogue within the EU. The Constitutional Court considers that the EU, through its institutional reforms, the Charter of Fundamental Rights, and the CJEU, can guarantee a level of protection of fundamental rights that is generally equivalent to that provided by national constitutions or at least sufficient and that the possibility of review reserved for the Constitutional Court must, therefore, be applied in light of the duty of cooperation and to ensure that European law is applied as far as possible. Consequently, when the Constitutional Court becomes aware that a preliminary ruling procedure or infringement proceedings are pending before the CJEU regarding the legislation it is examining, it will suspend its proceedings.¹²⁸

There had already been an example of suspension before the Quota Decision, but the Constitutional Court did not mention constitutional dialogue. It merely referred to the binding nature of the CJEU's decision to interpret EU law.¹²⁹ However, during this period, there were also several cases pending before the Constitutional Court, in which infringement proceedings were pending against Hungary (e.g. the law on the status and remuneration of judges, where the Constitutional Court did not await the decision of the European Court of Justice and did not refer to possible EU legal relations in its decision¹³⁰ and the Quota Decision itself, where Hungary initiated proceedings before the European Court of Justice, but there was no reference to it in the decision). Therefore, 2016 was a strong caesura in the practice of the Constitutional Court, and the suspension orders issued in 2018 can be seen as the first time the Constitutional Court established a real and substantive link between the proceedings

128 Ruling 3198/2018 (VI. 21.), Reasoning [3]–[9]; Ruling 3199/2018 (VI. 21.), Reasoning [2]–[7]; Ruling 3200/2018 (VI. 21.), Reasoning [2]–[5]; Ruling 3220/2018. (VII. 2.), Reasoning [2]–[3]. The Constitutional Court also considers the case law of the European Court of Human Rights (ECtHR), following a similar logic. It is rare for proceedings before the ECtHR to be pending in parallel with those before the Constitutional Court, and because of the case of Szalontay v. Hungary, which qualified the constitutional complaint as an effective remedy that must be exhausted in advance, the likelihood of this has further decreased. However, from the decisions taken so far, the Constitutional Court may suspend its proceedings in the case of an infringement of an international treaty pending the decision of the ECtHR {Ruling 3215/2016. (X. 26.), Reasoning [7]; Ruling 3228/2016 (XI. 14.), Reasoning [2]; Ruling 3044/2017 (III. 7.), Reasoning [2]}. In these cases, however, there is no reference to the importance of dialogue. Berkes, 2022b, pp. 654–657., 656.

129 Decision 3216/2013 (XII. 2.), Reasoning [9]–[11].

130 Decision 33/2012 (VII. 17.).

before it and those before the CJEU. While in the Quota Decision, the Court referred only in abstract terms to the constitutional dialogue within the EU and cooperation with the CJEU; these orders can now be seen as a concrete implementation of all this.¹³¹

However, these cases can also be seen as a redefinition of the Constitutional Court's position, as it can express its position as the last word after these decisions, thus defending its position as the main decision-maker on the issue of constitutionality. Even so, it is not yet possible to conclude on the outcomes of this dialogue. In the cases referred to, following the judgement of the CJEU, the legislator amended the contested legislation, which was repealed in its entirety, preventing the Constitutional Court from proceeding and leading to the termination of the proceedings.¹³² Only one case was decided on the merits¹³³, in which the Constitutional Court used the substantive decisions of the CJEU but examined the underlying problem only in the context of the infringement of the Fundamental Law, thus seeking to preserve the primacy of the Fundamental Law and ensure consistency with EU law.

8.5. Further emphasis on constitutional dialogue

The next step in the call for European constitutional dialogue for the Constitutional Court was Decision 2/2019 (III. 5.), which also refers to the coexistence (i.e. not hierarchy) of the EU and the domestic system of norms, the common values on which the two systems of norms are based, and the role of respect for constitutional dialogue in resolving possible conflicts. The novelty of the decision, however, is the emphasis on the fact that the Constitutional Court is the authentic interpreter of the Fundamental Law, based on which it is the task of the Constitutional Court to determine the interpretation of the constitutional order of Hungary, thus the authentic interpretation of the fundamental constitutional order. Meanwhile, the interpretation of other bodies cannot deviate from the authentic interpretative practice of the Constitutional Court.¹³⁴

However, the Constitutional Court also emphasises in its decision that EU law and the national legal system based on Fundamental Law are, presumably, intended to achieve the objectives set out in Article E(1). Thus, the 'creation of European unity and integration' is not only an objective for political bodies but also for the courts and the Constitutional Court, from which 'European unity' follows the harmony and coherence of legal systems as a constitutional objective. Hence, to achieve these objectives, legislation and the Fundamental Law must be interpreted, where possible, such that the content of the rules also accords with EU law. There is also a reference

131 Várnay, 2019 p. 67.

132 Ruling 3410/2022 (X. 21.), Reasoning [9]–[11], Ruling 3319/2021 (VII. 23.), Reasoning [28]–[30], Ruling 3318/2021 (VII. 23.), Reasoning [33], [36].

133 Decision 3040/2021 (II. 19.).

134 Reasoning [35].

to a commitment to the completion of European unity (*Europafreundlichkeit*), which is derived from Article E(1) of the Constitution.

Here as well, the need to bring the Constitution and EU Law closer together and harmonise them through legal interpretation is evident. The Constitutional Court expressly stated that it interpreted the second sentence in Article XIV(4)¹³⁵ of the Fundamental Law to ensure that its result is consistent with the spirit of the Fundamental Law as a whole and that, in the interests of constitutional dialogue and of contributing to the achievement of European unity in the interests of freedom, prosperity, and security of the peoples of Europe, it also considers the Directive's consistency with the relevant provisions of the Charter of Fundamental Rights.

However, this decision does not promote dialogue in any meaningful way: one of its most significant criticisms is that it is more of a 'monologue within the limits of cooperation'. For constitutional dialogue to be effective, it must be conducted in a common language, using general legal principles recognised at the European level, established or commonly agreed concepts, precise reasoning, duly explained criteria, and meaningful involvement of previous European constitutional practice. Without the use of this common language (and method), the arguments of the Constitutional Court will not only be useless between courts but also in the cooperation between the State and the EU institutions.¹³⁶

8.6. Emergence of the preliminary ruling procedure as a dialogue

In its Decision 26/2020 (XII. 2.), the Constitutional Court continued along this path and emphasised the balancing role of constitutional dialogue between the core of national constitutional law, which is untouchable by integration, and European law developed by the CJEU, which has priority of application. This balance can be ensured through dialogue between courts that are reciprocal and open to each other's arguments, without which neither the *sui generis* nature of national constitutional law nor European law can be guaranteed.

The argument also shows that the Constitutional Court has increasingly emphasised its equal position and associated it with the equality of constitutional law and European law. Moreover, by referencing the integrationist constitutional core part of the dialogue, the Constitutional Court increases the weight of constitutional law, which is reinforced by the fact that the decision states that the Constitutional Court cannot take a neutral position on institutionalised cooperation. Meanwhile, it is a major step towards the European Court of Justice and effective dialogue, which has

¹³⁵ 'Art. 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 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'.

¹³⁶ Blutman, 2022, p. 12.

also raised the possibility that the Constitutional Court's right to initiate preliminary rulings may be derived from Fundamental Law, especially if the case before it involves a threat to compliance with fundamental rights and freedoms under Article E(2) of the Fundamental Law or to the restriction of Hungary's inalienable right to dispose of its territorial unity, population, form of government, and state organisation. However, this leaves the question unanswered.

In 2021, the Constitutional Court interpreted the Fundamental Law¹³⁷ regarding the government's motion. In this case, the Constitutional Court did not rule on an individual case but rather carried out an abstract interpretation of the Fundamental Law.¹³⁸ The novelty of this case is that the Seventh Amendment to the Fundamental Law, which came into force after the Quota Decision, added the control of fundamental rights, sovereignty, and constitutional identity to Article E of the Fundamental Law.¹³⁹ Regarding dialogue, the decision does not contain anything new, its function being, as in previous decisions, to counterbalance the stronger content of constitutional protection and leave the conclusion of the decision open. However, beyond constitutional protection, the decision also underlined that the Constitutional Court accepts, as per the requirement of constitutional dialogue, that the interpretation of EU Law is a matter for the Court of Justice (and not the Constitutional Court). The next step towards the use of the preliminary ruling procedure is also the brief reference to the fact that the European Court of Justice has ruled that it is not necessary to request a preliminary ruling when 'the correct application of Community law is so obvious as to exclude all reasonable doubt', which was also considered by the Constitutional Court in its decision.¹⁴⁰

8.7. *Is the preliminary ruling procedure a possible way forward?*

The initiation of the preliminary ruling procedure has been raised in principle, which already shows that the Constitutional Court has considered it, but the procedural part—either statutory or at least case-law level—is missing (e.g. in which procedures it may be used, within which procedural framework, whether and when such an obligation exists, and whether and to what extent the Constitutional Court is bound by the decision of the European Court of Justice). Consequently, the literature is divided as to whether the Hungarian Constitutional Court can request

137 Decision 32/2021 (XII. 20.).

138 The request for interpretation of the Fundamental Law was made in the context of the implementation of the European Court of Justice's decision in Case C-808/18 *Commission v Hungary*.

139 'Art. E) (2) 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. Exercise of competences under this para. 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'.

140 32/2021 (XII. 20.), Reasoning [64].

a preliminary ruling.¹⁴¹ In 2010, two constitutional judges argued in a separate opinion that the Constitutional Court's decision also took a position on an EU law issue, implicitly accepting the 'national court' status and, also implicitly, by applying the doctrine of *acte clair*, did not exercise its right to initiate a preliminary ruling procedure.¹⁴²

Since then, these arguments have not been substantiated. The Constitutional Court has been very terse in its treatment of the issue, and the abovementioned decisions contain only a single sentence. In the absence of legislation, the Constitutional Court rejected such requests¹⁴³ and preferred to suspend the proceedings and await the European Court of Justice's decision, as the referred injunctions show.

9. Summary

One of the most important milestones of accession to the EU was the definition of constitutional foundations, in connection with which we have already pointed out that Hungarian public lawyers were relatively late addressing legal issues regarding European integration. While many scholars of civil law, commercial law, and private international law have been analysing the issues of EU law for decades and have applied the results of their research on this topic to the development of Hungarian law, public law literature has been slow to prepare for the consequences of the development of EU law in Hungary.¹⁴⁴ For a long time, the literature has also avoided taking a clear position on the question of which of the two has primacy in the event of a conflict between the Constitution and EU Law, and how this affects the perception of the country's sovereignty. However, given the Lisbon Treaty, the notion of the 'creeping extension of powers', the objection to the disregard of subsidiarity, and the voices that the rigid, hierarchical structure between legal systems based on the notion of the primacy of EU Law is far from clear and that the doctrine of absolute primacy cannot be applied without limitation in the relationship between European law and the law of Member States has emerged, partly as a result of foreign and partly political influence. With the growing prevalence of EU Law, the (apparent?) protection of national and constitutional identities has been countered. Without clarifying the issues of national and European identity, it is not possible to take a position on the future shape of European integration or key regional and global economic and geopolitical issues.¹⁴⁵ A successful European integration policy can

141 Sulyok, Csillik, Deli, 2022, p. 120.

142 Decision 142/2010 (VII.14.).

143 Ruling 3165/2014. (V. 23.), Reasoning [16], Ruling 3004/2015 (I. 12.), Reasoning [19], Ruling 3050/2015 (III. 2.), Reasoning [17]

144 Kecskés, 2006.

145 Trócsányi, 2023, p. 261.

only be based on a balanced relationship between national and European identities and due consideration of the requirements of these two identities. Consequently, any further extension of the competences in favour of the EU should be considered within a constitutional framework and in specific areas.¹⁴⁶ The Court finally tried to provide constitutional, sovereign, and pro-European answers to these questions. The reception of decisions was mixed because of the highly politicised nature of the issue. Critical voices predominate in the literature, emphasising the perceived shortcomings of decisions and their limited applicability as a practical guide, while the political world has found support to which it can appeal. This simplifies the debate into a pro- or anti-EU argument and thereby distracts attention from the longer-term question of the direction in which Europe and the freedom and prosperity of the peoples of Europe are heading and the vision of the future that unity in diversity should presuppose.

¹⁴⁶ Martonyi, 2018, pp. 30, 42., 52.

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