

CONSTITUTIONAL COURT

X/477/2021.



The Constitutional Court, sitting as the full court, in the matter of the interpretation of the Fundamental Law has adopted the following

Decision:

1. Having regard to the fact that under Article E (2) of the Fundamental Law

- the exercise of competences provided for in Article E (2) of the Fundamental Law shall be consistent with the fundamental rights and freedoms enshrined in the Fundamental Law, and this

- shall not restrict the inalienable right of Hungary to determine its territorial unity, population, form of government and State structure,

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

2. In its combined interpretation of Article E and Article I (1) of the Fundamental Law, the Constitutional Court further holds as follows: Where the incomplete effectiveness of the joint exercise of competences specified in Point 1 hereto leads to consequences that raise the issue of the violation of the right to identity of persons living in the territory of Hungary, the Hungarian State shall be obliged to ensure the protection of this right within the framework of its obligation of institutional protection.

3. On the basis of a combined interpretation of Article E (2) and Article XIV (1) and (4) of the Fundamental Law, the Constitutional Court finally holds as follows: The

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

This decision of the Constitutional Court shall be published in the Hungarian Official Gazette.

Reasoning

1. On behalf and under the authorisation of the Government, the Minister of Justice (hereinafter referred to as the “petitioner”) submitted a petition seeking an interpretation of Article E (2) and Article XIV (4) of the Fundamental Law on the basis of Section 38 (1) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the “Constitutional Court Act”).

2. The petitioner submits that the particular constitutional issue addressed in the case is the enforcement of the Fundamental Law and the judgement of the Court of Justice of the European Union (hereinafter referred to as the “CJEU”) of 17 December 2020 in the case C-808/18 (hereinafter referred to as the “CJEU judgement”), more specifically, the interpretation of the Fundamental Law in the context of the above CJEU judgement.

The petition is based on the following four main findings of the CJEU judgement.

First, the CJEU ruled that 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 was practically impossible for the persons concerned to submit a request for this procedure.

Secondly, the CJEU reaffirmed its earlier finding that the obligation for applicants for international protection to remain in the transit zone during the procedure for examining their application constitutes detention within the meaning of Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (hereinafter referred to as the “Reception Directive”).

Thirdly, Hungary has failed to fulfil its obligations under Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in

Member States for returning illegally staying third-country nationals (hereinafter referred to as the "Return Directive"), since Hungarian legislation allows for the removal of illegally staying third-country nationals without prior compliance with the procedures and safeguards provided for in the Directive.

Fourthly, Hungary did not respect the right which Directive 2013/32/EU of the European Parliament and of the Council on common procedures in Member States for granting and withdrawing international protection (hereinafter referred to as the "Procedures Directive") in principle grants to applicants for international protection to remain in the territory of the Member State concerned after their application has been rejected, until the deadline for lodging an appeal against the rejection or, if an appeal has been lodged, until the competent authorities have taken a decision to that effect.

3. As put forth by the petitioner, the implementation of the CJEU judgement means in practice that a foreigner national staying illegally in the territory of the State cannot be escorted out of the territory of Hungary to the other side of the border fence, notwithstanding Section 5 (1b) of Act LXXXIX of 2007 on State Borders [subject to Section 80/J (3) of Act LXXX of 2007 on Asylum], and in case of an application for asylum, asylum proceedings must be conducted, while in the absence of such application, a migration control procedure must be conducted. However, the effectiveness of the relevant readmission agreements is rather low: According to the Communication on the New Pact on Migration and Asylum presented by the European Commission, only one third of those whose return is ordered actually leave the territory of the Member States. As a consequence, in the event of initiating a migration control procedure or a negative decision in an asylum procedure, the persons concerned will remain in the territory of Hungary for an unforeseeable period of time and will essentially become part of the Hungarian population. The petitioner supports that the above violates Hungary's sovereignty and identity based on its historical constitution.

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

In summary, the implementation of the CJEU judgement raises the following specific constitutional issue, and in this respect the petitioner requests the Constitutional Court

to interpret Articles E (2) and XIV (4) of the Fundamental Law: Is Hungary allowed to implement an EU legal obligation which, in the absence of the full *effet utile* of EU legislation, could lead to a situation where a foreign national illegally staying in Hungary continues to stay in the territory of the Member State for an indefinite period of time and, thus, *de facto* becomes a part of the country's population?

II

The provisions of the Fundamental Law sought to be interpreted are as follows:

"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 arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and State structure."

"Article I

(1) The inviolable and inalienable fundamental rights of MAN must be respected. It shall be the primary obligation of the State to protect these rights."

"Article II

Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception."

"Article XIV

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

[...]

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

III

1. The Constitutional Court established that the petition had been submitted by the Minister of Justice on behalf of the Government; thus, it originates from an authorised person. The petition is aimed at the interpretation of Articles E (2) and XIV (4) of the Fundamental Law, that is, it indicates the specific provisions of the Fundamental Law upon which the petitioner seeks to be provided with an interpretation.

2. The following sets out the Constitutional Court’s assessment of further conditions for the interpretation of the Fundamental Law, the existence of a specific issue of constitutional law and whether the interpretation can be directly derived from the Fundamental Law.

Article 24 (2) of the Fundamental Law determines the material competence of the Constitutional Court without specifically mentioning within the points from (a) to (h) the competence to interpret the provisions of the Fundamental Law. However, pursuant to point (g), the Constitutional Court may exercise further competences laid down in a cardinal Act. Accordingly, Section 38 of the Constitutional Court Act regulates the

material competence of interpreting the Fundamental Law. The petitioner initiated the Constitutional Court's procedure on the basis of Section 38 (1) of the Constitutional Court Act. Pursuant to this provision, "on the petition of the National Assembly or its standing committee, the President of the Republic, the Government, or the Commissioner for Fundamental Rights, the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a specific issue of constitutional law, provided that the interpretation can be directly deduced from the Fundamental Law." Thus, on the basis of the normative text of the Constitutional Court Act, only certain bodies (or persons) may seek an interpretation of the Fundamental Law and they may do so only in a petition with specific content. The Constitutional Court is to render an assessment of whether the petition originates from an authorised body or person, whether it is seeking an interpretation of a specific provision of the Fundamental Law, whether it is related to a specific issue of constitutional law and whether the interpretation can be directly derived from the Fundamental Law.

A competence of abstract constitutional interpretation was also contained in Act XXXII of 1989 on the Constitutional Court (hereinafter referred to as the "former Constitutional Court Act"), which was in force until 31 December 2011, on the basis of which the Constitutional Court had developed the conditions for this procedure in a consistent practice. Upon the entry into force of the Fourth Amendment to the Fundamental Law of Hungary (25 March 2013), the Constitutional Court ruled, with regard to clause 5 of the Final and Miscellaneous Provisions of the Fundamental Law, that "in the course of reviewing the constitutional questions to be reviewed in new cases, the Constitutional Court may use the arguments, legal principles and constitutional correlations elaborated in its previous decisions if there is no impediment to the substantive conformity of a given section of the Fundamental Law with the Constitution, its contextual concordance with the Fundamental Law as a whole, the observance of the rules of interpretation of the Fundamental Law and the applicability of the findings on a case-by-case basis, and it appears necessary to include them in the statement of reasons for the decision to be taken" {Decision 13/2013 (VI. 17.) AB, Reasoning [32]}. As early as Decision 21/2012 (IV. 21.) AB, the Constitutional Court had already started from the premise, as also referred to in the explanatory memorandum to the Constitutional Court Act, that the legislator sought to retain the previous competence of constitutional interpretation: "The

wording of Section 38 (1) of the Constitutional Court Act is similar to the criteria elaborated in the course of the former case-law of the Constitutional Court on the interpretation of the Constitution, on the basis of Section 1 (g) and Section 51 of the previous Constitutional Court Act, before the Fundamental Law took effect" {Decision 21/2012 (IV. 21.) AB, Reasoning [24]}. In line with the foregoing, the Constitutional Court considered that the purpose and role of its power aimed at the abstract interpretation of the Fundamental Law as well as its place taken among other constitutional court procedures is not different from the characteristics of the previous abstract constitutional interpretation. Therefore, the Constitutional Court is not prevented from interpreting, by using its previous case law, the complex conditions for the abstract interpretation of the Fundamental Law as contained in the Constitutional Court Act.

The Constitutional Court furthermore points out that the principle of the separation of powers, which is one of the most important organisational and operational principles of the Hungarian State structure, must also be taken into account in the interpretation of the Fundamental Law. Consequently, constitutional interpretation may only take place if the petition originates from one of the bodies and persons specified in the Act, and it initiates the interpretation of a specific provision of the Fundamental Law from the aspect of a specific issue of constitutional law rather than from a general point of view, and the given constitutional problem can be directly derived from the Fundamental Law without the interposition of other legislation. In line with the above arguments, the relevant competence of the Constitutional Court should be interpreted restrictively. If indeed the Constitutional Court provided a broad interpretation for this competence, this would easily result in the Constitutional Court assuming the responsibility of the legislative and even that of the executive power, and thereby some form of governance by the Constitutional Court would be created, diametrically opposing the principles on the State structure as specified in the Fundamental Law.

The Constitutional Court interprets the Fundamental Law not only in the procedure expressly for this purpose, but also in all procedures for reviewing the constitutionality of legislation. Thus, the meaning of the specific provisions of the Fundamental Law unfolds in the process of ever newer interpretations in which the Constitutional Court takes into account both the unique features of the case at issue and its own previous interpretations. The Constitutional Court further interprets and shapes the holdings

arising from each interpretation in the course of applying them. The focal point of the interpretation of a given constitutional provision may be shifted, but the interpretations must give rise to a system without contradictions.

The Constitutional Court has been making consistent efforts to exercise the substantive competence of interpreting the Fundamental Law by keeping a distance from any completely abstract and unlimited interpretation of a constitutional provision and distancing itself from adopting a decision in any specific case or merely interpreting a rule of law by way of the abstract interpretation of the Fundamental Law. The latter condition has also served the purpose of keeping a distance between the Constitutional Court and the duties of other branches of power {Decision 17/2013 (VI. 26.) AB, Reasoning [10]}.

Since the question raised in a petition for the interpretation of the Fundamental Law must be related to a specific issue of constitutional law and the interpretation must be directly deducible from the Fundamental Law, not every issue of constitutional law can be considered a constitutional question suitable for addressing in an abstract constitutional interpretation procedure. Within the framework of this competence, only those clearly formulated, specific questions are suitable for assessment, which can be answered purely by interpretation of the Fundamental Law, without the interposition of a law, and solely by means of arguments based on constitutional law. Other types of issues of constitutional law can only be resolved within the other competences of the Constitutional Court.

In view of the above, the Constitutional Court reviewed whether the question raised in the petition is suitable to be answered on the basis of Section 38 (1) of the Constitutional Court Act.

An abstract constitutional interpretation may not become a statement of position applicable in the specific case on which the petition is based. Nor is it possible to provide an answer, appropriately abstract and binding for every future case, to a question which is closely related to the specific problem. The Constitutional Court considers that the question in the present case requiring the interpretation of the Fundamental Law can be separated from the judgement of the CJEU presented in the petition. Therefore, in the present procedure, the Constitutional Court has only dealt with genuine issues of constitutional interpretation that may be directly derived from

the question. Thus, the Constitutional Court interpreted Article E (2) of the Fundamental Law in the light of the specific issue of constitutional law identified in the petition. The Constitutional Court did not, however, assess whether the conditions set out in the petition were fulfilled in the specific case, that is, whether the incomplete effectiveness of the joint exercise of competences was realised, nor could it take a position on the question whether the petitioner's argument that as a consequence of the CJEU judgement foreign population may *de facto* become a part of the population of Hungary is correct; this is a matter to be judged by the body applying the law (and not by the Constitutional Court).

The Constitutional Court also held that the last sentence of Article XIV (4) of the Fundamental Law is instrumental to the specific issue of constitutional law, insofar as it defines the scope of persons not entitled to the right of asylum and, therefore, there is no need for an independent interpretation to that effect.

Finally, the Constitutional Court also stresses that its task is not to qualify, supplement, improve or revise the interpretation expressed by the petitioner in the petition, but only to provide an abstract interpretation of the Fundamental Law's provisions specified in the petition, in the context of the specific issue of constitutional law described therein.

IV

1. In its Decision 22/2016 (XII. 5.) AB (hereinafter referred to as the "2016 Court Decision"), the Constitutional Court held that Article E (2) of the Fundamental Law, taking into account the other provisions of the Fundamental Law, provides the Constitutional Court with three avenues of control (Reasoning [16]). The Constitutional Court may, within its own competence, in exceptional cases and as an *ultima ratio* measure, that is, by respecting the constitutional dialogue between the Member States, examine whether the joint exercise of competences based on Article E (2) of the Fundamental Law infringes the essential content of any fundamental right (fundamental rights control), or Hungary's sovereignty (including the scope of the competences it had handed over, sovereignty or *ultra vires* control), or its constitutional identity (identity control). (Reasoning [46]).

The Seventh Amendment to the Fundamental Law, which entered into force after the cited decision of the Constitutional Court, added new provisions to Article E of the Fundamental Law. Based on the currently effective provisions of Article E of the Fundamental Law, the exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure. The first clause of the addendum to Article E under the Seventh Amendment essentially establishes fundamental rights control, while the second clause establishes sovereignty and identity control at the level of the Fundamental Law.

Therefore, in the present case, when interpreting Article E (2), in the light of the wording of Article E (2) as supplemented by the Seventh Amendment to the Fundamental Law, the Constitutional Court had to assess whether, if the incomplete effectiveness of the joint exercise of competences based on Article E (2) was realised, as mentioned in the petition, such incomplete effectiveness could lead to a violation of Hungary's sovereignty, constitutional identity or fundamental rights and freedoms enshrined in the Fundamental Law (including, in particular, human dignity, which must be assessed also in the context of constitutional identity).

2. The Constitutional Court first examined whether the relevant joint exercise of competences, or the incomplete effectiveness thereof, could violate the fundamental rights and freedoms enshrined in the Fundamental Law, the protection of which is the primary obligation of the State under Article I (1) of the Fundamental Law.

In line with the case law of the Constitutional Court, "human dignity is the supreme constitutional guiding principle in the creation and application of all substantive law, the real basis for the system of fundamental constitutional rights, values and duties. Fundamental rights possess substantive content, and such content derives from human dignity. Each fundamental right must be interpreted explicitly in conjunction with, and in respect of, human dignity as a »maternal right«" [Decision 37/2011 (V. 10.) AB, ABH 2011, 225, 244]. Given that in the present case the Constitutional Court has to assess whether the joint exercise of competences under Article E (2) of the Fundamental Law, or its incomplete effectiveness, entails a violation of the fundamental rights and freedoms guaranteed by the Fundamental Law, rather than a specific fundamental rights issue arising under Article E of the Fundamental Law, the Constitutional Court

must first of all return to human life and dignity as the basis for the system of fundamental rights. Under the established practice of the Constitutional Court, “due to the nature of a general personality right as a maternal right, the right to human dignity is a subsidiary fundamental right which may be relied upon at any time both by the Constitutional Court and other courts for the protection of an individual’s autonomy when none of the specifically mentioned fundamental rights are applicable to a particular set of facts” [Decision 37/2011 (V. 10.) AB, ABH 2011, 411]. In the present case, in view of the abstract nature of the interpretation of the Fundamental Law, the assessment of the violation of specific fundamental rights cannot be carried out in a general manner; therefore, the focus of the examination must be primarily on the protection of the autonomy of the individual.

Since the entry into force of the Fundamental Law, the Constitutional Court has established on several occasions that Article II of the Fundamental Law and Article 54 (1) of the Constitution enshrine with the same content the right of every human being to human dignity and, therefore, continues to consider the decisions on the content of the right to human dignity adopted before the entry into force of the Fundamental Law to be applicable {Decision 24/2014. (VII. 22.) AB, Reasoning [130]; Decision 13/2020. (VI. 22.) AB, Reasoning [43]}.

The Constitutional Court regards human life and dignity as in unity, which means that the rights accorded to the social and biological dimensions of the human being cannot be separated [Decision 37/2011 (V. 10.) AB, ABH 2011, 411]. Being well established in the annals of the Constitutional Court, “the right to human dignity also encompasses the autonomy of natural persons, that is, their self-determination has a core beyond the reach of all others, whereby the human being remains a subject, not amenable to transformation into an instrument or object” {Last cited in Decision 3004/2020 (II. 4.) AB, Reasoning [38]}.

As laid down explicitly in the National Avowal, “We hold that human existence is based on human dignity. We hold that individual freedom can only be complete in cooperation with others. We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are loyalty, faith and love.” Pursuant to Article II of the Fundamental Law, “human dignity shall be inviolable. Every human being shall have the right to life and human dignity [...].”

Human dignity is at the centre of the Fundamental Law's system of values {Decision 19/2019 (VI. 18.) AB, Reasoning [102]}. Human dignity, as the basis for all human freedoms, can only unfold in the human society, in the course of living side by side as humans; under the Fundamental Law, human dignity is the dignity of the individual living in the society and bearing the responsibility of coexistence in society. However, not only are individuals responsible for living side by side in the society, as the society also bears responsibility for the individual. In consonance with the system of values of the Fundamental Law, the purpose of living side by side in society is the common pursuit of happiness, based on labour and the achievement of the human mind, the main framework of which is the family and the nation. The purpose and the supreme framework of the human society clearly identifies the role of the State in achieving these objectives and in protecting and supporting the main frameworks {Decision 19/2019 (VI. 18.) AB, Reasoning [103]}

Man, as the most elementary constituent of all social communities, especially the State, is born into a given social environment, which can be defined as man's traditional social environment, especially through its ethnic, linguistic, cultural and religious determinants. These circumstances create natural ties, determined by birth, which shape the identity of community members. The protection of this identity is also referred to in the National Avowal of the Fundamental Law, when it 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".

These circumstances are 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 derives from the dignity of the human person. As the Constitutional Court has previously stated, "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" [Decision 37/2011 (V. 10.) AB, ABH 2011, 411].

These natural ties or qualities, which are determined by birth, are considered to be circumstances that influence a person's self-determination, which, on the one hand, are created by birth and, on the other hand, are qualities that are difficult to change. Protection under constitutional law should not be an abstract, static protection of the individual removed from his or her historical and social reality: It must take into account the dynamic changes in contemporary life. Just as the State cannot make unreasonable distinctions regarding fundamental rights on the basis of these characteristics, it must also ensure, with regard to its obligation of institutional protection, that changes to the traditional social environment of the individual can only take place without significant harm to these determining elements of identity. Otherwise, in the absence of the State's obligation of institutional protection, individuals may be forced to change the direction and content of the free development of their personality with regard to one of its basic characteristics.

At the same time, the Constitutional Court notes that if the situation giving rise to the change in the above personality traits is beyond the control of the individual, individuals are forced to change the direction and content of the free development of their personality in respect of a fundamental characteristic, in such a way that the circumstances giving rise to this compulsion are outside the scope of the principle of popular sovereignty. At the same time, the situation thus arising is also lacking democratic legitimacy.

As previously stated by the Constitutional Court, "protecting the human person's dignity, autonomy and privacy without law is the duty under the Constitution of all State powers. This requirement provides human dignity with subjective legal content, since it constitutes an obligation of the State, that is, the State's obligation towards man. The subjective legal content deriving from the rule requiring the mandatory protection and defence of human dignity has several distinct characteristics. This subjective legal content consists, on the one hand, in the fact that human dignity has the function of preventing unauthorised interference by the State" [Decision 37/2011 (V. 10.) AB, ABH 2011, 412].

One's traditional social environment, as a natural bond determined by birth, determines the development of a person's personality, the direction and framework of his or her identity, and as such, is to be assessed in the context of the quality of human life. On the one hand, the State must refrain from interfering with the formation of an

individual's identity and, on the other hand, it must ensure as part of its obligation of institutional protection that, as a result of an international commitment of the State, no act of any institution other than a Hungarian State body would implement interference in a way which the State itself is obliged to refrain from.

From the very beginning of its operation, the Constitutional Court started to unfold the content of the right to human dignity, thus already in its Decision 8/1990 (IV. 23.) AB it stated that human dignity, as the maternal right of the general personality right, includes the right to the free development of one's personality or the right to privacy, as well as the right to the freedom of self-determination, the autonomy of action (ABH 1990, 42, 45.). In its Decision 23/1990 (X. 31.) AB, the Constitutional Court also stated that the right to human life and human dignity form an inseparable unity and as such they are indivisible and unlimited fundamental rights. In its subsequent decisions, the Constitutional Court also clarified that human dignity is unrestricted only in conjunction with the right to life, but some of its component rights, including the right to self-determination, can indeed be restricted in the same way as other fundamental rights {see also Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 301; Decision 75/1995 (XII. 21.) AB, ABH 1995, 376, 381; Decision 36/2005 (X. 5.) AB, ABH 2005, 390, 395; reinforced in Decision 24/2014 (VII. 22.) AB, Reasoning [131]}.

The Constitutional Court has also pointed out *inter alia* in Order 3371/2019 (XII. 16.) AB that "the Constitutional Court [...] grants constitutional protection to the right to identity, the right to the integrity of personality (moral integrity) or the right to self-determination on the basis of the right to human dignity" {Order 3371/2019 (XII. 16.) AB, Reasoning [14]}. The right to identity or self-determination deriving from human dignity implies the capacity of the individual to respond freely and individually to the endowments determined by one's traditional social environment, which provided the initial, determining framework for the formation of his or her identity. With regard to these fundamental rights, the State has an obligation of institutional protection in order to ensure that they are respected. Identity and the right to self-determination deriving from human dignity can only be achieved through a process of mutual reflection with the relevant social factors, given that the individual exercises his or her constitutional rights, including certain component rights deriving from the fundamental right to human dignity, as a member of the community {Decision 19/2019 (VI. 18.) AB, Reasoning [60]}.

The institutional protection by the State must ensure the exercise of both component rights in respect of the persons living in the State territory of Hungary. Identity (its determining elements) can be changed through individual self-determination. However, if the content of identity is artificially and undemocratically altered by the State (or any other organisation other than the State), this may infringe both the individual's identity and his or her existing self-determination to change this.

The traditional social environment the individual is born into and which is independent of the individual shapes the self-definition of the individual, and the self-definition of the individuals who make up society creates and then shapes the collective identity, that is, the identity of the given community and the given nation.

The Constitutional Court has pointed out in several of its decisions that the State's duty to respect and protect fundamental rights is, with respect to subjective fundamental rights, not exhausted by the duty not to encroach on them, but incorporates the obligation to ensure the conditions necessary for their realisation. {see Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 303., reinforced in Decision 21/2013 (VII. 19.) AB, Reasoning [63]}. On the basis of its obligation of institutional protection of fundamental rights, the State must therefore create a framework which ensures appropriate conditions for the exercise of the fundamental right to human dignity and its various component rights, as well as a balance between the legal interests involved in the exercise of the right {Decision 24/2014 (VII. 22.) AB, Reasoning [132]}. At the same time, the Constitutional Court notes that the State's obligation of institutional protection in the above circumstances must be assessed in the context of Hungary's constitutional identity, with regard to the protection of fundamental rights, in this case human dignity {Cf. The 2016 Court Decision [65]}; at the same time, it is to be considered as a fundamental function of the State affecting the public order of Hungary, about which Article 4 (2) of TEU, *inter alia*, states that the European Union must respect. In addition to the fact that for the individual born into the traditional social environment referred to above, this environment constitutes a natural and State-protected quality of life, it is the individual's right derived from human dignity to participate, in the framework of democratic exercise of power, in the decisions essentially affecting his or her right of self-determination.

As set out in the petition, in the event of initiating a migration control procedure or a negative decision in an asylum procedure, the foreign nationals illegally staying in

Hungary will remain in the territory of Hungary for an unforeseeable period of time and will essentially become part of the Hungarian population without having any title justifying their stay in the country. The reason for this, as laid down in the petition, is that the joint exercise of competences provided for in Article E (2) of the Fundamental Law is not fully effective in practice, because only a small proportion of returns can actually be carried out.

The petitioner maintains that the main reason for this is that the implementation of the readmission agreement between the European Union and the Republic of Serbia has been essentially suspended since 18 September 2015, and Serbia has not issued a statement of admission for third-country nationals for years. In recent years, Serbia has only taken back persons who can exit in passenger traffic, without sending a readmission application. This procedure can take place if the person expelled to Serbia has a valid travel document and can enter Serbia with it. These conditions, however, are only complied with in a small fraction of the relevant cases. For Hungary, the vast majority of other readmission agreements concluded by the European Union can only be implemented by air. From among the countries affected by illegal migration, Pakistan is the only one with which the European Union has a readmission agreement, but it is only applied in a few cases each year.

The petitioner considers, on the one hand, that most of the readmission agreements are not implemented and, on the other hand, with respect to many countries where concluding such agreements would be justified, they have not been concluded. For these two reasons, addressing illegal migration during the exercise of joint competences with the European Union is incompletely effective.

The joint exercise of the competences through the institutions of the European Union under the authorisation granted in Article E of the Fundamental Law may not lead, directly or indirectly, to a lower level of protection of fundamental rights than that required by the Fundamental Law. In the same way, it should not lead to a lower level of protection of fundamental rights than the one required by the Fundamental Law if the EU legal norm binding upon the Member States meets the requirements of the Fundamental Law, but its implementation is insufficient, that is, the result of the binding norm is not or only partially enforced.

In light of the above, the Constitutional Court examined whether, provided that the joint exercise of competences under Article E (2) of the Fundamental Law is incompletely effective as described above, this would infringe the right to identity and self-determination, which may be derived from human dignity, of the people living in Hungary. The Constitutional Court reiterates, however, that it is beyond its competence to review in the present procedure whether the statements made in the petition are correct in this respect. Accordingly, the findings of the present decision of the Constitutional Court can implicitly be fully applicable only if the arguments presented in the petition are factually correct, the assessment of which is primarily the task of the petitioner and other organs of the Hungarian State.

Pursuant to Article XIV (1) of the Fundamental Law, "No foreign population shall be settled in Hungary. A foreign national, not including persons who have the right to free movement and residence, may only live in the territory of Hungary under an application individually examined by the Hungarian authorities." Under paragraph (4), "Hungary shall, upon request, grant asylum to non-Hungarian nationals who are persecuted in their country or in the country of their habitual residence for reasons of race, nationality, the membership of a particular social group, religious or political beliefs, or have a well-founded reason to fear direct persecution if they do not receive protection from their country of origin, nor from any other country. A non-Hungarian national shall not be entitled to asylum if he or she arrived to the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution." It follows from this constitutional provision, as well as from the mutual solidarity that naturally exists between States, that Hungary must actively and efficiently contribute to a reassuring settlement of the situation of asylum seekers in its territory; however, this is also an unquestionable obligation of the institutions and bodies of the European Union.

There are many examples of the active expression of mutual solidarity and the welcoming of the persecuted throughout Hungary's history, and the concepts consistent with this are an integral part of our public law literature. (See for example Part VI of St Stephen's admonitions to his son, Prince Imre)

If, as a result of the incomplete effectiveness of the joint exercise of competences as defined in Article E (2) of the Fundamental Law, foreign populations permanently and massively remain in the territory of Hungary without democratic authorisation, this may violate the right to identity and self-determination of the people living in Hungary. The reason for this is that, as a consequence of the incomplete effectiveness of the exercise of competences, the traditional social environment of persons living on the territory of Hungary may change without democratic mandate or any influence by the persons concerned, without any State control mechanisms.

The incomplete effectiveness of the exercise of joint competences may therefore induce a process beyond the control of the State, which may lead to, or result in, a forced change in the traditional social environment of man. In view of the State's obligation of institutional protection, the prevention thereof is the State's obligation under Article I of the Fundamental Law.

The Constitutional Court notes that the settlement in Hungary of persons or groups of persons different from the traditional social identity of those living in Hungary does not in itself, as a general rule, raise the issue of violating human dignity. This is, however, subject to the condition that the settlement is controlled by the State's control mechanisms, including the exercise of the joint competences under Article E (2), provided that it is not incompletely effective, with due account to the fact that the State's obligation of institutional protection must be rendered effective *de jure* through such control mechanisms. In this context, the Constitutional Court repeatedly refers to the National Avowal of the Fundamental Law, which explicitly states the obligation to cultivate and protect the various religious traditions, the nationalities living with us, our heritage, our unique language, the Hungarian culture, and the language and culture of the nationalities living in Hungary.

The Constitutional Court stresses that the Constitutional Court's procedure in the present case is not aimed at reviewing the constitutionality of the State control mechanisms. Whether such control mechanisms meet the requirements set by the Fundamental Law, for example, whether they violate any fundamental right of the asylum seekers guaranteed by the Fundamental Law, can be examined in a separate procedure brought on the basis of a petition to that effect.

In this context, the Constitutional Court further emphasises that, as a consequence of the incomplete effectiveness of the exercise of joint competences under Article E (2) of the Fundamental Law, the State's obligation of institutional protection with respect to the right to human dignity may not, even exceptionally, result in making any distinction between the human dignity of individual human persons, nor does it affect the obligation of the State to ensure full protection of the human dignity of all persons, including asylum seekers, staying in the territory of the State. The objective institutional protection by the State with regard to the fundamental right to human dignity is to be equally granted to all persons staying in the territory of the State, regardless of the legal title and the lawfulness of their stay. However, this does not mean that those who are legally resident in Hungary and those who are illegally staying here, who are not in a comparable situation, could not be subject to different legal regulations.

The inherent equality of human dignity was last examined by the Constitutional Court in its Decision 2/2021 (I. 7.) AB. By referring to the consistent case law of the Constitutional Court, the Decision stated the following: "The National Avowal of the Fundamental Law, which, in the light of Article R (3) of the Fundamental Law, provides guidance for the interpretation of the provisions of the Fundamental Law, enumerates in the first place among the vows that are binding for Hungarian constitutionalism: »[w]e hold that human existence is based on human dignity.« Article II of the Fundamental Law expressly declares that the right to human dignity is inviolable {In this context, see Decision 11/2014 (IV. 4.) AB, Reasoning [29]}. The prohibition of discrimination resulting in the violation of human dignity has always been, and still is, closely linked to the interpretation of the right to human dignity. This follows directly from the fact that all human beings are equal by virtue of their existence, and that making any distinction linked to human quality is absolutely prohibited. Dignity can only be rendered meaningful if it is equally and unconditionally granted to all. Article XV (1) of the Fundamental Law states the general equality of rights, while Article XV (2), similarly to Article 70/A (1) of the former Constitution, prohibits discrimination with regard to fundamental rights. In the year of the entry into force of the Fundamental Law, the Constitutional Court interpreted Article XV, confirming its inseparable link to human dignity" {Decision 2/2021 (I. 7.) AB, Reasoning [103]}.

Furthermore, in line with the case law of the Constitutional Court, the equality of rights clause imposes a constitutional command on those exercising public authority “to treat all persons as having equal dignity and to weigh their considerations with equal standards and fairness. It follows from the above that a given regulation is considered to be incompatible with the constitutional standard of Article XV (1) of the Fundamental Law if it ultimately violates the right to human dignity. In other words, the principle of the equality of rights does not prohibit any differentiations, it only prohibits discrimination that violates human dignity. {Decision 3206/2014 (VII. 21.) AB, [23]; Decision 2/2021 (I. 7.) AB, [105]}.

The Constitutional Court summarised the aspects to be taken into account in the case of a discrimination violating human dignity in its Decision 42/2012 (XII. 20.) AB. In this Decision, it was stated that “a different regulation for a given homogeneous group within the same regulatory concept is contrary to the prohibition of discrimination, unless the difference has a reasonable constitutional justification of sufficient weight, that is, it is not arbitrary [...]. Pursuant to the consistent case law of the Constitutional Court, however, [...], no discrimination shall be established when the law provides for different rules concerning the scope of subjects having different characteristics as an unconstitutional discrimination is only possible with regard to a comparable scope of persons who belong to the same group {Decision 42/2012 (XII. 20.) AB, [28]; Decision 2/2021 (I. 7.) AB, [106]}.

The institutional protection by the State under Article E (2) of the Fundamental Law is related, subject to the existence of the circumstances referred to by the petitioner, to the identity and the right to self-determination of the persons living in the territory of Hungary, and it must be separated from the obligation to protect fundamental rights, enforced mandatorily in the procedure to be conducted in the case of foreign nationals arriving in Hungary. The latter scope could not be examined by the Constitutional Court in the present interpretation of the Fundamental Law.

Based on the above, in its combined interpretation of Article E and Article I as well as, based on the foregoing, Article II of the Fundamental Law, the Constitutional Court established that if the incomplete effectiveness of the joint exercise of competences specified in Article E (2) of the Fundamental Law may lead to consequences that raise the issue of the violation of the right to identity of persons living in the territory of

Hungary, the Hungarian State is obliged to ensure the protection of this right within the framework of its obligation of institutional protection.

3. Secondly, the Constitutional Court assessed the consequences of the shortcomings in the effectiveness of joint competences on Hungary's sovereignty and in the joint exercise of the competences.

3.1 In this context, the Constitutional Court examined whether the exercise, under Article E (2) of the Fundamental Law, of certain competences, which derive from the Fundamental Law, jointly with other Member States through the institutions of the European Union, creates an obligation to exercise such competence, or whether it creates the possibility for Hungary to exercise such competence independently under certain conditions.

The Constitutional Court notes, however, that it has already reviewed the relationship between EU law and national law in a number of its previous Decisions, in particular the 2016 Court Decision and Decision 2/2019 (I. 23.) AB (hereinafter referred to as the "2019 Court Decision"). The Constitutional Court also maintains and confirms in the present case its position laid down in this Decision on the relationship between EU and national law. At the same time, the Constitutional Court points out that the assessment of the relationship between EU law and national law is not the subject of this constitutional interpretation and, accordingly, the Constitutional Court does not take a position on this in this Decision.

3.2 Under Article 26 of the 1969 Vienna Convention on the Law of Treaties (promulgated in Hungary by Law Decree No. 12 of 1987), "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith" (*pacta sunt servanda*). Article 31 (1) of the Vienna Convention lays down as a general rule for the interpretation of international treaties that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." And Article 18 of the Vienna Convention already lays down the obligation not to defeat the object and purpose of a treaty prior to its entry into force. According to Article 60 3b of the Vienna Convention, the violation of a provision essential to the accomplishment of the object or purpose of the treaty shall qualify as a material breach of that treaty. Pursuant to Article 4 (1) of the Treaty on the Functioning of the European Union (hereinafter

referred to as "TFEU"), "[t]he Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6". Article 4 (2) (j) explicitly mentions the area of freedom, security and justice as such an area. In line with the requirement of constitutional dialogue, the Constitutional Court accepts that the interpretation of European Union law is a competence of the Court of Justice of the European Union (and not the Constitutional Court). However, the European Court of Justice itself has ruled that a reference for a preliminary ruling is not necessary where "the correct application of Community law is so obvious as to exclude all reasonable doubt" [Case C-283/81 CILFIT, paragraph 21, ECLI:EU:C:1982:335], which the Constitutional Court also took into account in considering its decision.

As the Constitutional Court has already explained in the 2016 Court Decision, "Hungary did not relinquish its sovereignty by joining the European Union, but only made possible the joint exercise of certain competences. 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). Sovereignty is enshrined in the Constitution as the ultimate source of competences and not as a competence. Therefore, the joint exercise of competences shall not result in depriving the people of the possibility of possessing the ultimate chance to control the exercise of public power (manifest in either a joint or an individual form, or in a quality as a Member State). This is supported by the rule on the express consent by the National Assembly granted in Article E) (4) of the Fundamental Law and, exceptionally, by exercising the right to referendum as set forth in Article XXIII (7) of the Fundamental Law (the 2016 Court Decision, Reasoning [59])."

The presumption of reserved sovereignty applies unquestionably to all competences that are not classified in the TFEU as falling within the exclusive competence of the Union. In these cases, not only the Fundamental Law, but also the TFEU itself provides that Member States are entitled to exercise a certain scope of competences also after the entry into force of the TFEU.

3.3 The effectiveness of EU law (*effet utile*) is a fundamental principle of EU law (for one of the first mentions of this, see, for example, Case C-9/70. Franz Grad v. Finanzamt Traunstein, ECLI:EU:C:1970:78, p. 5). The requirement of the effectiveness of EU law is

not only an obligation for Member States, but also for the EU institutions themselves. In the negative sense, *effet utile* means requiring Member States (and the EU institutions) to refrain from taking measures that could jeopardise the effectiveness of EU law, and in the positive sense, it means that Member States (and the EU institutions) are obliged to exercise their competences in such a way as to ensure the effectiveness of EU law. Indeed, Member States transfer some of their competences to the European Union precisely because they have concluded that exercising those competences jointly is more efficient than exercising them individually by a Member State. This reasoning is also supported by Article E (2) of the Fundamental Law, which explicitly links the possibility of exercising certain competences jointly to the exercise of rights and the performance of obligations arising under the founding treaties.

3.4 The European Court of Justice laid down in one of its early judgements that “in accordance with the principle of the precedence of Community law, the relationship between provisions of the treaty and directly applicable measures of the institutions on the one hand and the national law of the member states on the other [...] render automatically inapplicable any conflicting provision of current national law” [Case C-106/77 Simmenthal, ECLI:EU:C:1978:49, p. 17]. The scope of the pre-emption principle is not, however, absolute: It applies only to the extent that the institutions of the European Union actually and effectively exercise the relevant non-exclusive competence in question, in accordance with the requirement of good faith and the proper exercise of the law. In accordance with the 1969 Vienna Convention on the Law of Treaties, it would be contrary to the object and purpose of the Treaty and to the requirement of good faith if the principle of pre-emption were to be exercised not for the purpose of ensuring the effective application of EU law and promoting the exercise of joint competence, but for the purpose or effect of depriving individual Member States of the possibility of exercising a competence which they otherwise have in accordance with the provisions of the TFEU.

The Constitutional Court points out that it is not unprecedented, in the light of the case law of national constitutional courts, to question the applicability of a decision of the Court of Justice of the European Union in matters of national sovereignty and constitutional identity. As laid down in the 2016 Court Decision, “the Constitutional Court is aware of the fact that from the point of view of the Court of Justice of the European Union, EU law is defined as an independent and autonomous legal order (Cf.

Case C-6/64. Franz Grad v. Finanzamt Traunstein, ECLI:EU:C:1964:78, p. 66). However, the European Union is a legal community with the power, in the scope and the framework specified in the Founding Treaties and by the Member States, of independent legislation and of concluding international treaties in its own name, and the core basis for this community are the international treaties concluded by the Member States. As Member States dispose over these treaties, their national acts on the effectiveness of such treaties shall determine the extent of primacy enjoyed by Union law in the given Member State over the Member State's own law. (Cf. BVerfGE 75, 223, 242). In this respect, it makes no difference whether the norm determining how EU law is to be enforced has been developed in the constitution or constitutional law of the Member State concerned [...] or through case law solutions (e.g. in Italy, see Corte Costituzionale, 170/1984)." {the 2016 Court Decision, Reasoning [32]}.

In the 2016 Court Decision, the Constitutional Court, before making the above findings, examined in the context of the constitutional dialogue within the European Union and in the framework of its responsibility for integration a number of national practices concerning *ultra vires* acts and reservations of fundamental rights. {the 2016 Court Decision, Reasoning [34] to [44]}. The findings made in the 2016 Court Decision have since been reaffirmed by the case law of several national constitutional courts. The Constitutional Court recalls that the German Federal Constitutional Court in its decision of 5 May 2020 (merging several proceedings: 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15) held that the CJEU had not correctly applied the proportionality test in its decision of 11 December 2018 in the preliminary ruling procedure C-493/17 (2 BvR 859/15, para 116, paras 126-128), thus the requirement of proportionality laid down in the second sentence of Article 5 (1) and in Article 5 (4) of TEU could not fulfil its function of safeguarding the competences of the Member States and preventing *ultra vires* acts, thereby emptying out the principle of the transfer of competences laid down in the second sentence of Article 5 (1) and in Article 5 (4) of TEU. The decision of the German Federal Constitutional Court states that if the CJEU's interpretation of the law does not respect and exceeds the mandate laid down in Article 19 (1) of TEU, it violates the minimum requirement of democratic legitimacy for EU acts and the decision thus taken cannot be applied with respect to Germany.

3.5 Subsidiarity is also an important principle for the application of EU law. Pursuant to Article 5 (3) TFEU, the following aspects shall be taken into account when applying the

principle of subsidiarity: (i) areas which fall within the Union's exclusive competence are excluded; (ii) the objectives of the proposed action cannot be sufficiently achieved by the Member States; by reason of its scale or effects, the measure can be better achieved in the framework of Union action. The subsidiarity principle implies that in certain areas the European Union (and its institutions) can only act if and to the extent that the exercise of competence is rendered more effective at EU level than at Member State level.

The Constitutional Court notes that visas, immigration and asylum fall within the area of freedom, security and justice, an area in which is characterised by the Union having shared competences with the Member States, and the principle of subsidiarity may therefore be applied.

3.6 By taking the above principles into account, the Constitutional Court has reached the following conclusions.

The international treaties falling under Article E (2) of the Fundamental Law shall become, after entry into force, parts of the Union law, nevertheless, they shall retain their origin as international treaties {the 2019 Court Decision, Reasoning [18]; Order 3297/2020 (VII. 17.) AB, Reasoning [8]; Decision 16/2021 (V. 13.) AB, Reasoning [31]}.

In international law, the principle of restrictive interpretation applies for the interpretation of international treaties {Decision 16/2021 (V. 13.) AB, Reasoning [31]}. This is in line with the consistent case law of the Constitutional Court presuming the principle of reserved sovereignty in the case of international treaties under Article E (2) and (4) of the Fundamental Law {the 2016 Court Decision, Reasoning [60]}.

Pursuant to Article E (2) of the Fundamental Law, Hungary "may, to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties, exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the European Union."

Conferring the exercise of a competence is made subject to a condition laid down in the Fundamental Law itself: the conditional conferral of the exercise of the competence takes place "to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties". The purpose of conferring the exercise of competence is not to take the competence away from the Member States, but to ensure that the

European Union, or some of its institutions, exercise them more effectively than the Member States.

The European Union, or each of its institutions, exercise these competences, complying with Article E (2) of the Fundamental Law and conferred on them for the purpose of exercising them jointly, in accordance with the purpose of the Treaties establishing and amending the European Union, not only when they create secondary sources of law. The exercise of the competence is also conditional upon ensuring the effectiveness of the secondary legislation created. Only in this case does the exercise of the competence comply with the condition laid down in the enabling provision in Article E (2) of the Fundamental Law.

The presumption of reserved sovereignty is enforced not only in the case of the joint exercise of additional competences but, *a majore ad minus*, also covers the exceptional case where, due to the deficiency of jointly exercising the competences, securing the fundamental rights affected by the relevant competence or competences as well as the performance of the obligations of the State are impaired. This follows from the principle laid down in the 2016 Court Decision that “sovereignty is enshrined in the Fundamental Law as the ultimate source of competences and not as a competence” {the 2016 Court Decision, Reasoning [60]}. This also means that Article E (2) of the Fundamental Law cannot be interpreted as meaning that Hungary has definitively transferred the right to exercise a given competence to the institutions of the European Union if the institutions of the European Union manifestly disregard their obligation to exercise a competence transferred for joint exercise in accordance with Article E (2) of the Fundamental Law, or if such joint exercise of competence is only ostensibly carried out in such a way that it manifestly does not ensure the effectiveness of EU law.

The Constitutional Court emphasises that such application of the presumption of reserved sovereignty may be made exceptionally and only in cases where the lack of exercise of the common competences concerned, or their incomplete exercise, clearly failing to ensure the effectiveness of EU law, may lead to a violation of fundamental rights or a restriction on the performance of State obligations. Even in this case, Hungary is only entitled to exercise a competence under Article E (2) of the Fundamental Law, which is to be exercised jointly, until the European Union or its institutions have created the guarantees for the effectiveness of EU law; and only in a manner which is consistent with and aimed at promoting the founding and amending

treaties of the European Union (that is, contractual performance). The Member State's exercise of the competence to be exercised jointly under Article E (2) of the Fundamental Law is conditional on Hungary drawing the attention of the European Union or its institutions to the need to exercise the competence, which is to be exercised jointly, and the European Union or its institutions failing to do so. Interpreting Article E (2) of the Fundamental Law in this way is also in line with the requirements of the 1969 Vienna Convention on the Law of Treaties as an international obligation assumed by Hungary in accordance with Article Q (3).

On the one hand, the above interpretation of the presumption of reserved sovereignty follows from the principle laid down earlier that "under Article I (1) of the Fundamental Law, the protection of inviolable and inalienable fundamental human rights is a primary obligation of the State. As the protection of fundamental rights is the primary obligation of the State, everything else can only be enforced after that." {The 2016 Court Decision, Reasoning [48]}.

The above interpretation of reserved sovereignty is also supported by the finding that "by way of the institutional reforms, the Charter of Fundamental Rights and the CJEU, the European Union can usually guarantee the protection of fundamental rights equivalent to the level of protection granted by the national constitutions or at least a protection of sufficient level [...]. Consequently, the opportunity of review reserved for the Constitutional Court should be applied by taking into account the obligation of cooperation, in view of the potential enforcement of European law [...]. The Constitutional Court, however, cannot set aside the *ultima ratio* protection of human dignity and the essential content of fundamental rights, and it must grant that the joint exercise of competences under Article E (2) of the Fundamental Law would not result in violating human dignity or the essential content of fundamental rights." {The 2016 Court Decision, Reasoning [49]}.

In the Constitutional Court's view, the above interpretation of reserved sovereignty is also explicitly in line with the principle of sincere cooperation under Article 4 (3) TFEU. This provision prescribes that "pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union The Member States

shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

Under Article E (2) of the Fundamental Law, in the exercise of the competences which Hungary exercises jointly with the Member States of the European Union through the institutions of the European Union, these institutions, including the Court of Justice of the European Union, may take decisions which are binding on Hungary. The Constitutional Court states, at the same time, that the enforceability of European Union acts recognised as binding under Article E of the Fundamental Law may be hindered by the ineffectiveness of competences exercised jointly with the European Union.

However, on the basis of the interpretation of Article E (2) of the Fundamental Law, the Constitutional Court finds that, where the joint exercise of competences is incomplete, Hungary is entitled, in accordance with the presumption of reserved sovereignty, to exercise the relevant non-exclusive field of competence of the EU, until the institutions of the European Union take the measures necessary to ensure the effectiveness of the joint exercise of competences.

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

4. Finally, the Constitutional Court reviewed how the consequences of the potential incomplete effectiveness of the joint exercise of competence at issue in the case relate to Hungary's constitutional identity.

The Constitutional Court first dealt with the issue of constitutional identity in Decision 143/2010 (VII. 14.) AB, and then with its comprehensive interpretation in the 2016 Court Decision. After adopting 2016 Court Decision, the protection of constitutional identity

and sovereignty was also laid down in the Seventh Amendment to the Fundamental Law of Hungary.

The legal basis for the EU law is Article 4 (2) of TEU, laying down that “[t]he 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. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

Article 1 of the Seventh Amendment to the Fundamental Law of Hungary incorporated into the National Avowal the following: “We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State.”

In line with this, Article 3 of the Amendment has also added a paragraph (4) to Article R of the Fundamental Law: “The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of each body of the State.”

Article 2 of the Amendment added a second, already cited, sentence to Article E (2) of the Constitution: “With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and State structure.”

Article 5 of the amendment has replaced Article XIV (1) to (3) of the Fundamental Law with new provisions and added paragraphs (4) and (5) to this article. Pursuant to paragraph (1): “No foreign population shall be settled in Hungary. A foreign national, not including persons who have the right to free movement and residence, may only live in the territory of Hungary under an application individually examined by the Hungarian authorities. The basic rules on the requirements for the submission and assessment of such applications shall be laid down in a cardinal Act.”

According to the general explanatory memorandum to the Seventh Amendment to the Fundamental Law, "as part of the amendment to the Fundamental Law, provisions shall be added to the National Avowal to protect sovereignty and constitutionality. In the future, in line with the decisions of the Constitutional Court, the bodies of the State will be obliged to protect the constitutional identity."

The detailed explanatory memorandum to Article 2 of the Amendment, that is, to Article E (2) of the Fundamental Law, explained the background and purpose of the amendment: "The European Union is a community of rights and values that respects the constitutional identity of its Member States and their autonomy to decide on the most fundamental questions of statehood. Article 4 (2) TFEU explicitly states that the Union respects the principle of equality between Member States and their national identities that are integral parts of their political and constitutional structures. The definition of the national identity of a Member State is, by definition, the most fundamental and inalienable right of the State and its constituent political community, which is primarily, but not exclusively, reflected in its constitution. It is therefore appropriate for the political community of a State to enshrine in the constitution, through the constituting power, certain elements of the State's national identity. The interpretation of the relationship between national and EU law in the light of the constitutional identity of each State is also a constant issue before the constitutional courts of European countries. Under EU law, a Member State's constitutional choice of political and social values, which is considered important for its national and political identity, cannot be questioned. The addition to Article E of the Fundamental Law provides the term "to the extent necessary" in the current paragraph (2) with specific content, which is essentially a plain clarification of the exercise of competence by the Union."

The European identity of Hungary is referred to in the wording of the Fundamental Law's National Avowal that we are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago. It is also a part of our national values that our nation has over the centuries defended Europe in a series of struggles and enriched Europe's common values with its talent and diligence, and we also "believe that our national culture is a rich contribution to the diversity of European unity." As a direct consequence of this European identity, Hungary made consistent efforts after the change of the political

system to take part in the European integration and our accession was approved by a decisive national referendum" (the 2019 Court Decision, Reasoning [16]).

By stipulating that "[t]he Union shall respect the national identities of the Member States" and "the essential State functions", Article 4 (2) TEU protects Member States from interference by the Union in certain matters, setting limits on the exercise of competences by the Union.

On the side of Hungary, these norms can be compared with the State's obligation to protect "constitutional identity" under the Fundamental Law [National Avowal, Article R (4)] and the unrestricted nature of the "inalienable right of Hungary to determine" (sovereignty) in certain matters (in the course of the exercise of competences through the institutions of the European Union).

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

The Constitutional Court notes that the issues retained by Article E (2) of the Fundamental Law within the scope of Hungary's inalienable right of determination are closely related to several criteria of statehood itself, as defined in the Convention on the Rights and Duties of States signed in Montevideo on 26 December 1933. Under Article 1 of the Convention, a State, as a subject of international law, must have the following characteristics: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States. In these matters, the right to dispose and the ability to exercise this right effectively and

efficiently is undoubtedly a fundamental function of the State, which the Union respects in accordance with Article 4 (2) of TEU.

The values that make up Hungary's constitutional identity have come into existence on the basis of historical constitutional development, they are legal facts that cannot be waived neither by way of an international treaty nor with the amendment of the Fundamental Law, because legal facts cannot be changed through legislation.

From the founding of the State, the consolidation of sovereignty began with the establishment of the State organisation and continued with the the Hungarian *Magna Charta* more commonly known as the Golden Bull of 1222, which limited the fundamental freedoms and the royal power. Subsequently, King Ulászló I declared in his charter of 8 March 1440 in Krakow that Hungary and Poland would unite their forces against the Turks, and from then on Hungary bore the title of "*propugnaculum Christianitatis*", that is, "the bastion of Christianity", for centuries, which is commemorated in István Werbőczy's book "Tripartitum" as follows: "[...] there was no people or nation that stood more vigorously and steadfastly guard for the defence and propagation of the Christian republic than the Hungarian, which (not to mention the older ones) stood guard for about a hundred and forty years against the terrible Turks [...]". Werbőczy's Tripartitum was already identified as an achievement of the historical constitution in Decision 29/2015 (X. 2.) AB. (Reasoning [36]–[37]).

Another achievement of our historical constitution is Act XII of 1790/91, which stated that "the power to make, repeal and interpret laws in Hungary and the parts connected with it, without prejudice to the provisions of the Act 1741:VIII, shall be vested jointly in the legally crowned ruler and the national bodies and orders lawfully assembled in Parliament, and may not be exercised outside them."

Nevertheless, in the context of the manifestation of Hungary's national identity, the protection of linguistic, historical and cultural traditions as an achievement of the historical constitution, and thus part of our constitutional identity, already appeared in Act XVI of 1790/91.

Subsequently, the 1848-1949 Revolution and War of Independence led to the extension of freedoms, a centralised State organisation and a national government accountable to the National Assembly. After the defeat of the War of Independence, Hungary's sovereignty was restored as a result of the Austro-Hungarian Compromise

of 1867. Section 13 of Act XII of 1867 stipulates that “[...] the establishment or transformation of the system of defence for Hungary may at all times be made only with the consent of the Hungarian legislature.”

The listed elements of the historical constitution related to sovereignty, population, linguistic, historical and cultural traditions are considered to be achievements (*acquis*) with respect to Hungary’s constitutional identity, pursuant to Article R (3) of the Fundamental Law.

The efforts to preserve, protect and restore our nation’s constitutional right to self-determination are praised by the National Avowal in several places and it assumes continuity with these efforts, while it sharply distances itself from the periods that were contrary to them:

- “We are proud of our forebears who fought for the survival, freedom and independence of our country”;
- “We do not recognise the suspension of our historic constitution due to foreign occupations”;
- “We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; we therefore proclaim it to be invalid”;
- “We agree with the Members of the first free National Assembly, which proclaimed as its first decision that our current liberty was born of our 1956 Revolution”;
- “We date the restoration of our country’s self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected body of popular representation was formed. We shall consider this date to be the beginning of our country’s new democracy and constitutional order”.

The fact of the adoption of the Fundamental Law, which entered into force on 1 January 2012 and was adopted by a free and democratically elected constitutional power, can be seen in itself as an effort to safeguard, protect and restore our nation’s constitutional right to self-determination, especially in relation to our historical constitution.

The national holidays of Hungary, as stipulated in Article J of the Fundamental Law, are linked to the founding of the State, the 1848-49 revolution and war of independence and the 1956 revolution and war of independence, as struggles for the defence and restoration of self-determination. In the present case, this connection can be put into

specific terms in the sense that the aspiration to enforce the limitation in Article 2 of the Seventh Amendment to the Fundamental Law that the exercise of the joint competence may not restrict the inalienable right of Hungary to determine its territorial unity, population, form of government and State structure is itself part of Hungary's constitutional identity.

In the light of the above, on the basis of a combined interpretation of Article E (2) and Article XIV (1) of the Fundamental Law, the Constitutional Court established that the protection of Hungary's inalienable right to determine its territorial unity, population, form of government and State structure is part of its constitutional identity.

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The publication of this Decision of the Constitutional Court in the Hungarian Official Gazette is mandatory on the basis of the first sentence of Section 44 (1) of the Constitutional Court Act.

Budapest, 7 December 2021

Dr. Tamás Sulyok
President of the Constitutional Court
Rapporteur Justice of the Constitutional Court

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Ágnes Czine
Justice of the Constitutional Court, unable
to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Egon Dienes-Oehm
Justice of the Constitutional Court, unable
to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Tünde Handó
Justice of the Constitutional Court, unable
to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Attila Horváth
Justice of the Constitutional Court, unable
to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Ildikó Hörcherné dr. Marosi
Justice of the Constitutional Court, unable
to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Imre Juhász
Justice of the Constitutional Court, unable
to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Miklós Juhász
Justice of the Constitutional Court, unable
to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Zoltán Márki
Justice of the Constitutional Court, unable
to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Béla Pokol
Justice of the Constitutional Court, unable
to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. László Salamon
Justice of the Constitutional Court, unable
to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Balázs Schanda
Justice of the Constitutional Court, unable
to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Marcel Szabó
Justice of the Constitutional Court, unable
to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Péter Szalay
Justice of the Constitutional Court, unable
to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Mária Szívós
Justice of the Constitutional Court, unable
to sign