THE PARADOX OF JUDICIAL DIALOGUE WITH THE EUROPEAN COURT OF JUSTICE IN AN ILLIBERAL DEMOCRACY: THE RECENT EXPERIENCE WITH THE HUNGARIAN CONSTITUTIONAL COURT

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Abstract

The growth of populist national forms of governance in some EU Member States has caused a marked deterioration in the respect for democracy and the rule of law. The actions of these illiberal governments have led to the capture of those institutions designed to guarantee the rule of law, including constitutional courts. Some of these courts, mindful of the protection of national sovereignty and responding to the CJEU's case law promoting judicial independence, have refused to recognise the binding nature on them of the rulings of the CJEU. The Hungarian Constitutional Court (HCC) was recently given the opportunity to follow its sister courts in Germany, Poland and Romania in the *Refugee Pushback case* but refused to do so. The work examines the broader EU and more specific domestic constitutional contexts in order to understand the HCC's cautious approach and avoidance of a direct confrontation with the CJEU. It analyses how the HCC, in exceptional cases and in an

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ultima ratio manner, could use three types of control to verify, in the exercise of the competences shared between the EU and the Member States, whether it infringes the essential content of a fundamental right (fundamental rights review), the sovereignty of Hungary (sovereignty review or *ultra vires* review) as well as its constitutional identity (constitutional identity review). However, at the same time, the HCC balances the protection of the national constitutional order with the EU's duty of sincere cooperation in the form of judicial dialogue with the CJEU.

Keywords

Judicial dialogue; Constitutional identity review; *Ultra vires* review; Fundamental rights review; National sovereignty.

LA PARADOJA DEL DIÁLOGO JUDICIAL CON EL TRIBUNAL DE JUSTICIA EUROPEO EN UNA DEMOCRACIA ILIBERAL: LA EXPERIENCIA RECIENTE CON EL TRIBUNAL CONSTITUCIONAL HÚNGARO

Resumen

El crecimiento de formas nacionales populistas de gobierno en algunos Estados miembros de la UE ha provocado un marcado deterioro del respeto por la democracia y el Estado de derecho. Las acciones de estos gobiernos iliberales han llevado a la captura de aquellas instituciones diseñadas para garantizar el estado de derecho, incluidos los tribunales constitucionales. Algunos de estos tribunales, conscientes de la protección de la soberanía nacional y respondiendo a la jurisprudencia del TJUE que promueve la independencia judicial, se han negado a reconocer el carácter vinculante para ellos de las sentencias del TJUE. El Tribunal Constitucional húngaro (TCH) tuvo recientemente la oportunidad de seguir a sus tribunales hermanos en Alemania, Polonia y Rumania en el caso «*Refugee Pushback*» («*La devolución de refugiados*»), pero se negó a hacerlo. El trabajo examina la UE más amplia y los contextos constitucionales internos más específicos para comprender el enfoque cauteloso de la Corte y evitar una confrontación directa con el TJUE. Analiza cómo el TCH, en casos excepcionales y de forma *ultima ratio*, podría utilizar tres tipos de control para verificar si, en el ejercicio de las competencias compartidas entre la UE y los Estados miembros, se viola el contenido esencial de un derecho fundamental (control de derechos fundamentales), la soberanía de Hungría (control de soberanía o control *ultra vires*), así como su identidad constitucional (control de identidad constitucional). Sin embargo, al mismo tiempo, el TCH equilibra la protección del orden constitucional nacional con el requisito de la UE de cooperación sincera en forma de diálogo judicial con el TJUE.

Palabras clave

Diálogo judicial; Control de los derechos fundamentales; Control *ultra vires*; Control de identidad constitucional; Soberanía nacional.

LE PARADOXE DU DIALOGUE JUDICIAIRE AVEC LA COUR DE JUSTICE EUROPÉENNE DANS UNE DÉMOCRATIE ILLIBÉRALE: L'EXPÉRIENCE RÉCENTE AVEC LA COUR CONSTITUTIONNELLE HONGROISE

Résumé

La croissance des formes nationales populistes de gouvernance dans certains États membres de l'UE a provoqué une détérioration marquée du respect de la démocratie et de l'État de droit. Les actions de ces gouvernements illibéraux ont conduit à la capture des institutions conçues pour garantir l'état de droit, y compris les cours constitutionnelles. Certaines de ces juridictions, soucieuses de la protection de la souveraineté nationale et répondant à la jurisprudence de la CJUE promouvant l'indépendance judiciaire, ont refusé de reconnaître le caractère contraignant pour elles des arrêts de la CJUE. La Cour constitutionnelle hongroise (CCH) a récemment eu la possibilité de suivre ses juridictions sœurs d'Allemagne, de Pologne et de Roumanie dans l'affaire «*Refugee Pushback*» («*Le refoulement des réfugiés*»), mais a refusé de le faire. Le travail examine les contextes constitutionnels nationaux plus larges de l'UE et plus spécifiques afin de comprendre l'approche prudente de la CCH et d'éviter une confrontation directe avec la CJUE. Il analyse comment la CCH, dans des cas exceptionnels et de manière *ultima ratio*, pourrait utiliser trois types de contrôle permettent de vérifier si, dans l'exercice des compétences partagées entre l'UE et des États membres, sont violés le contenu essentiel d'un droit fondamental (contrôle des droits fondamentaux), la souveraineté de la Hongrie (contrôle de souveraineté ou contrôle *ultra vires*) ainsi que son identité constitutionnelle (contrôle d'identité constitutionnelle). Cependant, dans le même temps, la CCH équilibre la protection de l'ordre constitutionnel national avec l'exigence de l'UE d'une coopération sincère sous la forme du dialogue judiciaire avec la CJUE.

Mots clés

Dialogue judiciaire; Contrôle des droits fondamentaux; Contrôle *ultra vires*; Contrôle d'identité constitutionnelle; Souveraineté nationale.

SUMMARY

I. INTRODUCTION

Over the last decade or so, the EU has experienced the rise of populist nationalist governments in some of its Member States (Majtényi and Feischmidt, 2020), establishing governance regimes that challenge the Union's approach to liberal constitutionalism and its fundamental values set out in Art. 2 TEU (Scheppele, Kochenov and Grabowska-Moroz, 2021). These étatist regimes have challenged and rolled back the common narrative on European integration and have sought, through various means, to maintain and protect their ideas on national sovereignty against any further encroachment from EU law while undermining and removing the guarantees of the rule of law domestically (Bignami, 2020; Konstadinides, 2017).

In this respect, the return to power of Prime Minister Viktor Orbán in Hungary in 2010, with his coalition government's constitution-changing two-thirds majority in Parliament, inaugurated a thorough reorganisation of the domestic governance system to create an "illiberal democracy" (Halmai, 2014). Through these extensive powers, the government replaced the post-communist 1990 Constitution with the new 2011 Fundamental Law at the beginning of 2012 (Kovács and Tóth, 2011; Jakab and Sonnevend, 2013). Under its terms, a gradual but sustained process of "capture" by constitutional means has

effectively allowed the government to take over or silence the institutions and bodies necessary to ensure the continued functioning of a state under the rule of law or which, by their very nature, could provide an alternative narrative to this new illiberal order (Krekó and Enyedi, 2018). Among those that critics consider as having been captured in this way is the Hungarian Constitutional Court (HCC) whose bench eventually became the sole preserve of members nominated by the Orbán-led government and confirmed in office by Parliament (Tatham, 2020). This has led to commentators to describe the HCC's more recent case law as forming a strong element in the development of abusive constitutionalism in the country (Chronowski, Kovács, Körtvélyesi and Mészáros, 2022: 23-40).

While there is extensive literature on this subject (see, e.g., von Bogdandy and Sonnevend, 2015; Pap, 2019; Drinóczi and Bień-Kacała, 2022), this Note focuses on and analyses the broader EU and the narrower domestic constitutional contexts of the recent HCC judgment in the *Refugee Pushback case*, Decision *32/2021 (XII.20) AB*[2]. The outcome of that case surprised commentators in that – in the face of the prevailing comparative national constitutional case law – the bench refused to consider as *ultra vires*, the prior interpretation of EU law in a ruling of the Court of Justice of the European Union (CJEU). The present Note will examine this Decision within the enduring academic debate on legal pluralism and judicial dialogue (Bobić, 2022; Martinico and Pollicino, 2012), in order to see how the HCC seemingly managed to balance its role as "guardian" of the Fundamental Law (FL) under Art. 24 FL with the requirements of Union loyalty and sincere cooperation under Art. 4(3) TEU.

II. THE 2015 MIGRANT CRISIS AND THE HUNGARIAN LEGAL RESPONSE

1. CONTEXT

While the EU Member States in southern Europe have long experienced the phenomenon of increasing irregular migration via North Africa and Turkey, the impact of the Syrian civil war substantially altered the magnitude of that crisis in 2015 (Buonanno, 2017: 102) in which the EU experienced an enormous increase of in irregular border crossings[3], representing more than one

[2] Decision *32/2021 (XII.20) AB*: Álkotmánybíróság *Határozatai Közlöny (HCC Gazette)* ABK 2022/1, p. 2. English translation retrieved from: https://bit.ly/3QzCQyY.

[3] The numbers only substantially dropped off after the EU finalised an agreement on intended to limit the influx of irregular migrants entering it through Turkey, pro-

million people (Europol, 2016: 4-7). Hungary was among those States that experienced, for the first time, the influx of overwhelming numbers of people seeking international protection (see, generally, Cantat and Rajaram, 2019). In order to alleviate the heavy burden on reception countries, the EU introduced a temporary quota system[4] in September 2015 for the distribution and settlement of asylum seekers and migrants among the Member States, aimed at dispersing these arrivals throughout the Union. However, Hungary (together with the other members of the Visegrád Four) refused to participate in the new EU scheme and instead used the crisis to justify the imposition of exceptional measures and the development of practices inimical to the welfare and rights of refugees and asylum seekers (Kovács and Nagy, 2022).

Accordingly, the Hungarian government responded quickly by amending its domestic legislation (Nagy, 2016: 1045-1051) on the right to asylum and the return of third-country nationals illegally staying on its territory[5]. The provisions of a 2015 statute[6] allowed, among other matters, for the establishment of "transit zones" at Röszke and Tompa (two strips of land on the Hungarian-Serbian frontier), where the relevant asylum applications were to be processed. Moreover, that statute also allowed the Hungarian government to derogate from the general rules covering the field of asylum and migration where it determined that there was "a crisis situation caused by mass migration". Two years later, a further statute[7] extended the cases in which such a crisis situation could be declared and also broadened the grounds for derogation from the general rules. As a result of these and other domestic rules, between March 2017 and mid-May 2020 all asylum seekers (with exception of unaccompanied minors below 14 years old) were held in *de facto* detention in the transit zones for the whole duration of their asylum procedure (Matevžič, 2021: 13).

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viding some €3 billion to support work in this field (Saatçioğlu, 2020). When the agreement came to an end in 2020, it was extended until 2022 with Turkey receiving an additional €485 million.

4 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ L 248, 24 September 2015, p. 80).

5 Act LXXX of 2007 on the right to asylum: *Magyar Közlöny* [*Hungarian Official Gazette*] 2007/83, p. 6088.

6 Act CXL of 2015 amending certain laws in the context of managing mass immigration: *Magyar Közlöny* 2015/124, p. 19196.

7 Act XX of 2017 amending certain laws related to the strengthening of the procedure conducted in the guarded border area: *Magyar Közlöny* 2017/39, p. 3862.

2. EU CHALLENGES HUNGARY'S NEW RULES ON ASYLUM AND ILLEGAL MIGRATION

In respect of both pieces of domestic legislation, the European Commission raised doubts as to their compatibility with EU law[8] and, on 11 December 2015, sent Hungary a letter of formal notice thereby beginning the infringement process under Art. 258 TFEU. On 7 March 2017, it sent a supplementary letter to cover the shortcomings of the 2017 statute. Taken together, the Commission's criticisms focused on Hungary's alleged disregard of the substantive and procedural safeguards provided for in the main EU directives in this field, namely the Asylum Procedures Directive[9]; the Reception Conditions Directive[10]; and the Return Directive[11]. In its reasoned opinion, the Commission submitted that the Hungarian government had, *inter alia*, restricted asylum seekers' access to the international protection procedure; established a system of systematic detention of such applicants for that protection; and forcibly deported to the transit zones illegally staying

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8 This situation on asylum and the position taken by Hungary must be seen within a series of cases. On the one hand, Commission proceedings under Art. 258 TFEU: (i) Opinion of Advocate General Sharpston of 31 October 2019, *Commission v. Hungary (Temporary mechanism for the relocation of applicants for international protection)*, C-718/17, EU:C:2019:917; and (ii) Judgment of the Court (Grand Chamber) of 16 November 2021, *Commission v. Hungary (Criminalisation of support for asylum seekers)*, C-821/19, EU:C:2021:930. On the other hand, national courts making references under the Art. 267 TFEU reference procedure: (i) Judgment of the Court (Grand Chamber) of 29 July 2019, *Alekszij Torubarov v. Bevándorlási* és *Menekültügyi Hivatal*, C-556/17, EU:C:2019:626; (ii) Judgment of the Court of 19 March 2020, *PG v. Bevándorlási* és *Menekültügyi Hivatal*, C-406/18, EU:C:2020:216; (iii) Judgment of the Court of 19 March 2020, *LH v. Bevándorlási* és *Menekültügyi Hivatal*, C-564/18, EU:C:2020:218; and (iv) Judgment of the Court (Grand Chamber) of 14 May 2020, *FMS v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367.

9 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180, 29 June 2013, p. 60) (the Asylum Procedures Directive).

10 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180, 29 June 2013, p. 96) (the Reception Conditions Directive).

11 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals (OJ L 348, 24 December 2008, p. 98) (the Return Directive).

third-country nationals, without observing the guarantees provided for in the Return Directive.

When it failed to address these continuing concerns, the Commission initiated proceedings before the CJEU for Hungary's failure to fulfil EU obligations in the terms of its reasoned opinion. In its December 2020 ruling in *Commission v. Hungary (Reception of Applicants for International Protection)*[12], the CJEU held that:

(i) Hungary had failed to fulfil its obligation to provide effective access to the procedure for granting international protection to third-country nationals seeking to enter the country across the Serbian-Hungarian border. It had made it practically impossible for the persons concerned to submit a request for this procedure.
(ii) The obligation for applicants for international protection to remain in the transit zone during the procedure for examining their application constituted detention within the meaning of the Reception Conditions Directive.
(iii) Hungary has also failed to fulfil its obligations under the Return Directive because domestic legislation allowed for the removal of illegally staying third-country nationals without prior compliance with the procedures and safeguards provided for in that Directive.
(iv) Lastly, it did not respect the right which the Asylum Procedures Directive, in principle, granted to applicants for international protection to remain in the territory of the EU Member State concerned after their application has been rejected, until the deadline for lodging an appeal against the rejection or, if an appeal had been lodged, until the competent authorities had taken a decision to that effect.

After the landmark CJEU ruling, the transit zones were closed in May 2020 and people were released to the open reception facilities. At the same time, however, Hungary introduced new rules according to which practical and procedural access to asylum is severely limited, including to those who are legally staying in the country (Matevžič, 2021: 21). These are now the subject of a separate action of the Commission (European Commission, 2021a).

Against this background, the Commission maintained that Hungary was still not compliant with several aspects of the CJEU ruling in *Reception of Applicants* case. In particular, it had neither taken the measures necessary to

[12] Judgment of the Court (Grand Chamber) of 17 December 2020, *Commission v. Hungary (Reception of Applicants for International Protection)*, C-808/18, EU:C:2020:1029.

ensure effective access to the asylum procedure nor had it clarified the conditions related to the right to remain on its territory in case of an appeal in an asylum procedure, in the event where there is no "crisis situation caused by mass immigration".

For its part, the Hungarian government objected on the grounds that the compliance with the terms of *Reception of Applicants* case would be contrary to the 2011 Fundamental Law. Consequently, on 25 February 2021, the Hungarian government brought the matter before the HCC, informing the Commission that—pending the decision of the HCC—it could not comply with the CJEU ruling.

The Commission, however, refused to be deterred by the action of the Hungarian government. On 9 June 2021, it sent Hungary a letter of formal notice under Art. 260(2) TFEU (European Commission, 2021b). Continued failure to comply with these outstanding matters, subsequently led the Commission to ask the CJEU, on 12 November 2021 to impose fines on Hungary in the form of a lump sum and a daily penalty payment (European Commission, 2021c). Such claim was made a few weeks before the HCC handed down its judgment, the subject of the analysis in the present Note.

III. *REFUGEE PUSHBACK CASE:* PETITION

1. BASIS OF THE PETITION

In her petition to the HCC in Decision *32/2021 (XII.20) AB*, the Minister of Justice, Ms. Judit Varga, claimed that compliance with the CJEU ruling in the *Reception of Applicants* case would be unconstitutional since it would violate Hungary's sovereignty and constitutional identity. In effect, she was requesting the HCC's confirmation of the Hungarian government's ability to ignore that CJEU ruling.

In her petition for an abstract constitutional interpretation[13], the Minister submitted[14] that the implementation of the CJEU ruling meant, in practice,

[13] On the petition of Parliament, a parliamentary standing committee, the President of the Republic or the government, the HCC is to provide an interpretation of provisions of the Fundamental Law with respect to a specific constitutional issue provided that this interpretation can be deduced directly from the Fundamental Law: Art. 24(2)(g) FL and s. 38(1) of Act CLI of 2011 on the Constitutional Court: *Magyar Közlöny* 2011/136, p. 32722.

[14] Decision *32/2021 (XII.20) AB*, para. [8].

that a foreign national staying illegally in Hungary could not be escorted out of its territory to the other side of the border fence, despite the express wording of domestic legislation. As a result, in the case of an application for asylum, asylum proceedings would have to be conducted while, in the absence of such application, a migration control procedure would have to be made. However, she noted, the effectiveness of the relevant readmission agreements was rather low, citing to the European Commission's own Communication in the matter, according to which only one third of those whose return had been ordered actually left the territory of the relevant Member State (European Commission, 2020: 1).

Consequently, in the event of initiating a migration control procedure or of a negative decision in an asylum procedure, the persons concerned would remain on the territory of Hungary for an undefinable period and would thereby *de facto* become part of the Hungarian population. This situation, the Minister submitted[15], would violate Hungary's sovereignty and identity based on its historical constitution since it would restrict its inalienable right to determine its own population. In such situation, she questioned the constitutionality of implementing that CJEU decision.

The Minister's petition must therefore be seen in both its broader EU as well as its more focused national constitutional context. There are thus two lines of thought intertwined in this petition, viz., constitutional identity as one of the counter-limits to the transfer of the exercise of sovereignty to the EU – as developed by the HCC – and its (potential) use to justify ignoring the terms of a CJEU ruling, binding on it. Each of these will now be considered in turn.

2. HUNGARIAN CONSTITUTIONAL CASE LAW ON THE PERMISSIBLE LIMITS TRANSFERRING THE EXERCISE OF DOMESTIC SOVEREIGNTY TO THE EU

2.1. Constitutional counter-limits and German influence

The notion of constitutional identity (Besselink, 2010) and its use as a potential bulwark protecting the nation against the primacy of EU law (von Bogdandy and Schill, 2011) can be traced back, in a way, to the HCC's pre-accession ruling in Decision *32/1998 (VI.25) AB* on the constitutionality of the then extant Europe (Association) Agreement between the European Community and Hungary (Tatham, 1999). In developing its approach – particularly within the context of the new Fundamental Law and the migration crisis – the German Federal Constitutional Court (GFCC) and its

[15] Decision *32/2021 (XII.20) AB*, paras. [8]-[10].

case law has profoundly influenced the HCC in its decision making (Tatham, 2013: 135-203).

In this context, the GFCC has developed three types of control that would permit it to constitutionally review the basis for any transfers of the exercise of sovereignty to the EU. These are the fundamental rights review (*Solange I*[16]), the *ultra vires* review (*Maastricht*[17]) and the constitutional identity review (*Lisbon*[18]), although, in recent years, the GFCC has started to blend the last two types of review[19]. However, as with any transplant (Watson, 1974) or migration of a constitutional institution or ruling between systems (Choudhry, 2007), local conditions and actors have a strong impact on the way such concepts are adapted to new circumstances.

2.2. *Lisbon Treaty case*

In this respect, the HCC's ruling in Decision *143/2010 (VII.14) AB*[20] on the Lisbon Treaty is the appropriate starting point for the present discussion. The petitioners in this case challenged the constitutionality of the domestic statute promulgating the Lisbon Treaty[21] on the grounds that the Treaty's new rules and mechanisms challenged the existence of Hungary as an independent, sovereign State, governed by the rule of law as provided under Art. 2(1) and (2) of the 1990 Constitution[22]. The petitioners alleged that the Treaty's innovations went beyond the powers transferred to the EU under

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16 *Internationale Handelsgesellschaft (Solange I)*, 29 May 1974, 2 BvL 52/71: *Entscheidungen des Bundesverfassungsgerichts* (*Decisions of the Federal Constitutional Court*) BVerfGE 37, p. 271.

17 *Maastricht*, 12 October 1993, 2 BvR 2134 and 2159/92: BVerfGE 89, p. 155.

18 *Lisbon*, 30 June 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, p. 267.

19 In the saga of the European Central Bank's programme of Outright Monetary Transactions (OMT), the GFCC outlined (in its 2016 decision) a relationship between *ultra vires* and identity review, specifying that the former was a species of the genus of the latter: *OMT*, 21 June 2016, 2 BvR 2728/13: BVerfGE 142, p. 123, para. 153.

20 Decision *143/2010 (VII.14) AB*: *Álkotmánybíróság Határozatai* (*Decisions of the HCC*) ABH 2010, p. 698.

21 Act CLXVIII of 2007 amending the Treaty in the European Union and the Treaty establishing the European Community on the promulgation of the 2007 Lisbon Treaty: *Magyar Közlöny* 2007/182, p. 13778.

22 Constitution Art. 2(1) and (2) provided that Hungary was "an independent, democratic constitutional state" where supreme power was "vested in the people, who exercise their sovereign rights directly and through elected representatives".

the Europe clause (Tatham, 2005) of the Constitution which clause, Art. 2A(1), provided that Hungary could exercise certain constitutional powers jointly with other EU Member States to the extent necessary in connection with the rights and obligations conferred by the treaties of the EU. Such powers could be exercised independently and by way of the EU institutions.

The HCC discussed, at some length, the relationship between Constitution Arts. 2 and 2/A. It observed[23] that Art. 2/A contained the constitutional power – "transfer of sovereignty" or "transfer of power" – through which the Constitution established a clear constitutional basis and framework to enable Hungary to accede to the EU. It continued by re-examining its previous case law on state sovereignty and the limitations on it (Tatham, 2013: 153-156) and stated[24]: "The requirement of the traceability of popular sovereignty, according to this Decision, was complied with in the preparation for EU accession by placing [this requirement] into Constitution Article 2/A…. The prevalence of Article 2/A may not however deprive Article 2(1)-(2) of its substance".

Although Constitution Art. 2/A was the domestic constitutional basis for continuing EU membership and amendments to the founding Treaties (now the TEU, TFEU and Euratom), Constitution Art. 2(1) and (2) on sovereignty and the rule of law constituted the "constitutional identity" of Hungary. Thus, the transfer of competences to the EU could not exceed the extent necessary to exercise the rights and perform the obligations under EU law. To this mix must be added Constitution Art. 6(4) according to which participation in European integration was a state goal. As the HCC pointed out: "Participation is not a goal in itself but has to serve human rights, prosperity and security". An EU law that did not serve these aims could therefore be regarded as infringing the constitutional identity of Hungary[25]. To this nucleus of constitutional identity, the protection of fundamental rights arguably belonged, a point apparently conceded by the HCC in Decision *61/2011 (VII.13) AB*[26].

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23 Decision *143/2010 (VII.14) AB,* pp. 705-708.

24 Decision *143/2010 (VII.14) AB*, pp. 707-708.

25 In fact, in the case itself, the concurring Opinion of Trócsányi, J. suggested that principles which comprised the constitutional identity or essential core of Hungarian sovereignty and were thus protected from restriction by the EU included the rules on the election of MPs, the dissolution of Parliament, or the appointment of members of the government or of the judiciary: Decision *143/2010 (VII.14) AB*: pp. 713-714.

26 Decision *61/2011 (VII.13) AB*: ABH 2011, p. 290, pp. 320-321.

The HCC's development of such constitutional counter-limits[27] to EU integration, was underscored by the entry into force of the 2011 Fundamental Law that was clearly designed with a more robust protection of Hungarian sovereignty and identity in mind (although the wording of the former Europe clause under Art. 2 was largely retained unaltered in new Art. E FL). In addition, as will be seen through the remainder of this Note, the 2015 migrant crisis caused several petitions to be brought before the HCC, all linked to the CJEU ruling in the *Reception of Applicants* case.

2.3. *EU migrant quota case*

The next large step along the road to articulating Hungarian constitutional identity came in Decision *22/2016 (XII.5) AB*[28]. That case arose directly from the EU's introduction in 2015 of the quota system for the distribution and settlement of asylum seekers and migrants among the Member States, mentioned above. As a result, the Ombudsman petitioned the Court on the grounds, *inter alia*, as to whether Art. E(2) FL: (a) required state institutions to implement EU legislation that conflicted with domestic fundamental rights; and (b) might restrict the implementation of an *ultra vires* act of the EU.

In its decision, the HCC held that Art. E(2) FL, taking into account the other provisions of the Fundamental Law, provided it with three avenues of control of the joint exercise of powers with the EU[29]. It thus decided[30] that, within its own competence, in exceptional cases and as an *ultima ratio* measure

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[27] By this doctrine, the Italian Constitutional Court (ICC) retained its competence to review the application of EU law domestically if it might infringe its own "*controlimiti*" or "counter-limits" to integration based on fundamental principles of the Constitution and inalienable human rights: *Frontini c. Ministero delle Finanze*, 27 December 1973, n. 183: *Gazzetta Ufficiale*, 2 January 1974, n. 2. In the much later *Fragd* case, the ICC affirmed that in principle a rule of Union law could not be applied in Italy if it infringed a fundamental principle of the Constitution, notwithstanding the fact that the CJEU had already accepted the legality of the rule: *SpA Fragd c. Amministrazione delle Finanze dello Stato*, 21 April 1989, n. 232: *Gazzetta Ufficiale*, 3 May 1989, n. 18. For a concrete application of theory of counter-limits by the ICC, see *Constitutionality of Law ratifying Lisbon Treaty*, 23 November 2017, n. 24: *Gazzetta Ufficiale*, 1 February 2017, n. 5.

[28] Decision *22/2016 (XII.5) AB*: ABH 2016, p. 456. English translation retrieved from: https://bit.ly/3n6Q3le.

[29] Decision *22/2016 (XII.5) AB*, para. [16].

[30] Decision *22/2016 (XII.5) AB*, para. [46].

– i.e., by respecting the constitutional dialogue between the Member States and the CJEU – it could review whether the joint exercise of competences based on Art. E(2) FL infringed: (i) the essential content of any fundamental right ("fundamental rights control"); (ii) Hungary's sovereignty (including the scope of the competences it had handed over ("sovereignty control" or "*ultra vires* control"); or (iii) its constitutional identity ("identity control"). It thereby adopted the GFCC approach of control to its own particular constitutional needs and standards. Thus, unlike the way in which the GFCC had used human dignity as a way to allow individuals to use any of the three types of control to bring challenges before it vis-à-vis EU law, the HCC has steadfastly refused such a migration of this constitutional idea.

On the fundamental rights control, the HCC used Arts. E(2) and I(1) FL. Under Art. I(1) FL, the inviolable and inalienable fundamental rights of man are to be respected. The HCC noted that it was the primary duty of the State to protect these rights. Bearing in mind the provisions, together with the need for cooperation in the EU as well as the primacy of EU law, the HCC stated that it could not renounce the *ultima ratio* defence of human dignity and other fundamental rights. It held that as Hungary was bound by fundamental rights, the binding force of such rights are also applicable to cases where public power or competences were exercised together with the EU institutions or other Member States.

As regards *ultra vires* control, the HCC referred to the concept of "state sovereignty" (supreme power, territory and population) that followed from Arts. B(1), B(3) and B(4) FL[31]. The HCC stated that Hungary had not relinquished its sovereignty by joining the EU but only made possible the joint exercise of certain competences[32]: "Accordingly, the reservation of Hungary's sovereignty should be presumed when judging upon the joint exercise of further competences additional to the rights and obligations provided in the Founding Treaties of the European Union (presumption of reserved sovereignty)". Echoing its words in Decision *143/2010 (VII.14) AB*, the HCC held that Art. E(2) FL should not empty Art. B FL of its meaning and stressed that the exercise of powers (within the EU) could not result in the loss of the

[31] Art. B FL variously provides that, under para. (1), "Hungary shall be an independent and democratic State governed by the rule of law". Under para. (3): "The source of public authority shall be the people", while under para. (4): "The people shall exercise power through their elected representatives, and also directly in exceptional cases".

[32] Decision *22/2016 (XII.5) AB*, para. [59].

ultimate possibility oversight by the Hungarian people over public power, a matter recognised in the Fundamental Law[33].

Lastly, the HCC based its understanding of constitutional identity review on Art. 4(2) TEU. It recognised[34] that the protection of constitutional identity rested with the CJEU and was based on continuous cooperation, mutual respect, and equality, i.e., judicial dialogue with the national courts. In the HCC's understanding, then, constitutional identity meant the constitutional identity of Hungary whose content was to be determined on a case-by-case basis. Such gradual evolution would be based on the Fundamental Law as a whole and its provisions in accordance with its Art. R(3) FL that requires its interpretation to be in harmony with its purposes, the National Avowal that formed part of the Fundamental Law and the achievements of the historical constitution.

While apparently eschewing the need to provide an exhaustive list of values that comprised Hungary's constitutional identity, the HCC nevertheless (as with the example of the GFCC in *Maastricht* and *Lisbon*) indicated some of them. These comprised[35] freedoms, the separation of powers, the republican form of state, respect of public law autonomies, freedom of religion, legality, parliamentarism, equality before the law, recognition of judicial power, and the protection of nationalities that are living in Hungary. Potential areas for consideration that could emerge in relation to areas shaping the citizens' living conditions, included[36] especially the private sphere of their own responsibility and of political and social security, protected by fundamental rights, and in areas in which the linguistic, historical and cultural involvement of Hungary could be detected. Thus, the HCC determined that the constitutional identity of Hungary was "not a list of static and closed values"[37] but rather[38]:

> a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore, the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State.

33 Decision *22/2016 (XII.5) AB*, paras. [59]-[60].
34 Decision *22/2016 (XII.5) AB*, paras. [61]-[64].
35 Decision *22/2016 (XII.5) AB*, para. [65].
36 Decision *22/2016 (XII.5) AB*, para. [66].
37 Decision *22/2016 (XII.5) AB*, para. [65].
38 Decision *22/2016 (XII.5) AB*, para. [67].

In the HCC's view, it followed that sovereignty and constitutional identity intersected in many points and therefore the two reviews needed to be employed vis-à-vis each another. In this way, the HCC followed the development noted by the GFCC in the *OMT* case[39].

2.4. *Hungarian rules on illegal migration case*

The final case for consideration in this part was delivered after the Seventh Amendment of the Fundamental Law had introduced changes in 2018, *inter alia*, into Art. E FL. As amended, this Article now provides expressly that the exercise of competences, within the EU context, has to comply with the fundamental rights and freedoms provided for in the Fundamental Law and are not to limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure. In this way, the three types of control established by the HCC in Decision *22/2016 (XII.5) AB* are now clearly provided for at the constitutional level in the amended Art. E FL.

The Minister of Justice brought the petition in Decision *2/2019 (III.5) AB*[40] as the result of the European Commission's letter of formal notice under Art. 258 TFEU (mentioned above) concerning the 2015 and 2017 statutes amending certain Hungarian legal rules related to measures to combat illegal immigration. The petitioner claimed[41] that the central constitutional issue was the question of the exclusive competence of the HCC over the interpretation of the Fundamental Law. He asked, *inter alia*, for an interpretation as whether[42]: (i) Art. R(1) FL that provides that the Fundamental Law is the foundation of the legal system was, at the same time, the legitimising source of all sources of law, including that of the EU; and (ii) it followed from Art. 24(1) FL, that provides the HCC is the principal organ for protecting the Fundamental Law, the Court's interpretation of the Fundamental Law could not be derogated from by any interpretation provided by another organ (expressly, in this case, the European Commission but also, impliedly, the CJEU).

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39 *OMT*, 21 June 2016, 2 BvR 2728/13.

40 Decision *9/2019 (III.5) AB*: ABH 2019, p. 28. English translation retrieved from: https://bit.ly/3naQyux.

41 Decision *9/2019 (III.5) AB*, para. [2].

42 Decision *9/2019 (III.5) AB*, paras. [3]-[5].

The HCC partly agreed with the Minister on the first question[43], noting that – as with other EU Member States – their domestic legal rules on the national enforcement of the founding treaties (TEU, TFEU and Euratom) and the frameworks set by their own constitutions would determine the extent of primacy enjoyed by EU law in a particular Member State over its own laws. Consequently, having regard to the application of the primacy of EU law over national law, the Court determined that, on the basis of Art. R(1) FL, the foundation of the applicability and effectiveness of EU law in Hungary was Art. E FL.

As regards the second question[44], the HCC indicated that usually the parallel systems of EU and national law did not provoke a constitutional dilemma since the two normative systems were based on a common set of values. However, due to differing standards, the HCC admitted that it could – at times – reach a different conclusion to that of the CJEU with respect to the conformity of national rules to EU law. It therefore followed from Art. 24(1) FL that the HCC retained the role and duty of determining the interpretation of the constitutional order of Hungary, including its fundamental system. Nevertheless, this of itself did not exclude other domestic and international organs, courts or institutions, from interpreting the Fundamental Law or Hungarian laws in the course of proceedings before them[45]. However, the HCC's interpretation of the Fundamental Law (which approach applied equally to interpretation by other constitutional courts in EU Member States) possessed an *erga omnes* character. This meant that all organs or institutions were to respect this interpretation in their own proceedings as the authentic meaning[46].

In addition, the HCC recommitted[47] itself to the requirement of judicial dialogue as it had done in Decision *22/2016 (XII.5) AB*[48] and with it the realisation of the condition of cooperation based on the principles of equality and collegiality, with mutual respect to each other, i.e., the CJEU. Consequently, the relevant courts had to take into account each other's authentic interpretations. Indeed, in defining the harmony and the coherence of legal systems as constitutional objectives that followed from the need to promote

43 Decision *9/2019 (III.5) AB*, paras. [13]-[24].
44 Decision *9/2019 (III.5) AB*, paras. [25]-[37].
45 Decision *9/2019 (III.5) AB*, para. [34].
46 Decision *9/2019 (III.5) AB*, para. [35].
47 Decision *9/2019 (III.5) AB*, para. [36].
48 Decision *22/2016 (XII.5) AB*, paras. [33] and [63].

"the creation of European unity" in Art. E(1) FL, the HCC emphasised[49] that domestic laws and the Fundamental Law itself should be interpreted – as far as possible – in a manner to make the content of the national norm comply with EU law. This approach appears to comply with *Marleasing*[50] and the CJEU principle for the consistent interpretation of national law with EU law (Tatham 2013: 172-177).

Nevertheless, the phrase "as far as possible", while echoing the CJEU's wording in *Marleasing*, still gives the HCC discretion not to comply with that principle if any CJEU interpretation might conceivably come up against the counter-limits of the Fundamental Law.

Moreover, Decision *9/2019 (III.5) AB* underlines the point that, were the relevant circumstances to arise, the HCC could make a binding decision on the effect or otherwise of a CJEU ruling in Hungary, which decision could not be subject to challenge in the domestic legal system. That this is a feasible position to defend can be seen from the next section that discusses how constitutional courts in various EU Member States have sought to ignore CJEU rulings in their own decision-making.

3. CJEU INTERPRETATIVE RULINGS AS *ULTRA VIRES* ACTS

3.1. Earlier national court judgments

Through her petition in Decision *32/2021 (XII.20) AB*, the Minister was in effect inviting the HCC to follow recent comparable national case law according to which constitutional courts in several EU Member States had refused to follow CJEU rulings binding on them, on the grounds that they had considered them to infringe domestic fundamental rights, or were *ultra vires* the powers their State already conferred on the EU, or breached their State's constitutional identity. Although – as mentioned above – the GFCC developed the possibility of *ultra vires* review of CJEU rulings made under Art. 267 TFEU in *Maastricht* and in *Lisbon*, the progeny of this approach can be traced back much further, at least to the French *Conseil d'État* in its 1978 judgment in the case of *Cohn-Bendit* in which it refused to recognise the direct effect of provisions of a Directive (as well as of EEC law generally)

[49] Decision *9/2019 (III.5) AB*, para. [36].

[50] Judgment of the Court of 13 November 1990, *Marleasing SA v. La Comercial Internacional de Alimentación SA*, C-106/89, EU:C:1990:395.

(Tatham, 1991). Such judgment had ignored the previous CJEU ruling on the subject in *Van Duyn*[51].

While the GFCC rejected the claim – made in *Honeywell*[52] – that the CJEU ruling *Mangold*[53] was *ultra vires* because it had transgressed its conferred competences through its expansive interpretation of EU law and principles (Corti Varela, Porras Belarra and Román Vaca, 2011), it did find favour with the Czech Constitutional Court (CCC) in the *Slovak Pensions* case[54]. In that judgment, the CCC decided that the CJEU in its ruling in *Landtová*[55] had applied EU law in a purely internal situation involving social security entitlements connected with employment periods completed within a single State. In the view of the CCC, such interpretation had exceeded the limits of the powers of CJEU and constituted an *ultra vires* act.

Commentators were divided as to whether this was the first salvo in a new round of problems with the exercise of judicial dialogue or merely an exceptional phenomenon (Komárek, 2012; Zbíral, 2012).

3.2. *Further national constitutional courts ignore CJEU rulings*

It took several more years however before it finally manifested itself again, this time before the GFCC in the *Public Sector Purchase Programme* (*PSPP*) *case*[56]. In that case, the GFCC ruled that the Federal Government and the *Bundestag* had violated several of the complainants' fundamental rights under the German Basic Law. These institutions had failed to take steps to challenge the European Central Bank (ECB) decisions on the adoption and implementation of the PSPP since they had neither assessed nor substantiated the fact that the measures provided for in the relevant ECB decisions had satisfied the principle of proportionality under German constitutional law. Moreover, the CJEU in *Weiss*[57], one that the GFCC had itself requested under

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51 Judgment of the Court of 4 December 1974, *Yvonne van Duyn v Home Office*, 41/74, EU:C:1974:133.

52 *Honeywell*, 6 July 2010, 2 BvR 2661/06: BVerfGE 126, p. 286.

53 Judgment of the Court of (Grand Chamber) of 22 November 2005, *Werner Mangold v. Rüdiger Helm*, C-144/04, EU:C:2005:709.

54 CCC, Decision Pl. ÚS 5/12 of 31 January 2012 (*Slovak Pensions*). English translation retrieved from https://bit.ly/3n2np4O.

55 Judgment of the Court of 22 June 2011, *Marie Landtová v* Česká *správa socialního zabezpečení*, C-399/09, EU:C:2011:415.

56 *PSPP*, 5 May 2020, 2 BvR 859/15: BVerfGE 154, p. 17.

57 Judgment of the Court (Grand Chamber) of 11 December 2018, *Proceedings brought by Heinrich Weiss*, C-493/17, EU:C:2018:1000.

Art. 267 TFEU, had held that the Decision of the ECB Governing Council on the PSPP and its subsequent amendments were still within the ambit of the ECB's competences. In response, the GFCC considered that the CJEU's interpretation of the principle of proportionality had exceeded the judicial mandate conferred upon it in Art. 19(1) TEU and so, to that extent, the ruling in *Weiss* was thereby rendered *ultra vires* (Corti Varela, 2021).

While this caused a political storm that was eventually settled, the "genie was out of the bottle". In fact, at the time, commentators had warned (e.g., Poiares Maduro, 2020) that *PSPP* would encourage other national courts and governments to fling wide the doors for open revolt against the CJEU/EU, especially those in Eurosceptic countries already involved in legal and political battles on the rule of law with the EU.

Unfortunately, this has proven to be a case. With the grave situation in the marked deterioration of respect for the rule of law in Poland and the fight for maintaining judicial independence in the face of the political roll-back of rights and freedoms, the CJEU (together with the European Court of Human Rights (ECtHR) in Strasbourg[58]) has been at the forefront in seeking to stop and reverse such backsliding in the rule of law (Pech and Kochenov, 2021: 183-204). In view of the current circumstances in which the PCT is presently regarded as being "captured" by the current Polish populist government (similarly to the HCC) and as an illegally constituted and illegitimate "court" according to the relevant ECtHR judgments and CJEU rulings, it came as no great surprise for the Polish Prime Minister to file a motion in spring 2021 inviting the PCT *inter alia* to consider ignoring CJEU rulings. The PCT duly obliged and, in October of that year, ruled in Decision *K 3/21 (Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union)*[59] that the CJEU interpretations of Arts. 1 and 19 TEU, in its various rulings on the independence of the judiciary[60], were in conflict with the 1997 Polish Constitution (Jaraczewski, 2021). As a result, it became

[58] The ECtHR has been equally strong in its condemnation of illegally appointed individuals to the bench: ECtHR (Grand Chamber), *Guðmundur Andri Ástráðsson v. Iceland*, 1 December 2020, CE:ECHR:2020:1201JUD002637418; ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, 7 May 2021, CE:ECHR:2021:0507JUD000490718; and ECtHR (Grand Chamber), *Grzęda v. Poland*, 15 March 2022, CE:ECHR:2022:-0315JUD004357218.

[59] Decision *K 3/21*, 7 October 2021. English translation retrieved from https://bit.ly/3xLeLwm.

[60] In particular, Order of the Vice-President of the Court of 14 July 2021, *Commission v. Poland*, C-204/21 R, EU:C:2021:593; and Judgment of the Court (Grand Chamber) of 15 July, *Commission v. Poland*, C-791/19, EU:C:2021:596.

possible to discipline judges for failing to comply with this Decision, if they were to apply CJEU rulings that included an interpretation of treaty provisions that the CT had already declared unconstitutional: such disciplinary proceedings have already been brought[61].

The Romanian Constitutional Court (RCC) followed suit a few months later. In 2018, the Romania had established a new section within the Public Prosecutor's Office for investigation of offences committed within the judicial system (*Secţia pentru Investigarea Infracţiunilor din Justiţie* or SIIJ). In *Asociaţia Forumul Judecătorilor din România*[62], the CJEU held, *inter alia*, that national legislation providing for the creation of the SIIJ was contrary to EU law where its establishment was not justified by objective and verifiable requirements relating to the sound administration of justice and was not accompanied by specific guarantees that the CJEU identified.

A few weeks later, in Decision *390/2021*[63], the RCC dismissed an objection that the provisions of national law on the establishment and functioning of the SIIJ were unconstitutional[64]. It noted that, in its previous judgments, it had held that the provisions in question were constitutional and stated that it saw no reason to depart from those rulings notwithstanding the CJEU in *Asociaţia Forumul Judecătorilor din România*. The RCC acknowledged that, while Art. 148(2) of the 1991 Romanian Constitution provided for the primacy of EU law over conflicting provisions of national law, such

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61 In this context, domestic disciplinary proceedings have already been commenced to suspend several Polish judges for their having applied the ECtHR judgments and CJEU rulings relating, in particular, to the Disciplinary Chamber of the Supreme Court and holding that the National Council of the Judiciary's lack of independence compromised the legitimacy of a court composed of judges appointed on its recommendation. As a result, these judges have already applied to the ECtHR: ECtHR, *Synakiewicz v. Poland* (interim measures), no. 46453/21, 24 March 2022; ECtHR, *Niklas-Bibik v. Poland* (interim measures), no. 8687/22, 24 March 2022; ECtHR, *Piekarska- Drążek v. Poland* (interim measures), no. 8076/22, 24 March 2022; and ECtHR, *Hetnarowicz-Sikora v. Poland* (interim measures), no. 9988/22, 24 March 2022.

62 Judgment of the Court (Grand Chamber) of 18 May 2021, *Asociaţia Forumul Judecătorilor din România v. Inspecţia Judiciară*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393.

63 Decision *390 of 8 June 2021*: *Monitorul Oficial al României* (*Official Gazette of Romania*), 22 June 2021, No. 612.

64 There is now a reference from a Romanian court on this matter before the CJEU: Opinion of Advocate General Collins of 20 January 2022, *Proceedings brought by RS*, C-430/21, EU:C:2022:44.

principle could not eliminate or negate national constitutional identity. That Article therefore did not grant EU law primacy over the Constitution, with the result that a national court had no power to examine the conformity with EU law of a provision of domestic law that the RCC had already been held to be constitutional[65].

As a result of the foregoing, on the one hand, the HCC had defined an increasingly stronger position of identity vis-à-vis EU law without actually attempting to review an interpretation of that law by the CJEU on the grounds of its infringing the counter-limits of Hungarian sovereignty (Tatham, 2013: 145-152). Nevertheless, in its Decision *2/2019 (III.5) AB*, the HCC basically implied that it ultimately possessed the jurisdiction to ignore CJEU rulings. On the other hand, the increasing tendencies of the GFCC and its sister courts in Central Europe to rule interpretations of EU law by the CJEU as *ultra vires* gave the HCC comparative legal support in the situation that it would wish to adopt such an approach.

Given these two streams of case law, their confluence in the HCC's forthcoming decision would have seemed to be the next natural progression. In this way, the Minister of Justice would probably have been confident that her arguments on the petition would carry the day for the Hungarian government.

IV. *REFUGEE PUSHBACK CASE:* REASONING OF THE COURT

1. AVOIDING OPEN CONFRONTATION

Given this overall context, then, Decision *32/2021 (XII.20) AB* came as somewhat of a surprise. Although confirming its previous case law on human

[65] For a critique of the poor reasoning of this judgment, see Selejan-Gutan, 2021. Even more worrying was the publication of an RCC press release on 23 December 2021 that called into question the primacy of EU law, as developed by the CJEU since the 1960s. The publication was no coincidence: Two days before, in Judgement of the Court of Justice (Grand Chamber) of 21 December 2021, *Criminal proceedings against PM (Eurobox)*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, the CJEU had confirmed that national courts had the power to disapply RCC decisions that conflicted with EU law. According to the same commentator, the press release, although a non-legal document, would likely have a dissuasive effect upon the judges who would otherwise be ready to disapply domestic legal rules as per CJEU rulings. In Romania, the disregard of RCC decisions can be a ground for disciplinary action against judges (Selejan-Gutan, 2021), a similar situation to that now also exists in Poland.

dignity, constitutional identity and *ultra vires*, the HCC nimbly sidestepped the issue that was confronting it. Instead of following the approach of their colleagues in Warsaw, Bucharest and even Karlsruhe, the justices in Budapest decided to maintain their formal commitment to judicial dialogue with the CJEU and ruled that they were unable to rule on that part of the petition. The HCC thus respected the CJEU's jurisdiction to rule on the exercise of shared powers.

From the outset, the HCC stated[66] that, in the context of its abstract constitutional review, it was entirely possible for it to answer the question posed by separating it from the ruling of the CJEU in *Commission v. Hungary (Reception of Applicants for International Protection)*. The logic behind this approach clearly lay in its concern not to carry out a constitutional review of CJEU rulings, thereby respecting the principle of separation of powers. In fact, the HCC had already indicated (in previous decisions) its lack of jurisdiction to conduct the direct constitutional review of EU acts (Tatham, 2013: 183-186).

Yet this desire to respect judicial dialogue did not extend to the HCC making a reference[67] under Art. 267 TFEU for a preliminary ruling (Tatham, 2013: 168-171 and 199-200). Rather the bench indicated that it considered the matter as an *acte clair*, within the terms of *CILFIT*[68], and that accordingly it was not necessary to refer questions on the application of EU law in the present case to the CJEU[69]. Nevertheless, the wording of the HCC on this point could also imply its willingness to follow the GFCC in *PSPP* and so refer the relevant question for consideration to the CJEU before the HCC would decide the case before it.

2. DECISION CONCENTRATES ON EU FAILURE TO EXERCISE SHARED COMPETENCES AND IMPLICATIONS FOR HUNGARIAN CONSTITUTIONAL COUNTER-LIMITS

2.1. Methods of national control over EU inaction in shared competences

The object of the HCC review therefore was not the CJEU ruling but rather became Art. E FL, the Europe or accession clause. In not directly

66 Decision *32/2021 (XII.20) AB*, paras. [21].

67 Thereby following its approach in Decision *143/2010 (VII.14) AB*.

68 Judgment of the Court of 6 October 1982, *Srl CILFIT v. Ministry of Health*, 283/81, EU:C:1982:335.

69 Decision *32/2021 (XII.20) AB*, para. [64].

challenging the primacy of the CJEU ruling, the HCC had decided instead to reorient its decision on the petition before it, towards the situation where the Union had failed to exercise or incompletely exercise its shared competences with EU Member States in the fields of asylum and immigration law within Arts. 67-89 TFEU.

The HCC thus resolved to interpret Art. E(2) FL but could not, for jurisdictional reasons, examine whether in the specific case the exercise of joint competence had in fact been incomplete[70]. Neither could the HCC decide whether the petitioner's argument that, as a consequence of the CJEU ruling, a foreign population might in fact become part of the population of Hungary were correct. Instead, this would be a matter to be judged by the relevant domestic legislator or body applying the law but not the HCC. The HCC also stressed[71] that the abstract constitutional interpretation might not be aimed at reviewing a CJEU ruling, nor did the HCC's procedure in the present case – due to its nature – include the examination of the primacy of EU law.

The HCC – using the already established three methods of control – thus examined in turn whether the lack of joint exercise of competences, based on Art. E(2) FL, could lead to a violation of: (1) the essential content of any fundamental right, in particular, human dignity (fundamental rights control); or (2) Hungary's sovereignty (including the scope of the competences it had handed over, *ultra vires* or sovereignty control); or (3) its constitutional identity (identity control).

2.2. Fundamental rights control (human dignity)

The HCC first examined whether the relevant joint exercise of competences, or its incomplete effectiveness, could violate the fundamental rights and freedoms enshrined in the Fundamental Law, the protection of which was the primary obligation of the State under Art. I (1) FL[72]. Since this involved such rights in general, rather than specific ones, the HCC decided to rely on the right to human dignity as the basis of its examination since, under its established case law[73], such right could be relied upon by the HCC or other courts to protect an individual's autonomy when no specific fundamental rights were applicable to a set of facts. The right to human dignity included,

[70] Decision *32/2021 (XII.20) AB*, para. [21].
[71] Decision *32/2021 (XII.20) AB*, para. [23].
[72] Decision *32/2021 (XII.20) AB*, para. [27].
[73] Decision *37/2011 (V.10) AB*: ABH 2011, p. 411.

in the interpretation of the HCC, the right to personal identity and the right to self-determination.

The HCC noted[74] that a person, as the most elementary constituent of all social communities, especially the State, was born into a given social environment that could be defined as their traditional social environment, especially through its ethnic, linguistic, cultural and religious determinants. Such circumstances created natural ties, determined by birth, which shaped the identity of community members[75]. These circumstances were difficult or impossible for individuals to change; therefore, they become a determining element of their personality and an integral part of the human quality that derived from the dignity of the human person. Thus, as the HCC had previously stated[76]: "The right to human dignity, by virtue of its general function of protecting the personality, also includes other specifically defined rights, component rights, such as the right to identity, the right to self-determination, the general freedom of action, the right to the protection of privacy".

Protection under constitutional law, the HCC continued[77], ought not to be an abstract, static protection of the individual removed from their historical and social reality: rather it had to take into account the dynamic changes in contemporary life. Just as the State could not make unreasonable distinctions regarding fundamental rights on the basis of these characteristics, it also had to ensure, with regard to its duty to protect institutions, that changes to the traditional social environment of the individual could only take place without significant harm to these substantial (determining) elements of an individual's identity.

However, if the content of identity were artificially and undemocratically altered by the State (or any other organisation other than the State), this might infringe both the individual's identity and their existing self-determination to change this. As the HCC further observed[78], the traditional social environment into which the individual was born and that was independent of the individual shaped the self-definition of the individual, and the self-definition

74 Decision *32/2021 (XII.20) AB*, para. [33].

75 The protection of this identity was also referred to in the National Avowal of the Fundamental Law where it variously states that: "We value the various religious traditions of our country", "the national minorities living with us form part of the Hungarian political community and are constituent parts of the State"; furthermore, "we commit ourselves to promoting and safeguarding our heritage, our unique language, Hungarian culture and the languages and cultures of national minorities living in Hungary".

76 Decision *37/2011 (V.10) AB*, p. 411.

77 Decision *32/2021 (XII.20) AB*, para. [35].

78 Decision *32/2021 (XII.20) AB*, paras. [37]-[38].

of the individuals who make up society created and then shaped the collective identity, i.e., the identity of the given community and the given nation.

According to the HCC[79], when – as a result of the defective exercise of shared powers under Art. E(2) FL – a foreign population, without democratic authorisation, were to remain permanently and en masse on Hungarian territory, then that would be likely to affect human dignity because it could cause a forced change in the traditional social environment of man. Due to the State's obligation of institutional protection, the prevention of such occurrence was the State's duty under Art. I FL.

Nevertheless, the HCC was at pains to stress[80] that the settlement in Hungary of (groups of) people different from the traditional social identity of those living in Hungary did not in itself, generally speaking, raise the issue of violation of human dignity provided such settlement was subject to the State's control mechanisms. Moreover, no distinction was to be made in the State's objective institutional protection of the human dignity of all persons staying in Hungary, regardless of the legal title and the lawfulness of their stay. However, the State was able to subject legal residents and those who were illegally staying in the country to different legal regulations since they were accordingly not in a comparable situation and so did not constitute a homogenous group.

2.3. Ultra vires (or sovereignty) control

With regard to *ultra vires* control, the HCC[81] referred back to its previous case law, particularly Decision *22/2016 (XII.5) AB*, on the presumption of reserved sovereignty. The application of such presumption in a case might be made exceptionally and only where the lack of exercise of the common competences concerned – or their incomplete exercise – clearly failed to ensure the effectiveness (*effet utile*) of EU law, might lead to a violation of fundamental rights or a restriction on the performance of State obligations.

Even in this case, Hungary was only entitled to exercise a shared competence under Art. E(2) FL (that was to be exercised jointly), until the EU or its institutions had created the guarantees for the effectiveness of EU law. Even then, it could only do so in a manner that was consistent with and aimed at promoting the founding and amending treaties of the EU. The Member State's exercise of the shared competence to be exercised jointly under Art.

79 Decision *32/2021 (XII.20) AB*, paras. [51]-[52].
80 Decision *32/2021 (XII.20) AB*, paras. [53]-[55].
81 Decision *32/2021 (XII.20) AB*, paras. [62]-[67] and [76]-[80].

E(2) FL was conditional on Hungary drawing the attention of the EU or its institutions to the need to exercise such competence and the Union or its institutions failing to do so. The HCC maintained[82] that its interpretation of reserved sovereignty was also expressly in line with the principle of sincere cooperation under Art. 4(3) TEU.

The HCC then proceeded[83] to provide some indications as to how Hungarian institutions and bodies were to draw up domestic legislation on asylum procedures and asylum seekers. In these matters, such entities had a duty, under Art. E(2) FL, to ensure that the said national rules were drawn up in accordance with the principles of solidarity and sincere cooperation laid down in Art. 4(3) TEU. They were to do this while also taking into account the provisions of Art. 4(2) TEU on the essential functions and territorial integrity of the State together with the maintenance of public order and the provisions on the protection of national security. In addition, the said entities were also to ensure observance and the rules of the 1951 Geneva Convention relating to the status of refugees and its additional protocol, as reflected in the legal provisions of the Union. The HCC observed[84] that the *effet utile* of EU law was to be presumed when designing these rules but also emphasised that the actual decision to grant or refuse asylum remained a sovereign national act of Hungary.

It has already been observed that the judgment is particularly incomplete on this point and may be subject to divergent interpretations (Cseke, 2022). On the one hand, it is possible to consider that the reasons of public policy indicated by the HCC are not sufficiently taken into account by the EU legislature, so that Hungary can indeed have recourse to that presumption. On the other hand, assuming the effectiveness of EU law on asylum, Hungary may adopt implementing measures that must be in accordance with EU law. This last interpretation is based on the constitutional dialogue underlined on several occasions by the HCC itself.

2.4. Constitutional identity control

Finally, the HCC reviewed how the consequences of the potential incomplete effectiveness of the joint exercise of competence at issue related to Hungary's constitutional identity[85]. As with *ultra vires* review, the HCC

82 Decision *32/2021 (XII.20) AB*, para. [83].
83 Decision *32/2021 (XII.20) AB*, para. [86].
84 Decision *32/2021 (XII.20) AB*, para. [86].
85 Decision *32/2021 (XII.20) AB*, para. [87].

referred to its previous case law[86] on the subject – Decision *143/2010 (VII.14) AB* and Decision *22/2016 (XII.5) AB* – and to the 2018 (Seventh) Amendment of the Fundamental Law that had provided for the protection of constitutional identity and sovereignty. In addition to the changes to Art. E(2) mentioned earlier, the National Avowal also now provides: "We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State". While new Art. R(4) FL reads: "The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of each body of the State".

In the HCC's interpretation[87], following the GFCC in the *OMT* case, constitutional identity and sovereignty (*ultra vires* control) were not complementary concepts but rather were interrelated in several respects. On the one hand, the safeguarding of Hungary's constitutional identity, also as an EU Member State, was basically made possible by its sovereignty (the safeguarding of it). On the other hand, constitutional identity manifested itself primarily through a sovereign act, viz., the adoption of the Fundamental Law. Thirdly, taking into account Hungary's historical struggles (on which the HCC discoursed at some length[88]), the aspiration to safeguard the country's sovereign decision-making powers was itself part of the country's national identity and, through its recognition by the Fundamental Law, of its constitutional identity as well. Lastly, the main features of State sovereignty recognised in international law were closely linked to Hungary's constitutional identity due to the historical characteristics of the country.

3. FINAL JUDGMENT

The HCC consequently held[89] first that, where the joint exercise of competences specified Art. E FL was incomplete, Hungary was entitled – in accordance with the presumption of reserved sovereignty – to exercise the relevant non-exclusive field of competence of the EU, until the EU institutions took the measures necessary to ensure the effectiveness of the joint exercise of competences.

Secondly where this incomplete effectiveness of the joint exercise of competences led to consequences that raised the issue of the violation of the right to identity of persons living in the territory of Hungary, the Hungarian

86 Decision *32/2021 (XII.20) AB*, paras. [88]-[92].
87 Decision *32/2021 (XII.20) AB*, paras. [97]-[99].
88 Decision *32/2021 (XII.20) AB*, paras. [102]-[109].
89 Decision *32/2021 (XII.20) AB*, p. 2.

State was obliged to ensure the protection of this right within the framework of its obligation of institutional protection.

Lastly, the protection of the inalienable right of Hungary to determine its territorial unity, population, form of government and State structure formed part of its constitutional identity.

V. CONCLUSION

The approach taken in its latest decision is characterised by two diametrically opposed opinions, namely the HCC's respect for the relevant CJEU ruling and its recourse to the presumption of reserved sovereignty (Cseke, 2022).

The HCC's clear choice of a pro-European path has been welcomed (Chronowski and Vincze, 2021) since this approach limited its power to use abstract constitutional interpretation and so it basically declined to be drawn into the politically sensitive issues impliedly raised in the Minister's petition, thereby holding itself not competent to pronounce on the validity or primacy of EU law and CJEU interpretations. The HCC accordingly avoided a full-blown crisis like those with the PCT and the RCC and which have already resulted in open conflict with Luxembourg and Brussels.

In this way, the HCC's Decision *32/2021 (XII.20) AB* sits firmly between the positions taken, on the one hand, by the GFCC in *PSPP* in which it ruled that the CJEU had failed to exercise its powers properly and, on the other, by the PCT in Decision *K 3/21* and the RCC in Decision *390/2021* that decided in essence, that the CJEU had acted *ultra vires* by exercising its lawful powers of interpretation under Art. 267 TFEU (Dózsa and Menkes, 2021). Such positioning should not come as a surprise, considering the HCC's pragmatic approach to the nature and supremacy of EU law that it has been developing since the late 1990s (Tatham, 2013: 159-203; Varju and Fazekas, 2011).

Although the HCC can plausibly maintain that its interpretations of the Fundamental Law and, in particular, that of reserved sovereignty have no consequence on the validity or the primacy of an act of the Union, this does not of course give the full picture. While the HCC explained and restricted the application of the presumption of reserved sovereignty (see discussion under *ultra vires* control above), use of such a solution would itself constitute a questioning of a CJEU ruling, found to be incompatible with the Fundamental Law as interpreted by the HCC (Cseke, 2022). This approach thus leaves the door ajar for the HCC in future cases to exercise a review jurisdiction that would, in effect, amount to the constitutional control of a CJEU ruling.

In addition, the appeal to the historical constitution itself raises important issues that were previously mentioned in respect of its appearance in Decision *22/2016 (XII.5) AB*. In a critique of that case (Halmai, 2018), while the HCC had asserted that Hungary's constitutional identity was rooted in its historical constitution, this latter notion was itself ambiguous and there existed no legal-scientific consensus as to its precise nature (Schweitzer, 2013). In fact, commentators have strongly criticised the invention and role of the "historical constitution" within the context of Hungary's current abusive constitutionalism (Bárd, Chronowski and Fleck, 2022). This criticism is also supported by the fact that, apart from some relatively brief exceptions in its more than thousand years of history, the dominant approach to governance in Hungary has been authoritarian (Halmai, 2018: 40-41). Nevertheless, in the present case, the HCC started the process of clarifying what it meant by the notion "historical constitution", emphasising the more "democratic" elements of it[90].

Moreover, the HCC did not examine whether the joint exercise of powers had any shortcomings, nor could it take a position on the question as to whether the Minister's argument of a *de facto* change of the Hungarian population due to immigration was correct. In such case, the legislature and the government (and not the HCC) were given *carte blanche* to assess these issues.

It has also been stated in respect of Decision *32/2021 (XII.20) AB* that it still gives the Hungarian government enormous leeway "to continue its illegal practices, contending that migration is a shared competence and if the EU is silent on a matter or if a piece of EU law is not effective, the national authorities can step in" (Bárd, 2021). However, the HCC failed to make clear in Decision *32/2021 (XII.20) AB* that, in exercising these residual competences (pending joint action with the EU), Hungarian law must not contradict EU law (Bárd, 2021). Indeed, it has also been argued that the EU's failure to exercise its joint competence in this field is allowing regimes like that of Hungary to exploit such inaction and severely curtail the rights and prospects of asylum seekers. Continuing exploitation of these shortcomings consequently lie to be addressed not by the HCC but rather by the European Commission, ultimately before the CJEU again (Dózsa and Menkes, 2021).

Even the HCC's reminding the State to ensure full protection of the human dignity of all persons, including asylum seekers, residing in its territory, had to be seen in the present domestic political and legal context. Even though the HCC's decision is strongly oriented towards human dignity, the emphasis is not on the individual's right to self-determination as

[90] Decision *32/2021 (XII.20) AB*, paras. [102]-[109].

it had been in the Court's first 20 years of post-communist activity (Dupré, 2003). Rather it was on the right to self-identity, which is determined by belonging to a community, and more in tune with the stance of the present governing parties in government and parliament (Chronowski and Vincze, 2021).

Moreover, while everyone is entitled to human dignity, the HCC stated that differentiation in the level of its protection was constitutional, depending on whether one was part and parcel of the population, lawfully resident on the territory of Hungary and those that were not. The HCC had drawn a similar and no less inhuman/inhumane distinction in Decision *19/2019 (VI.18) AB*[91] in which the majority on the bench had used the right to human dignity to justify the separate treatment of homeless people in Hungary from those that were not (Chronowski and Halmai, 2019). The HCC had declared in that case that the criminalisation and imprisonment of homeless people were not unconstitutional. In fact, according to the majority, people living in need on the streets were not to be protected by the right to human dignity nor did they share the value of equal dignity since, according to the Fundamental Law, human dignity was the dignity of an individual living in a society and bearing the responsibility of social coexistence. Thus, as was remarked upon, protection of human dignity was for good Hungarians only (Chronowski and Halmai, 2019) and, following Decision *32/2021 (XII.20) AB*, it is even less likely for illegal immigrants.

In conclusion, the HCC reasoning in Decision *32/2021 (XII.20) AB* strikes a cautious balance between, on the one hand, maintaining judicial dialogue with the CJEU and, on the other, protecting the counter-limits of Hungarian sovereignty in the face of further EU integration. Compared to the recent decisions of the GFCC, PCT and RCC, this cautious approach of the HCC has been the hallmark of its interactions with EU law and CJEU interpretations since at least its accession in 2004. While clearly cognisant of other courts' approaches to these relations and inspired by them, especially the GFCC, the HCC steers a course that eschews outright confrontation, a paradox considering its role in the illiberal democracy of Hungary. Nevertheless, the time will come when the HCC cannot avoid a hard case and, like its counterparts, will thus be called upon to choose between guarding Hungarian sovereignty and continuing its sincere cooperation with the CJEU.

[91] Decision *19/2019 (VI.18) AB*: ABH 2019, p. 493.

Bibliography

Bárd, P. (2021). Interview contribution to P. Murphy. Hungary Court Avoids EU Conflict After Orban Challenge. *International Business Times*, 12-10-2021. Available in: https://bit.ly/3xCh70G.

Bárd, P., Chronowski, N. and Fleck, Z. (2020). Inventing constitutional identity in Hungary. *MTA Law Working Papers*. Available in: https://bit.ly/3zRXOU2.

Besselink, L. F. (2010). National and Constitutional Identity Before and After Lisbon. *Utrecht Law Review*, 6 (3), 36-49. Available in: https://doi.org/10.18352/ulr.139.

Bignami, F. (2020). *EU Law in Populist Times: Crises and Prospects*. Cambridge: Cambridge University Press.

Bobić, A. (2022). *The Jurisprudence of Constitutional Conflict in the European Union*. Oxford: Oxford University Press.

Buonanno, L. (2017). The European Migration Crisis. In D. Dinan, N. Nugent, and W. E. Paterson (eds.). *The European Union in Crisis* (pp. 100-130). London: Red Globe Press. Available in: https://doi.org/10.1057/978-1-137-60427-9_6.

Cantat, C. and Rajaram, P. K. (2019). The Politics of the Refugee Crisis in Hungary: Bordering and Ordering the Nation and Its Others. In C. Menjívar, M. Ruiz and I. Ness (eds.). *The Oxford Handbook of Migration Crises* (pp. 181-196). Oxford: Oxford University Press. Available in: https://doi.org/10.1093/oxfordhb/9780190856908.013.69.

Choudhry, S. (2007). *The Migration of Constitutional Ideas*. Cambridge: Cambridge University Press CUP. Available in: https://doi.org/10.1017/CBO9780511493683.

Chronowski, N. and Halmai, G. (2019). The Constitutional Court's Decision on the Criminalization of Homelessness: Human Dignity for Good Hungarians Only: *Verfassungsblog on Matters Constitutional* [blog], 11-06-2019. Available in: https://bit.ly/3y6YPpE.

Chronowski, N. and Vincze, A. (2021). Full Steam Back: The Hungarian Constitutional Court Avoids Further Conflict with the ECJ. *Verfassungsblog on Matters Constitutional* [blog], 15-12-2021. Available in: https://bit.ly/3HFNujx.

Chronowski, N., Kovács, Á., Körtvélyesi Z. and Mészáros G. (2022). The Hungarian Constitutional Court and the Abusive Constitutionalism. *MTA Law Working Papers*. Available in: https://bit.ly/3zSljfF.

Corti Varela, J. (2021). El Public Sector Purchase Programme (PSPP) a la luz de las Jurisprudencias del TJUE y del Tribunal Constitucional Federal Alemán: antecedentes y consecuencias de la sentencia del BVerfG de 5 de mayo de 2020 (2 BvR 859/15). *Revista de Derecho Comunitario Europeo*, 68, 67-112. Disponible en: https://doi.org/10.18042/cepc/rdce.68.03.

Corti Varela, J., Porras Belarra, J. y Román Vaca, C. (2011). El control *ultra vires* del Tribunal constitucional alemán. Comentario de la decisión de 06.07.2010 (2 BvR 2661/06, *Honeywell*). *Revista de Derecho Comunitario Europeo*, 40, 827-852.

Cseke, N. (2022). La primauté du droit de l'Union et ses limites dans l'interprétation par la Cour constitutionnelle hongroise. *blogdroiteuropéen* [blog], 24-02-2022. Available in: https://bit.ly/3tPdcww.

Dózsa, D. and Menkes, M. J. (2021). Somewhere between Poland and Germany - The Hungarian Constitutional Court's Ruling in the Refugee Push-Back Case. *EU Law Live-Op-Ed* [blog], 15-12-2021. Available in: https://bit.ly/3xA82oY.

Drinóczi, T. and Bień-Kacała, A. (2022). *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law*. Abingdon: Routledge. Available in: https://doi.org/10.4324/9781003175353.

Dupré, C. (2003). *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity*. Oxford: Hart Publishing. Available in: http://hdl.handle.net/1814/27335.

European Commission (2020). Communication on the New Pact on Migration and Asylum, 23-09-2020: COM(2020) 609 final.

— (2021a). Commission refers Hungary to the Court of Justice of the European Union for unlawfully restricting access to the asylum procedure. *Press Release*, 15-07-2021. Available in: https://bit.ly/3OcbSfl.

— (2021b). June infringements package: key decisions. (Asylum: Commission calls on Hungary to implement the Court of Justice ruling in the area of procedures for granting international protection and return). *Press Release*, 09-06-2021. Available in: https://bit.ly/3tPpkgQ.

— (2021c). Migration: Commission refers Hungary to the Court of Justice of the European Union over its failure to comply with Court judgment. Press Release, 12-11-2021. Available in: https://bit.ly/3NatQxc.

Europol (2016). *Migrant Smuggling in the EU*. The Hague: Europol Public Information.

Halmai, G. (2014). An Illiberal Constitutional System in the Middle of Europe. In W. Benedek, F. Benoît-Rohmer, M. C. Kettemann, B. Kneihs and M. Nowak (eds.). *European Yearbook of Human Rights 2014* (pp. 497-514). Brussels: Intersentia.

— (2018). Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law. *Review of Central and East European Law*, 43, 23-42. Available in: https://doi.org/10.1163/15730352-04301002.

Jakab, A. and Sonnevend, P. (2013). Continuity with Deficiencies: The New Basic Law of Hungary. *European Constitutional Law Review*, 9, 102-138. Available in: https://doi.org/10.1017/S1574019612001058.

Jaraczewski, J. (2021). Gazing into the Abyss: The K 3/21 decision of the Polish Constitutional Tribunal. *Verfassungsblog on Matters Constitutional* [blog], 12-10-2021. Available in: https://bit.ly/3tLD5gr.

Komárek, J. (2012). Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU *Ultra Vires*; Judgment of 31 January 2012, Pl. ÚS 5/12, *Slovak Pensions XVII*.

European Constitutional Law Review, 8, 323-337. Available in: https://doi.org/10.1017/S1574019612000193.

Konstadinides, T. (2017). *The Rule of Law in the European Union-The Internal Dimension*. Oxford: Hart Publishing.

Kovács, K. and Nagy, B. (2022). In the Hands of a Populist Authoritarian: The Agony of the Hungarian Asylum System and the Possible Ways of Recovery. In V. Stoyanova and S. Smet (eds.). *Migrants' Rights, Populism and Legal Resilience in Europe* (pp. 211-235). Cambridge: Cambridge University Press. Available in: https://doi.org/10.1017/9781009040396.013.

Kovács, K. and Tóth, G.A. (2011). Hungary's Constitutional Transformation. *European Constitutional Law Review*, 7, 183-203. Available in: https://doi.org/10.1017/S1574019611200038.

Krekó, P. and Enyedi, Z. (2018). Orbán's Laboratory of Illiberalism. *Journal of Democracy*, 28 (3), 39-51. Available in: https://doi.org/10.1353/jod.2018.0043.

Martinico, G. and Pollicino, O. (2012). *The Interaction Between Europe's Legal Systems Judicial Dialogue and the Creation of Supranational Laws*. Cheltenham: Edward Elgar.

Majtényi, B. and Feischmidt, M. (2020). The Rise of Populist Nationalism. Budapest: CEU Press 2020.

Matevžič, G., Pardavi, M., Iván, J. and Bakonyi, A. (2021). *Country Report: Hungary (2021 Update)*. Budapest: Hungarian Helsinki Committee/Brussels: European Council on Refugees and Exiles (Asylum Information Database, AIDA). Available in: https://bit.ly/3n5k9G4.

Nagy, B. (2016). Hungarian Asylum Law and Policy in 2015-2016: Securitization Instead of Loyal Cooperation. *German Law Journal*, 17 (6), 1033-1081.

Pap, A. L. (2019). *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy*. Abingdon: Routledge.

Pech, L. and Kochenov, D. (2021). *Respect for the Rule of Law in the Case-Law of the Court of Justice: A Casebook Overview of the Key Judgments since the Portuguese Judges Case*. Stockholm: SIEPS.

Poiares Maduro, M. (2020). Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court. *Verfassungsblog on Matters Constitutional* [blog], 06-05-2020. Available in: https://bit.ly/3xE75fD.

Saatçioğlu, B. (2020). The European Union's refugee crisis and rising functionalism in EU-Turkey relations. *Turkish Studies*, 21 (2), 169-187. Available in: https://doi.org/10.1080/14683849.2019.1586542.

Scheppele, K. L., Kochenov, D. V. and Grabowska-Moroz, B. (2021). EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union. *Yearbook of European Law*, 39, 3-121. Available in: https://doi.org/10.1093/yel/yeaa012.

Schweitzer, G. (2013). Fundamental Law-Cardinal Law-Historical Constitution: The Case of Hungary since 2011. *Journal on European History of Law*, 4 (1), 124-128.

Selejan-Gutan, B (2021). A Tale of Primacy Part. II: The Romanian Constitutional Court on a Slippery Slope. *Verfassungsblog on Matters Constitutional* [blog], 18-06-2021. Available in: https://bit.ly/3zO70bS.

Tatham, A. F. (1991). The Effect of European Community Directives in France: the Development of the Cohn-Bendit Jurisprudence. *International and Comparative Law Quarterly*, 40, 907-919. Available in: https://doi.org/10.1093/iclqaj/40.4.907.

— (1999) Constitutional Judiciary in Central Europe and the Europe Agreement: Decision 30/1998 (VI.25) AB of the Hungarian Constitutional Court. *International and Comparative Law Quarterly*, 48, 913-920. Available in: https://doi.org/10.1017/S0020589300063740.

— (2005). The European Clause of the Hungarian Constitution: a Comparative Perspective. *Collectio Iuridica Universitatis Debreceniensis*, 5, 255-271.

— (2013). *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model of Integration in Hungary and Poland*. Leiden: Martinus Nijhoff. Available in: https://doi.org/10.1163/9789004234550.

— (2020). "The Taming of the Judicial Shrew": A Short Account of How the Hungarian Constitutional Court was moved from Centre Stage to the Wings (2010-2013). In S. Sanz Caballero (ed.). *El futuro de la Unión y la amenaza de una no Europa: La crisis de valores en la UE* (pp. 193-214). Pamplona: Thomson Reuters Aranzadi.

Varju, M. and Fazekas, F. (2011). The reception of European Union law in Hungary: The Constitutional Court and the Hungarian judiciary. *Common Market Law Review*, 48 (6), 1945-1984. Available in: https://doi.org/10.54648/COLA2011075.

Von Bogdandy, A. and Schill, S. (2011). Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty. *Common Market Law Review*, 48 (5), 1417-1451. Available in: https://doi.org/10.54648/COLA2011057.

Von Bogdandy, A. and Sonnevend, P. (2015). *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*. Oxford: Hart Publishing. Available in: https://doi.org/10.5771/9783845261386.

Watson, A. (1974). *Legal Transplants: An Approach to Comparative Law*. Edinburgh: Scottish Academic Press. Available in: https://doi.org/10.2307/1228215.

Zbíral, R. (2012). Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12: A Legal revolution or negligible episode? Court of Justice decision proclaimed ultra vires. *Common Market Law Review*, 49, 1475-1492. Available in: https://doi.org/10.54648/COLA2012072.