# 28 Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law*

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## 28.1 The Motion

Council Decision (EU) 2015/1601 of 22 September 2015 (hereinafter: 'EUC Decision') established provisional measures in the area of international protection for the benefit of Italy and Greece. The provisions of the EUC Decision ordered the transfer of 1294 persons to Hungary. According to the petitioner, László Székely, the Commissioner for Fundamental Rights in Hungary, the procedure to be undertaken under the EUC Decision neglects the substantive and comprehensive examination on the merits of the individual situation of the applicants, it is of collective nature, and it deviates from the general legal approach intrinsic to the EU legal order based on the rigorous protection of fundamental rights. The petitioner sought the interpretation of the Fundamental Law in relation to the EUC Decision from the Constitutional Court.

As an own initiative petition, the Commissioner sought the interpretation of Article XIV (1)–(2)[1] and Article E) (2) of the Fundamental Law[2] based on of Section 38 para. (1) of the Act CLI of 2011 on the Constitutional Court. The specific questions and arguments formulated by the Commissioner concerning the interpretation of the Fundamental Law were the following:

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1 Article XIV (1) Hungarian citizens shall not be expelled from the territory of Hungary and may return from abroad at any time. Foreigners staying in the territory of Hungary may only be expelled under a lawful decision. Collective expulsion shall be prohibited.
(2) No one shall be expelled or extradited to a State where he or she would be in danger of being sentenced to death, being tortured or being subjected to other inhuman treatment or punishment.

2 Article 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 set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union.

(I.) Does the unconditional prohibition on the collective expulsion of foreigners, regulated in Article XIV (1) of the Fundamental Law, apply to the instrumental acts performed by the bodies or institutions of the Hungarian State as to implement the prohibition in respect of an unlawful collective expulsion executed by another State, or does this prohibition only apply to those cases when foreigners must leave the territory of Hungary as a specific result of the exercise of State authority of Hungarian bodies applying the law? In this context, the petitioner made references to several international organisations, court statements and conventions that support the prohibition of collective expulsion as well as the right of asylum seekers to stay lawfully in the relevant State until the completion of the procedure. In the petitioner's opinion, the EUC Decision is in conflict with the requirements of individual assessment and approval by the receiving State prescribed by the Dublin III Regulation. The petitioner contends that the reception act of another Member State is essential for the transfer exercised by a Member State. Accordingly, if a Member State contributes to the wrongful act of another Member State, the responsibility of each Member State may be invoked in relation to collective expulsion. In this respect, the Commissioner requested the assessment of the substance of Article XIV (1) of the Fundamental Law.

(II.) The second question, concerning the interpretation of Article E) (2) of the Fundamental Law, consists of three parts:

(a) The first part essentially refers to the fundamental rights reservation, namely, whether legal acts of the EU, that are contrary to the fundamental rights provisions of the Fundamental Law, must be implemented or not, and if not, which public body has the competence to establish this? In this regard, the petitioner asserted that while Article E) (2) ensures the constitutional basis for exercising competences in Hungary, at the same time it foresees constitutional limitations as well. The European Union can exercise public authority in Hungary only within the limits specified by the Fundamental Law, not unlike Hungarian public bodies, therefore, the provision of the Fundamental Law in question may be regarded as a fundamental rights reservation.

(b) The second part concerns the evaluation of so called *ultra vires* legal acts of the EU. Can the implementation of EU legal acts that go beyond the competence transferred by Hungary to the European Union be restricted in Hungary on the basis of the Founding Treaties? Which Hungarian institution may declare *ultra vires* EU legal acts to be inapplicable? In this context, the Commissioner for Fundamental Rights concluded that Hungarian institutions and bodies are only bound to implement legal acts of the EU in case those are based on the authorisation supplied by the Founding Treaties. Safeguarding compliance with the *ultra vires* prohibition, as a matter of constitutional law, is namely the duty of Hungarian constitutional institutions, in particular, the Constitutional Court.

(c) The third part, revisiting Article XIV., examines whether Article E) and the prohibition of collective expulsion may jointly restrict the implementation of the EUC Decision by Hungarian institutions and bodies.

## 28.2 The Reasoning of the Decision

### *28.2.1 The Majority Decision*

(I) The Constitutional Court, taking into consideration the examination criteria laid down in Decision 8/2014. (III.20.) AB, found that the petition had been submitted by a person entitled to file a motion, seeking the interpretation of a specific provision of the Fundamental Law. It further declared that, as before, it examined the two other conditions, namely, the existence of a concrete constitutional issue and deducing the interpretation of the same directly from the Fundamental Law, in a narrow sense. The Constitutional Court separated, by issuing a separate order, the motion on the interpretation of Article XIV of the Fundamental Law, as a specific contested issue, from the motion on the interpretation of Article E) of the Fundamental Law, because it was of the view that for the adjudication of the case it was more expedient to examine them on the merits and assess them separately.

(II) In respect of Article E) of the Fundamental Law the Constitutional Court established that the first two parts of the second question were related to concrete constitutional issues that may be directly deduced from the Fundamental Law. However, it found that the third part may only be addressed by the Constitutional Court "in certain respects". According to the Constitutional Court, the issue raised in the third part can only be interpreted with due consideration to the first two problems, i.e. the fundamental rights reservation and the *ultra vires* acts, as it is the only level of abstraction satisfying the condition of concreteness set forth under Article 38 (1) ACC. Therefore, the Constitutional Court expanded on response in relation to the third part in its response to the first two parts.

(III) The Constitutional Court went on to state that it is aware of the point of view of the Court of Justice of the European Union (hereinafter: CJEU) regarding the independence and autonomous nature of the EU legal order, however, it recalled that the basis of the Community are formed by the international treaties concluded by the Member States. In that regard, the Constitutional Court recalled the decision of the Bundesverfassungsgericht,[3] which stated that the Member States' implementing acts ultimately determine the extent of primacy afforded to EU law against the national law of the relevant Member State.

(IV) Subsequently, referring to the importance of constitutional dialogue, the Constitutional Court examined the positions taken by the Member States concerning *ultra vires* acts and the fundamental rights reservation.

(IV-1) The Supreme Court of Estonia stated that if it becomes evident that the new Founding Treaty of the European Union or the amendment to a Founding Treaty of the

3 BVerfGE 75, 223 [242].

European Union gives rise to a more extensive delegation of the competences to the European Union, it is necessary to seek the approval of the holder of supreme power.[4]

(IV-2) According to the French Constitutional Council, the transposition of a Directive may not run counter to a rule or principle inherent to the constitutional identity of France.[5]

In the view of the Supreme Court of Ireland, it would be too narrow an interpretation to authorise any form of amendment to the Treaties without further amendment to the Constitution.[6]

The Constitutional Court of Latvia also laid down the limits of the delegation of competences when stating that nothing can affect the rule of law and the integrity of an independent, sovereign and democratic republic based on the protection of fundamental rights.[7]

(IV-3) The Hungarian Constitutional Court highlighted several ideas from the principles developed by the Constitutional Court of Poland. According to the Polish Constitutional Court, the accession of Poland to the European Union did not undermine the supremacy of the Constitution over the entire legal order within the field of sovereignty of the Republic of Poland.[8] The Constitutional Court of Poland further established that regulations of the EU have supremacy over the Polish legal system in the event of their unconformity with statutes, nevertheless, the Constitution retains its superiority and primacy in all cases over all legal acts in force under the Polish constitutional order, including the legal acts of EU.[9] The Polish Constitutional Court stated that the Constitution is the supreme law of the Republic of Poland, therefore, it would be admissible to examine whether the norms of the EU are consistent with the Constitution.[10]

(IV-4) The Spanish Constitutional Court held that the transfer of the exercise of competences to the EU and the integration of Community legislation into the domestic law inevitably restricts the sovereignty of the state. This shall be acceptable only if European legislation is compatible with the fundamental principles of the social and democratic rule of law established by the national Constitution. Consequently, the constitutional sovereignty transfer enabled by the Constitution is subject to substantive limitations imposed on the transfer.[11]

(IV-5) The Constitutional Court of the Czech Republic pronounced, in the context of the CJEU's doctrine regarding the absolute primacy of EC law, that the Constitutional Court may exercise its jurisdiction in relation to Community law norms only under

4 Judgement No. 3-4-1-6-12. (12 July 2012).
5 Decision No. 2006-540 DC of 27 July 2006.
6 *Crotty v. An Taoiseach* case (9 April 1987).
7 Case No. 2008-35-01, 7 April 2009.
8 K 18/04, 11 May 2005.
9 K 18/04, 11 May 2005.
10 Case No. SK 45/09 of 16 November 2011.
11 Case No. DTC 1/2004 of 13 December 2004.

certain circumstances.[12] In another decision, the Constitutional Court of the Czech Republic held that the transfer of powers to the bodies of the EU may remain in effect in so far as the bodies of the Union exercise these powers consistently with preserving the Czech Republic's state sovereignty, in that it cannot go so far as to violate the very essence of the republic as a democratic state governed by the rule of law.[13]

(IV-6) Citing one of the decisions of the England and Wales High Court (Administrative Court) the Hungarian Court points out that, responding to the requirement of constitutional dialogue between Member States, the United Kingdom recalled the decision of the German Constitutional Court. In this decision, the England and Wales High Court refer to the decision of the Constitutional Court of Germany, which states that as part of a cooperative relationship between the Federal Constitutional Court and the European Court of Justice, this decision must not be read in a way that would put into question the identity of the Basic Law's constitutional order.[14]

(IV-7) The Hungarian Constitutional Court underlined a key point of the German Federal Constitutional Court's decision on the Treaty of Lisbon, which states that the German Constitutional Court shall always examine whether legal instruments enacted by European institutions and bodies keep within the limits of the sovereign powers accorded to them by way of conferral, whilst adhering to the principle of subsidiarity under Community and Union law. Furthermore, it shall review whether the inviolable core content of the Basic Law's constitutional identity is respected by acts of the Union.[15]

(V) After analysing the relevant decisions of the Member States' constitutional courts, the Hungarian Constitutional Court draws the conclusion that within its own scope of competences, on the basis of a relevant petition, in exceptional cases and only as a last resort (*ultima ratio*), i.e. while respecting the constitutional dialogue between the Member States, it can examine whether exercising competences on the basis of Article E) (2) of the Fundamental Law results in the violation of a) human dignity or the essential content of any other fundamental right, b) the sovereignty of Hungary, c) the constitutional self-identity of Hungary.

(VI) As far as the fundamental rights reservation is concerned, the Constitutional Court held that any exercise of public authority in Hungary must respect fundamental rights. As the protection of fundamental rights is a primary obligation of the state, it shall precede the enforcement of everything else. Subsequently, the Constitutional Court refers to the Solange-decisions of the German Constitutional Court, in respect of which it states that the European Union affords the same level of protection for fundamental rights as the level secured by national constitutions. The Constitutional Court, however, cannot set aside the *ultima ratio* protection of human dignity and the core substance of fundamental

12 Judgement No. Pl US 50/04 of 8 March 2006.
13 Case No. ÚS 19/08 of 26 November 2008.
14 *State v. Secretary of State for Transport*, 22 January 2014.
15 BverfG, 2 BvE 2/08 of 30 June 2009.

rights, consequently, the Court must guarantee that the joint exercise of competences with other Member States would not result in the violation of human dignity or the core substance of fundamental rights.

(VII) With regard to the petitioner's motion related to the assessment of the *ultra vires* nature of legal acts, the Constitutional Court notes that in case of such acts both the National Assembly and the Government may take steps deemed necessary in the given situation.[16] Furthermore, the National Assembly of Hungary or the Government of Hungary may file an action before the Court of Justice of the European Union asserting that the legislative act of the EU violated the principle of subsidiarity. The Constitutional Court further adds that the joint exercise of competences under Article E) (2) of the Fundamental Law is not without limitations, since the aforementioned provision not only grants the validity of EU law in respect of Hungary, but at the same time it imposes limitations on competences transferred and jointly exercised. Interpreting the Fundamental Law's National Avowal and its Article E) (2), with due consideration to Article 4 (2) TEU, the Constitutional Court established two main limitations upon the joint exercising of competences. According to the Constitutional Court, the joint exercise of competences must not violate Hungary's sovereignty (sovereignty control) or its constitutional identity (identity control). The Constitutional Court also held that although the National Assembly, contributing to the EU's decision-making mechanism, and the Government, directly participating in that mechanism, both have a duty to protect these values, under Article 24 (1) of the Fundamental Law, the principal organ for such protection is the Constitutional Court itself. Subsequently, the Constitutional Court emphasized that the subject of the two abovementioned controls is not directly the legal act of the Union or its interpretation, therefore, the Court shall not comment on the validity or the primacy in the application of such EU acts.

(VII-1) With regard to sovereignty control, the Constitutional Court notes that its basis is Article B) of the Fundamental Law. As long as the source of public power in Hungary is the people, and power is exercised by the people through elected representatives, these provisions shall not be emptied out of their substance by Article E). The Constitutional Court also defines the *principle of retained sovereignty*.[17] It stated that sovereignty has been laid down in the Fundamental Law as the ultimate source of competences, therefore, the joint exercise of powers shall not result in depriving the people of the possibility of possessing the ultimate chance to control the exercise of public power.

16 On the basis of Article 6 of the Protocol that forms an integral part of the Founding Treaties, the National Assembly and in accordance with Article 16 (2) TEU, the Government.

17 Since by joining the European Union, Hungary has not surrendered its sovereignty, it rather allowed for the joint exercise of certain competences, the maintenance of Hungary's sovereignty should be presumed when adjudicating the joint exercise of further competences additional to the rights and obligations provided in the Founding Treaties of the European Union. Decision 22/2016 (XII. 5.) AB p. 60.

(VII-2) With regard to identity control, the Constitutional Court notes, recalling Article 4(2) TEU,[18] that the protection of constitutional identity should be granted in the framework of an informal cooperation with the CJEU based on the principles of equality and collegiality, and mutual respect. The Constitutional Court interpreted the concept of constitutional identity as Hungary's self-identity, unfolding the content of this concept from case to case, on the basis of the Fundamental Law as a whole, and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution, as foreseen under Article R) (3) of the Fundamental Law. The Constitutional Court also adds that constitutional self-identity is not a system of static and closed values, nevertheless, many of its important components correspond the constitutional values generally accepted nowadays and may be highlighted, for example: freedoms, the division of powers, republic as the form of government, respect for autonomies under public law, the freedom of religion, lawful exercise of public authority, parliamentarism, equality of rights, acknowledging judicial power, protection of nationalities. In addition to the abovementioned elements, these values also include achievements of our historical constitution that serve as the basis of our Fundamental Law, and thus, the entire Hungarian legal system. Next, the Constitutional Court specified in which cases the protection of constitutional self-identity may be raised, such as cases influencing the living conditions of individuals, in particular their privacy protected by fundamental rights, their personal and social security, their decision-making responsibility, and the cases when Hungary's linguistic, historical and cultural traditions are affected. It further established that the constitutional self-identity of Hungary is a fundamental value hat had not been created by the Fundamental Law, but merely acknowledged by it. Consequently, Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. According to the Constitutional Court, the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign state. Accordingly, sovereignty and constitutional identity are interlinked at multiple points, and shall therefore be jointly assessed in specific cases.

(VII-3) Finally, the Constitutional Court answered the third part of the question. It stated that if a fundamental right, the sovereignty of Hungary, including the extent of powers transferred, or its self-identity based on its historical constitution can be presumed to be violated due to the joint exercise of powers, the Constitutional Court may examine, upon a relevant motion, in the course of exercising its competences, the existence of the alleged violation.

18 The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

### 28.2.2 Concurring and Dissenting Opinions

(P1-I) Egon Dienes-Oehm agreed with the findings of Constitutional Court in respect of the general power to review the joint exercise of competences, however, he noted that the reasoning does not give an exhaustive list of the limits of Constitutional Court review. Therefore, in his concurring opinion he provided a summary of limitations based on the TEU, the TFEU, the Fundamental Law and Act CLI of 2011 on the Constitutional Court (ACC).

(P1-II) Firstly, he pointed out that a petition aimed at establishing the *ultra vires* nature of an EU legal act can only result in a review obligation with temporal limitations. He then continued to underline that, in accordance with Article 344 TFEU, any legal debate following the adoption of EU legislation pertains to the sole competence of the CJEU. Nevertheless, Member States' constitutional courts may still play a role, the only questions is with which conditions. Taking part in the preliminary ruling procedure of the CJEU or looking for solutions in the framework of European constitutional dialogue could be an opportunity to solve problems of ultra vires nature. The judge is of the view that it is clear that the Constitutional Court shall not review the judicial acts of the EU either.

(P1-III) With respect to procedures falling within the Constitutional Court's scope of duties and competences, he noted that it must be recalled that sources of EU law directly enforceable in the Member States without any measure taken by the Member States are not "legal regulations" under the Fundamental Law[19] and the ACC,[20] and as such, cannot form the subject matter of preliminary or posterior review. The same applies to constitutional complaints. He held that EU legislation of ultra vires nature, with the exception of Hungarian legal rules transposing an EU directive, can only be reviewed in the abstract, based upon Section 38 (1) ACC.

(P1-IV) The Constitutional Court judge accepted the principle of retained sovereignty with the proviso that it be regarded as a procedural requirement providing guidance for the Constitutional Court's future activity in the field of sovereignty-control, thus, it can only play a role for the purposes of the constitutional review of assessing the presumption of retained sovereignty in the transfer of new competences. He also highlighted that the cases where this review requirement can be taken into account are exceptional ones. As an example, he referred to the development of EU measures in the field of future policies related to border control, asylum and immigration in the area of freedom, security and justice.

(P2-I) Imre Juhász found it particularly questionable to separate the petitioner's claim to interpret Article XIV of the Fundamental Law in the light of the fact that the EUC

19 Article 24 (2) of the Fundamental Law.
20 Sections 23-31 of ACC.

Decision is applicable to persons who arrive(d) to the territory of Italy or Greece between 25 September 2015 and 26 September 2017, as well as to those applicants who arrived to the territory of the Member States since 24 March 2015.

(P2-II) In his view, the level of fundamental rights' protection under EU law should have been analysed more deeply, on the basis of Hungarian constitutionality. He holds that the level of fundamental rights' protection in the European Union cannot be specified in an exact way, and the present state of fundamental rights' protection has also been the subject of debate. The judge states, by way of example, that the protection of fundamental rights through the Charter of Fundamental Rights can only be interpreted in the context of EU law, it can only be invoked if the Member State implements the law of the EU. He held that an obvious example of this is keeping the Beneš-decrees in force, which are based on the principle of collective guilt, the reluctance towards the protection of autochthonous national minorities, the application of a double standard with regard to the test of fundamental rights in case of "old" Member States and "new" ones, and the unresolved relationship between the CJEU and the ECtHR. Accordingly, Imre Juhász did not consider it sufficient to presume the adequate level of fundamental rights' protection.

(P3-I) According to Béla Pokol the Hungarian Constitutional Court did not take sufficiently into account the experiences gained from foreign examples. The judge of the Constitutional Court saw the problem in the fact that declaring the concrete Union act to be inapplicable and establishing an abstract right of resistance against the legal acts of the Union are considered separately. Declaring the inapplicability of an EU act may namely have consequences for foreign policy, an issue that falls outside the scope of duties of the Constitutional Court.

(P3-II) With regard the abovementioned issue, the judge of the Constitutional Court notes that this conflict could be resolved by establishing the Government's exclusive right of initiative in such cases. This way, the commencement of the Constitutional Court's procedure would always be preceded by a preliminary assessment by appropriate foreign policy expert staff, relieving the judges of the Constitutional Court of this burden. In his view, by making available a right of petition with such an extensive scope, practically in the course of all of its competences, the Constitutional Court makes the same mistake as other Member States made, and which resulted in the fact that this procedure of the constitutional courts does not actually work in other European countries either. With regard to the Government's right to initiate the procedure, considering the fact that the EU legal act transgressed the Founding Treaties as a new international obligation, the judge was of the view that under Section 23 ACC the Government's motion should be admitted.

(P4-I) According to István Stumpf, the Constitutional Court as an authentic interpreter of the Fundamental Law may review and establish the unconstitutionality of *ultra vires* legal acts under Article B) (1) and Article E) (2) of the Fundamental Law. He referred to this right of the Constitutional Court as "the reservation of integration".

(P4-II) In his concurring opinion he further argued that the Constitutional Court makes an evident statement with regard to its scope of competences, as the joint exercise of powers under Article E) is based on the Fundamental Law, thus, such legal acts, permitted by the Fundamental Law, can reasonably hardly violate the Fundamental Law. He added that Article E) is only a accession clause and not an integration clause, therefore, it does not contain provisions on the relation of EU law and the national legal system.

(P4-III) István Stumpf found the statement of the majority decision, namely, that "the Constitutional Court may examine, upon a relevant motion, in the course of exercising its competences, whether the joint exercise of powers under Article E) (2) would violatethe Fundamental Law" is framed in too general terms. In his view, Article 24 (2) of the Fundamental Law defines the subject of review with regard to each and every procedure: it may be a legal provision or a judicial decision. Constitutional complaints may be submitted only in case a right granted by the Fundamental Law is violated, while according to the consistent practice of the Constitutional Court, abstract constitutional values, such as the sovereignty or constitutional identity, cannot form the basis of such procedure. The only possible solution could be that upon the amendment of the Founding Treaties the competent bodies of the state request the Constitutional Court to examine whether the amendment complies with the provisions of the Fundamental Law.

(P4-IV) The judge of the Constitutional Court did not agree with the statement of the majority decision that "the subject of sovereignty- and identity control is not directly the legal act of the EU or its interpretation, therefore, the Court shall not comment on the validity or the primacy of application of such EU legal acts." According to István Stumpf, the Constitutional Court argued in vain that it did not review the invalidity of a legislative act of the EU, because, by examining the *ultra vires* nature of a legal act of the EU, it actually engaged in reviewing the validity of said legal act.

(P4-V) In his view, the argument developed in points [58] – [60] of the reasoning, according to which a situation cannot arise in which people are deprived of the possibility of possessing the ultimate chance to control the exercising of public power, is contradictory. This statement could easily be refuted with the limitations of the referendum, the system of prohibited referendum subject matters. Indeed, in such cases people are deprived of the possibility of final control by means determined by the Fundamental Law itself. The Constitutional Court judge could not identify with the substance of identity associated with "the living conditions of the individuals", for the Hungarian Constitutional Court took this statement, without examination, from the decision[21] of the German Federal Constitutional Court, without grounding any argument on the Fundamental Law of Hungary. He also noted that the reasoning isolates Hungary's constitutional identity from the text of the Fundamental Law, which would mean that the Constitutional Court would have had an obligation to protect the constitutional identity independently

21 BverfG, 2 BvE 2/08, 30 June 2009.

from the text of the Fundamental Law, implying the existence of an "invisible Fundamental Law".

(P5-I) András Zs. Varga in his concurring opinion firstly explained the important statements of the reasoning related to the immutable and extratextual nature of identity, the legal basis of which he finds in the achievements of our historical constitution. In his view, constitutional self-identity is not a universal legal value, it is a feature of specific nations and its communities that distinguish them from other people. This is particularly the case in Hungary, since the values that make up the identity have come into existence on the basis of historical constitutional development. These are legal facts that cannot be waived, for legal facts cannot be amended through legislation.

(P5-II) Hungary's constitutional identity existed at the time of accession to the European Union. Accordingly, the accession treaty cannot be interpreted as a waiver by Hungary of its constitutional identity. He states that the Constitutional Court should interpret the principle of "retained sovereignty" narrowly. In his view, this means that if there are arguments put forward that support keeping the exercise of certain powers within the sovereignty of Hungary, then this should be presumed, even when there are other arguments put forward supporting the transfer of such powers.

(K1-I) According to László Salamon, the majority decision fails to provide a satisfactory answer to the questions posed by the Commissioner for Fundamental Rights. The question submitted by László Székely, which was aimed at finding out whether Hungarian state bodies are entitled or obliged to implement measures of the European Union, if such measures are in conflict with the provisions of the Fundamental Law regarding the substance of fundamental rights, would have required the declaration that no state body may act in contravention of the Fundamental Law. Therefore, it is prohibited to implement a measure of the European Union which violates the fundamental rights provisions of the Fundamental Law.

(K1-II) The other question of the Commissioner for Fundamental Rights, which is essentially aimed at finding out whether the enforcement of an EU legal act is affected by the fact that it is *ultra vires*, would also have required, according to László Salamon, a more detailed answer. In his view, the competence for protecting against legal acts adopted in the absence of competence should have been declared not only for the Constitutional Court, but for all other state bodies as well.

(K1-III) Finally, he stated that the procedures to be followed by state bodies and institutions cannot be linked to a preliminary procedure of the Constitutional Court, this is neither expressly stated, nor contested by the decision itself.

## 28.3 The Operative Part and the ratio decidendi

The Constitutional Court declared that it may examine, upon a relevant motion, in the course of exercising its competences, whether the joint exercise of powers under Article E) (2) of the Fundamental Law would violate a) human dignity, another fundamental right, b) the sovereignty of Hungary or c) its identity based on the country's historical constitution.

## 28.4 Criticism of the Reasoning

Ad (I) Although the Constitutional Court refers to the requirements related to the competence of abstract interpretation of the constitution, i.e. the existence of a concrete problem of constitutional law and the fact that interpretation must be directly derived from the Fundamental Law, it fails to provide the analytical assessment of the case regarding the two issues raised by the Commissioner for Fundamental Rights. Instead, the Constitutional Court merely makes the statement that these issues "manifestly constitute a specific constitutional problem".[22] It would have been useful to reveal the method of analysis as well: according to Decision 17/2013. (VI.26.) AB,[23] which was also cited by the Constitutional Court: "within this competence, only those clearly formulated, concrete questions can be suitable for assessment from the wide range of constitutional issues, which can be answered solely with constitutional arguments, purely through the interpretation of the Fundamental Law, without the intervention of any legal act."[24] Should the methodological requirements have been set and compared to the specifics of the case under consideration, then we would have had a more accurate starting point for the assessment of the Constitutional Court's arguments.

It is worth pointing out that the Constitutional Court did not provide a detailed justification for the separation of the motion on the interpretation of Article XIV of the Fundamental Law (constitutional prohibition on expulsion), the Decision only states that the Court considered the separate assessment to be appropriate.[25] Although the reference to the notion of appropriateness clearly complies with the ACC,[26] it would have been useful to learn the substantive arguments behind such separation. In this respect, one constitutional and one political argument can certainly be raised. It may be a relevant constitutional consideration that the Constitutional Court give separate weight to its own

22 Decision 22/2016. (XII. 5.) AB, p. 31.

23 Which states, inter alia, that the "function, role and the place of this competence among the other proceedings of the Constitutional Court does not differ from the characteristics of the former abstract interpretation of the constitution". See: Decision 17/2013. (VI. 26.) AB, p. 7.

24 Decision 17/2013. (VI.26.) AB, p. 11.

25 Decision 22/2016. (XII. 5.) AB, p. 29.

26 See: para. (3) of Article 58 of the ACC.

statements regarding fundamental rights, sovereignty control and identity control by stating that they are applicable regardless of the interpretation of Article XIV. However, in order to support this, it would have been necessary for the Constitutional Court to present in detail the elements relevant to the abstract constitutional review on a preliminary basis. This would have included, for example a specific constitutional problem, the direct deduction of interpretation from the Fundamental Law. It could be a political argument, and therefore unlikely to be expressly formulated, that the Constitutional Court did not want to deal with the constitutional context of the application of the EUC Decision 2015/1601, a decision leading to political debates, in the year of the "quota referendum", which is likely to be based on a dubious constitutional basis, invalid and ultimately leading the submission of an unsuccessful proposal for the amendment of the Fundamental Law.

Ad (II) The reason of the Constitutional Court's answered the third question raised by the Commissioner for Fundamental Rights concerning the interpretation of Article E, namely, whether it is possible to transfer a significant group of foreign persons staying lawfully in another Member State of the European Union without the assessment of the individual and personal situation of the persons that form the group, by stating that this question can be addressed by the Constitutional Court only in certain respects, is in fact the separation of the assessment on the interpretation of Article XIV of the Fundamental Law. Without the interpretation of Article XIV the issue raised in the third part cannot even be partially answered: it follows from the further findings of the reasoning that the possibility to applythe fundamental rights reservation, sovereignty and identity control is not primarily determined by the subject of the assessment. Therefore, the Constitutional Court did not answer the specific issues concerning the possibility of collective relocation "in certain respects," instead it offered a general approach that could be applied in relation to other legislative acts of the EU.

Ad (III) The Constitutional Court adopts two important and conflicting points of view on the question of the enforcement of EU law. While from the point of view of the Court of Justice of the European Union, the law of the European Union is an independent, autonomous legal order, and, as such, demands primacy, from the Member States' perspective it is unavoidable that the ultimate basis of the European Union's legal community are international treaties concluded by the Member States, which, therefore, also necessarily designate the limits of the scope of EU law. However, the arguments of the Constitutional Court are somewhat misleading, basing the possibility of establishing the content and specifying the typical legal sources (constitution, other laws, constitutional court interpretations, case law solutions) for the standard determining the enforcement of EU law solely on the fact that it is the Member States who are the "masters of the Treaties". The extent of latitude granted in this regard to the EU, as a legal community, by international treaties concluded by and between Member States and the underlying constitutional provisions, should be the more important question.

Ad (IV) It is noteworthy that the Constitutional Court, receptive to transnational judiciary and academic legal approaches, highlights the notion of *constitutional dialogue* when examining the standpoints of the Member States on *ultra vires* legal acts and the fundamental rights reservation. However, the detailed and diverse sources presented as a result of a thorough research only amounts to an unwanted monologue, since the Constitutional Court merely presents the relevant judicial practice. Unfortunately, the Constitutional Court fails to provide the analysis of the presented approaches and conceptual constructs and their evaluation in light the Hungarian context. Therefore, the "interaction of equal constitutional bodies", which would help us "to explore the most accurate constitutional content possible", is missing from the conceptual elements of the constitutional dialogue.[27] Unfortunately, the detailed presentation of Member States' practices does not support the substantive arguments, these are merely complementary. This is particularly regrettable, since, given the significance of the decision, in this case the Constitutional Court would have had the opportunity to engage in the professional dialogue taking place in the European public sphere.

Ad (V) This lack of dialogue is all the more striking, since the Constitutional Court makes its most important findings right after examining the practices of the Member States and the CJEU. Although, the decision's operative part is complemented by the *ultima ratio* nature and the requirement to respect the constitutional dialogue between the Member States, the explanation on how the practices of the Member States support or refute the possibility of the fundamental rights reservation, the sovereignty and identity protection, or even the *ultima ratio* character, is completely missing from the operative part. The reader may also be confused that while the Constitutional Court previously discussed two notions, namely, the fundamental rights reservation and *ultra vires* legal acts, in the context of the substantive issues analysed, the notion of sovereignty and identity also appear in the conclusion. The reasons for this, however may be largely ascertained in the context of the latter and more detailed reasoning.

Ad (VI) Substantiating the Constitutional Court's statements regarding the fundamental rights reservation should be the easiest task, perhaps this is the reason why the relevant and relatively short reasoning reflect no particular effort to do so. The most important finding of the Constitutional Court is a constitutional axiom, according to which in Hungary the exercise of public authority, including the joint exercise of competences with other Member States, is limited by fundamental rights. The statement, of course, can be supported by the historically traceable, theoretically proven, classical notion of fundamental rights existing in legal practice, the essence of which is that fundamental rights protect the freedom of the individual against public authority. However, the Constitutional Court does not point out this correlation, but it rather interprets the provision of the Fundamental Law laid down in Article 1 (1), according to which the protec-

27 See: Tímea Drinóczi: Jogrendszerek versenye és alkotmányos párbeszéd *Iustum Aequum Salutare* 2016/2. pp. 213-233, p. 216.

tion of fundamental rights is a primary duty of the state. Therefore, "priority" is the criterion which leads the Constitutional Court to the conclusion that the obligation to protect fundamental rights precedes other state obligations, including the obligations arising from membership in the legal community of the European Union.

It is understandable that the Constitutional Court does not rely on a detailed explanation of the conceptual characteristics of fundamental rights, but on the normative text of the Fundamental Law. Consequently, the Constitutional Court is not compelled to take position in the debate, which has several different viewpoints and obviously attracts the interest of the members of the Constitutional Court as well, the essence of which is the primacy of fundamental rights or the majority decision based on a democratic mandate.[28] Undoubtedly, the prominent position of fundamental rights can also be inferred from the concept of "primary obligation", which can accordingly be interpreted in the light of the hierarchy of constitutional rules.[29] However, a more convincing argument can be derived from Article I (3) of the Fundamental Law, which defines legitimate objectives, extent and substantive content of fundamental rights restriction. It follows imperatively from the interpretation of this provision[30] that the protected content of fundamental rights shall be safeguarded against any act of a public authority, including legislation and application of law carried out by Hungarian constitutional bodies and the legal community of the European Union.

The Constitutional Court relies, in essence, solely on the decisions of the German Federal Constitutional Court[31] in order to state that the Hungarian Constitutional Court also has the possibility to review European law, in the exercise of which the enforcement of European law should be kept in mind. However, the Constitutional Court, without further justification, makes an all important, separate statement, according to which it "cannot set aside the *ultima ratio* protection of human dignity and the essential content of fundamental rights".[32] In our view, the conclusion is correct, however, a detailed ex-

28 Bruce Ackerman uses an easily to apply typology in this context: the author distinguishes between the *fundamentalist approach of fundamental rights*, which promotes the normative primacy of fundamental rights, the *monist conception of democracy*, which focuses on the primacy of (majority) decisions taken in democratic procedure, and the *dual model of democracy*. The essence of this latter is the differentiation between the levels of community decision-making: while in the "regular operation" of politics majority views are predominate, in "exceptional times of constitutional politics" it is necessary to gain the support of the majority of the political community (including the minority) for a political decision. See: A többségi döntés tartalmi korlátai és az alkotmánybíráskodás In: András Jakab– András Körösényi: *Alkotmányozás Magyarországon és máshol. Politikatudományi és alkotmányjogi megközelítések* MTA TK Politikatudományi Intézet – Új Mandátum Kiadó, 2012. 33-57. 33-35.

29 For the possible meaning of the concept, see: László Sólyom: Normahierarchia az Alkotmányban *Közjogi Szemle* 2014/1. 1-7.

30 With regard to the abstractness of concepts and their contexts with other constitutional rules, the systematic interpretation would probably be the easiest way to arrive this conclusion. Of course, this operation requires prior knowledge of interpreted concepts, as well as taking into account the constitution as a whole. For the interpretation method, see: Lóránt CSINK– Johanna FRÖCHLICH: Egy alkotmány margójára. Alkotmányelméleti és értelmezési kérdések az Alaptörvényrol, Gondolat, 2012.73-75.

31 Solange I, Solange II, 2 BvR 2735/14.

32 Decision 22/2016. (XII. 5.) AB p. 49.

planation of the arguments leading to this conclusion would increase the normative force of the statement. It would be sufficient to point out that human dignity, as a legal status defending the entire personality, is conceptually irreconcilable.[33] The same is true for the substantive content of fundamental rights, because the constitutional legislature sets a framework for the constitutional restriction of fundamental rights in order to protect the essential content of fundamental rights.[34]

Therefore, it is convincing to invoke fundamental rights that enjoy absolute immunity, however, readers may nevertheless have a feeling that something is lacking: constitutional prohibitions[35] resulting from human dignity, as well as constitutional criminal guarantees[36] may also be mentioned in this context.

Emphasizing the *ultima ratio* nature of review is certainly a gesture towards the supremacy of European Law. However, this is irrelevant in connection with absolute rights, since the Constitutional Court and all other bodies exercising public authority, have a constitutional obligation to step up against any restriction of absolute rights, and not only as a last resort.

Ad (VII) With regard to the assessment of the *ultra vires* legal acts the Constitutional Court stressed that, pursuant to Article 6 of the Protocol forming an integral part of the Founding Treaties, both the National Assembly and, in accordance with Article 16 (2) TEU, the Government may take the necessary steps, while it also mentions the action before the CJEU, as a tool to contest legal acts violating of the principle of subsidiarity. Once again, this reinforces the *ultima ratio* nature of the procedure, which, taking into account the context outlined in the earlier practice of the Constitutional Court, is by no means surprising. The 'cautiousness' of the Hungarian Constitutional Court may be attributed to the fact that while many European states in their decisions[37] taken after the ratification of the Treaty of Lisbon have determined or at least attempted to determine the core of the state's existence inviolable by integration, the Hungarian Constitutional Court had previously refrained from such clear and definite statements. It did so, even though in several previous cases of the Constitutional Court the issue of the relationship between Hungarian and EU law and the Constitutional Court's jurisdiction to examine EU law had been raised.[38] Em-

33 Human dignity, together with the right to life, is already presumed by the Constitutional Court to be an "absolute value" in Decision 23/1990. (X. 31.) AB. See: Decision 23/1990. (X. 31.) AB, ABH 1990. 88-114. 93.

34 For the methodological challenges related to the definition of the essential content of fundamental rights, see: Zoltán Pozsár-Szentmiklósy: Megismerheto-e az alapjogok lényeges tartalma? *Magyar Jog* 2013/12. 714-722.

35 See: the prohibitions in Article III of the Fundamental Law, among others the prohibition of torture.

36 The picture may be slightly nuanced by Gábor Halmai and Attila Gábor Tóth. In their view, constitutional criminal guarantees recognized in the practice of the Constitutional Court are absolute rights that have achieved their status as a result of weighing. See: Halmai Gábor – Tóth Gábor Attila: Az emberi jogok korlátozása In: Gábor Halmai– Gábor Attila Tóth (eds.): *Emberi jogok* Osiris, 2003. 108-135. 111-112.

37 See the summarized decisions quoted by the Hungarian body in chapter "The reasoning of the Decision".

38 See: Decision 17/2004 (V. 25.) AB ("excess inventory case"), 744/B/2004 ("firearm dealers"), 143/2010. (VII. 14.) ("Lisbon decision") AB.

phasis on the *ultima ratio* nature is further justified by the sensitive character of the subject. Examination of EU law by the constitutional courts of the Member States, going even further, the possibility of a constitutional court of a Member State to state that an EU measure is unconstitutional in that particular Member State, and therefore inapplicable, would have unpredictable consequences both for the effectiveness and the political dimension of European Union law.[39]

The Constitutional Court's statement, namely, that "respecting and safeguarding the sovereignty of Hungary and its constitutional identity is a must for everybody" includes not only the decision-makers of the European Union, but also the main institutions of the Hungarian state. Guarantees against integration are based on the notion of national identity set out in Article 4 (2) TEU, however, the reference to the constitutional provision obliging the Government or the National Assembly of Hungary to respect constitutional identity cannot be read into the arguments of the Constitutional Court. A statement restricting the sovereignty of the state to such an extent, without any proper reference to the provisions of the Fundamental Law, is certainly missing. The concurring opinion of András Zs. Varga, stipulating the unchangeable nature of values resulting from historical constitutional development as a possible origin of binding force, somewhat compensates for the shortcomings of this statement. We will return to the protective function of constitutional identity when presenting the critique of identity control.

The Constitutional Court's statement regarding the general findings on *ultra vires* legal acts of the EU, according to which the subject of sovereignty and identity control is not directly the EU legal act, and therefore, it cannot make a decision on its validity, also raises certain questions. We agree with István Stumpf's standpoint put forward in his concurring opinion, since establishing the *ultra vires* nature of an EU legal act adopted in lack of competence – meaning EU legal acts going beyond the scope of the joint exercise of powersbased on Article E) (2) – inherently includes declaring that legal act of the EU to be invalid. With respect to the subject of the examination, it may be stated that it is difficult to interpret the sovereignty or identity control carried out in specific cases without taking into account the sources of European Union law. Following the establishment of external protection, i.e. safeguards against integration, the 'enforcement' of these limitations may only be achieved by examining the specific act of the EU. Consequently, these findings of the Constitutional Court should have been further detailed for clarity. This is a clear statement regarding the Constitutional Court's powers related to EU law, however, instead of deciding this sensitive question the Constitutional Court merely implies the position underlying the majority reasoning, that is, that the Constitutional Court cannot declare the invalidity or inapplicability of a legal act of the EU in the territory of

39 For the possible models of relations between Member States and EU law, see: László Blutman – Nóra Chronowski: Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában (II.) *Európai Jog* 2007/4. 14-28.

Hungary. The current wording however, leaves a broad leeway to interpret this issue in the future.

Ad (VII-1) In the context of sovereignty control, it is an essential finding of the Constitutional Court that the joint exercise of powers based on Article E) of the Fundamental Law cannot empty Article B) of its substance, that is, the principle of the sovereignty of an independent state and the principle of popular sovereignty cannot be hollowed out. In its subsequent arguments the Constitutional Court only applies the term sovereignty, from which it is not apparent whether it means state or a popular sovereignty. The Constitutional Court finally resolved this uncertainty by linking the two concepts with each other, when it stated that the people cannot lose ultimate control over the exercise of public authority.[40] Another fundamental finding is the definition of *"the principle of retained sovereignty"*. According to the Constitutional Court, sovereignty was not defined as a competence, but as the ultimate source of power. From this statement we can logically draw the conclusion, taking into consideration the substance of the principle of retained sovereignty, that we did not actually transfer sovereignty to the EU, only specific powers.[41] Nevertheless, the term "principle of retained sovereignty" may appear ambiguous, although the reasoning describes a transfer of powers, the term itself only refers to sovereignty and its retention, thus, no clear distinction between the two terms are made. There also appears to be some academic controversy regarding the conceptual differentiation, namely, whether it does in fact concern the right of final decision / supreme power or the division of powers, and, if it does concern the latter, what are the boundaries to be taken into consideration in light of international cooperation and the future of the same.[42]

In the context of the principle of retained sovereignty, the fact may also be criticized that it fails to answer the question when the review of "additional powers" may exactly take place. May the Constitutional Court examine the exercise of powers on the basis of powers that have already been transferred or does sovereignty control only extend to powers that are to be transferred in the future?[43] *Ultra vires* legal acts, after their nature as such had been established, are essentially considered as legal acts going beyond the powers laid down in the treaty, and may therefore, without particular difficulty of justification, constitute the exercise of "further joint competences". From this perspective, limiting sovereignty control to reviewing competences to be transferred in the future

40 Tímea Drinóczi: A 22/2016 (XII. 5.) AB határozat: mit (nem) tartalmaz, és mi következik belole. Az identitásvizsgálat és az ultra vires közös hatáskörgyakorlás összehasonlító elemzésben. *MTA Law Working Papers* 2017/1. 13.

41 Cf. András Zs. Varga: Végleges szuverenitás, vagy korlátozott hatáskör-transzfer? *Fontes Iuris* 2016/1.

42 Tímea Drinóczi: A párbeszéd hatása az állami szuverenitásra. *MTA Law Working Papers* 2014/27. 16.

43 This stands in contradiction with the concurring opinion of Egon Dienes-Oehm, in which he notes that he accepts the presumption of retained sovereignty with the interpretation that it can only refer to the examination of powers to be delegated in the future.

seems to be an undue restriction. In our view, it is actually the reverse that follows from the arguments and the general logic of the majority decision.

Ad (VII-2) The reasoning concerning identity control starts with a reference to Article 4 (2) TEU, which does not use the term "constitutional", but refers to national identity instead. This reference in itself shows that the concept of constitutional identity in the Hungarian constitutional system is in fact more closely connected to a content very similar and concomitant to national identity. The solution of the Constitutional Court, basing the limits of integration on Article 4 (2) TEU and, thus, practically on national identity, can also be discerned in the practice of the constitutional courts of other Member States.[44] However, the majority reasoning does not adequately reflect the close link between national identity and constitutional identity. A full definition of the content of constitutional identity is not provided; the Constitutional Court actually defined only the framework for the interpretation of the term and provided some relevant examples. However, in his concurring opinion András Zs. Varga, points out in relation to the substance of the concept that constitutional identity is not a group of universal rights, but a set of values of the individual nations and their communities that distinguish them from other peoples. Thus, in his concurring opinion judge András Zs. Varga explains the thesis, which may be derived from the EU context, but is nevertheless lacking from the majority reasoning, namely, that in Hungary national identity and constitutional identity are inseparable from each other.

In fact, the definition supplied by the Constitutional Court provides a framework for interpretation, according to which the Constitutional Court shall determine identity-forming values in the future on a case-by-case basis. The Constitutional Court establishes this framework by referring to Article R) (3) of the Fundamental Law,[45] according to which in the future the Constitutional Court will decide which values belong under the scope of constitutional identity on the basis of the National Avowal, the achievements of the historical constitution and the provisions of the Fundamental Law, considered in light of the respective goals of these provisions. In this respect, it is important to note that this provision of Article R) is a mandatory principle not only for the interpretation of constitutional identity, but in every procedure of the Constitutional Court when interpreting the Fundamental Law, thus, this reference does not actually bring us closer to determining the substance of constitutional identity.[46] The problem with this approach mainly stems from the fact that a doctrine, which is novel in the Hungarian constitutional system, and thus, for now is difficult to define, has been linked to an uncertain notion that was also not applied for a long time. As far as the scope of achievements of the historical

44 Cf. the decisions summarized and quoted by the Hungarian body in the part "Reasoning of the Decision".

45 Para. (3) of Article R) The provisions of the Fundamental Law shall be interpreted in accordance with their purpose, the National Avowal contained therein and the achievements of our historical constitution.

46 On the provisions of para. (3) of Article R) stipulating the achievements of the historical constitution to be an interpretative principle mandatory for the Constitutional Court and related issues, see: Imre Vörös: A történeti alkotmány az Alkotmánybíróság gyakorlatában. *Közjogi Szemle* 2016/4. 44-57.

constitution is concerned, there are still more questions than answers to this in the scholarly literature and the practice of Constitutional Court.[47]

The reasoning also reveals that Hungary's constitutional identity is not a system of static and closed values. This is followed by an exemplary list of values which certainly form part of this system. At this point, it should be noted that there is an implicit ambiguity between the definition connected to national identity, meaning the emphasis on the national element as a distinctive factor, and the almost exclusively universal values[48] placed on the list. This discrepancy was most likely due to the ambition of the Constitutional Court to include only undisputable values in the exemplary list. Although these values are undeniably based on Hungarian tradition, and as such, on the historical constitution, they do not bear the distinctive features of national identity. The problem, however, may be understood against the previously discussed reasoning of the Constitutional Court, according to which everyone shall respect the constitutional identity of Hungary, and this requirement applies, on the one hand, under Article 4 TEU, to the EU decision-makers and, on the other hand, to the supreme institutions of the Hungarian state. In our view, the contradiction described above could have been solved by the Constitutional Court by clearly defining the two directions of the protective function of constitutional identity, namely, firstly, the limitations imposed on the European Union in order to protect the sovereignty of the Member States[49] or challenging the *ultra vires* nature of the legal acts of the European Union, and, secondly, the internal protection, within our own constitutional system, against the supreme institutions of the state. This would be a very important distinction, since the universal values listed, such as "power sharing", could hardly be reference points for example in the argument based on Article 4 TEU, which presumes a specific reference to national identity, with other words, a special value which is characteristic only of the given state.[50] In the exemplary list however, there is no concept that has a particularly close link to national identity. It speaks for the Constitutional Court that solving this delicate issue is particularly difficult. It would also be necessary that the body circumscribe the concept of national identity beyond its legal meaning. Of course, universal rights included in the list are much easier to interpret and are well within the framework of principles, which form part of the Hungarian constitutional system and with which, according to the arguments, the Government and the National Assembly of Hungary must comply.

47 Cf. Vörös 2016; Attila Horváth: Az alkotmányozáshoz. A magyar történeti alkotmány tradíciói. *Alkotmánybírósági Szemle 2011/1.*; András Jakab: Az Alaptörvény keletkezése és gyakorlati következményei. *HVG-ORAC*, Budapest 2011. 198.

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

49 László Trócsányi: Az alkotmányozás dilemmái *HVG-ORAC*, Budapest, 2014. 79.

50 See: Drinóczi 2017. The judgments of the CJEU related to the noble title and language use, including the use of a name.

According to the further essential findings of the reasoning, identity-forming values are not created by the Fundamental Law, indeed, they are merely recognized by it, furthermore, these values are applicable in so far as Hungary is a sovereign country. This approach may give rise to various interpretations. It actually follows from the denial of staticity that identity-forming elements are constantly taking on form and evolving, being filled with content, meaning that the values adopted in the Fundamental Law can only give but a snapshot of the elements of identity summarized by the "constitutive generation".[51] According to another approach, the "personality" of the Fundamental Law consists of both genetic and momentary conditions, and thus, its identity, in many cases, is shaped by reactions to "environmental" impacts. Therefore, constant change is natural.[52] This idea is consistent with the interpretation of identity defined by the Constitutional Court, which is based on historical constitutional development, conceivable only through the lens of, and closely related to the national identity. Difficulties begin where the Constitutional Court states that Hungary cannot waive these values, it can only be deprived of them through the final termination of its sovereignty. As such, this statement defines constitutional identity as the entirety of the eternal and unchangeable values, which may even tear deviate from the text of the Fundamental Law.[53] In connection with this paragraph of the judgment, the question arises whether the values expressing constitutional identity may even be an obstacle to a possible constitutional process or an amendment of the constitution? From this wording it follows that the state can only be deprived of said values through the final termination of its sovereignty. Consequently, the legislature amending the constitution would not be in the position to ignore these values taking into account the integrity of the country's sovereignty. With this statement, the Constitutional Court gave extraordinary significance to the notion of constitutional identity.

The Constitutional Court states in the same paragraph that sovereignty and identity are closely linked, thus, the two related controls must, if necessary, be carried out with due consideration to each other. However, the Constitutional Court does not explain the actual connection between the two concepts, nor does it subsequently provide for a differentiation of the terms. Since identity and sovereignty are in many respects in contact with each other, it is difficult to make a precise distinction. Hence, a decision of the Constitutional Court on this matter would be necessary. This issue has particular relevance in the approach which claims that the reference to constitutional identity is actually a more modern term replacing the reference to sovereignty.[54] At the same time, it is

51 Gary J. Jacobsohn: Az alkotmányos identitás változásai *Fundamentum* 2013/1. 1-7.

52 Lóránt Csink: Az Alaptörvény identitása – honnan hová? In: Judit Tóth (ed.): *Tanulmányok Dr. Tóth Károly címzetes egyetemi tanár 70. születésnapjára*. Acta Universitais Szegediensis. Acta Juridica et Politica. Tomus LXXVIII. Szeged, 2015. 134-141.

53 Decision 22/2016. (XII. 5.) AB, p. 109.

54 Trócsányi 2014. 72. A relevant idea from the concurring opinion of András Zs. Varga is that the protection of the sovereignty of Hungary also means the protection of identity.

important to understand that the 21st century concept of sovereignty also lacks clarification. Determining its substance, just like defining the content of identity, is exceptionally difficult, particularly in the context of international cooperation. According to some scholars, state sovereignty, from the global aspect of sovereignty, is shared, and as a result, it culminates in the joint exercise of power in the framework of integration and international co-operation.[55] These issues and approaches demonstrate that it is of some consequence in which context we talk about identity and sovereignty and what functions we associate with them.

Ad (VII-3) Finally, the Constitutional Court, in respect to the EU decision prompting constitutional review, in essence, reiterates the reasoning when it emphasizes that if "human dignity, another fundamental right, the sovereignty of Hungary or its self-identity based on its historical constitution can be presumed to be violated as a result of the exercise of competences based on Article E) (2) of the Fundamental Law, the Constitutional Court may examine, on the basis of a relevant petition, in the course of exercising its competences, the existence of the alleged violation". We have already mentioned the indefinite nature of the relationship between the secondary law of the EU and the constitutions of the Member States.[56] In this decision, no clear explanation is given on this relationship either. It is not clear from the wording "exercising its powers" that on the basis of what competences, prescribed by the Fundamental Law, the Constitutional Court wishes to carry out the identity or sovereignty control over EU law. The other issue the Constitutional Court failed to explicitly answer is the scope of the EU legal acts that may potentially be the subject of assessment. The wording "joint exercise of powers under Article E)" alludes to an extremely broad framework, which may include, when appropriate, individual decisions arising from the application of EU law. As a result, we are still in the dark about which EU decisions may be brought before the body.

## 28.5 The Relevance of the Case

The Constitutional Court dealt in its majority decision with the doctrine of constitutional identity for the first time. The Constitutional Court unfortunately failed to provide an elaborate definition to elucidate the substance of this notion, which is still considered to be novel in Hungarian public law terms. Furthermore, it also failed to clarify the methodological framework for carrying out the relevant constitutional interpretation. Nevertheless, it made several statements that could later become highly relevant. In the future, the Constitutional Court intends to examine the concept of 'constitutional identity' with

55 Tímea Drinóczi: Állami szuverenitás és párbeszéd In: Takács Péter (szerk.): *Az állam szuverenitása – eszmény és/vagy valóság*. Gondolat Kiadó 2015. 96.

56 Member States have formally never give up the primacy of their legal order in favour of EU law. Cf. Varga Zs. 2016.

respect to the historical constitution and national identity, however, for this operation to be successful, the careful clarification and a convincing definition of concepts and methodological framework will be indispensable. Linking constitutional identity with the notion of sovereignty seems to be less problematic, however, in this regard, the clarification of certain aspects of sovereignty will also be unavoidable. In the case of the fundamental rights reservation, the arguments supporting the possibility of reservation are yet to be precisely determined.

It remains an open question whether, and in relation to which legal acts of the EU and in which procedures the Constitutional Court may refer to the abovementioned concepts in the future. Further issues include the possible recognition of values beyond the exact wording of the constitution and the hierarchy of constitutional norms, that also bind the constitutional legislature. All in all, it might well be the case that the judgment of the Constitutional Court gave rise to more questions than[57] it had answered.

57 Cf: Nóra Chronowski– Attila Vincze: Önazonosság és európai integráció – az Alkotmánybíróság az identitáskeresés útján *Jogtudományi Közlöny* 2017/3.