

The Zauberlehrling Unchained?

The Recycling of the German Federal Constitutional Court's Case Law on Identity-, *Ultra Vires*- and Fundamental Rights Review in Hungary

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“Herr und Meister, hör mich rufen! –
 Ach, da kommt der Meister!
 Herr, die Not ist groß!
 Die ich rief, die Geister,
 Werd’ ich nun nicht los.”

(*Johann Wolfgang von Goethe: Der Zauberlehrling*)**

Abstract

Currently, the governments of some member states are engaged in striking freedom fights against the European Union (EU) – at least at the rhetorical level. However, a more effective battle is fought by the national constitutional courts. In some of the more recent decisions, these courts are challenging the validity of EU acts referring the protection of fundamental rights protection, regarding their national constitutional identity or regarding the limits of EU competences. This paper illustrates these tendencies through the example of a decision of the Hungarian Constitutional Court of December 2016. In the analysed ruling, the Court established a peculiar mix of identity-, *ultra vires*-, and fundamental rights review, creatively – but at several points, inconsequentially – recycling the German case law.

I. Introduction: The Unintended Effects of Some GFCC Decisions

“Spirits that I’ve cited, my commands ignore” – the German Federal Constitutional Court (GFCC) may feel like *Goethe’s “Zauberlehrling”* when experiencing the far reaching – and probably partly unintended – effects of its *Solange*,¹ *Maastricht*² and *Lisbon*³ rulings and of the fundamental rights, identity and *ultra vires* review of EU law it has developed. The most recent example of the creative recycling of the GFCC’s case law is

** “Lord and master, hear me crying! - / Ah, he comes excited. / Sir, my need is sore. / Spirits that I’ve cited / My commands ignore.” *Johann Wolfgang von Goethe: The Sorcerer’s Apprentice*; English translation by *Edwin Zeydel*.

¹ *Solange I*, BVerfG (Federal Constitutional Court) 29.5.1974, BVerfGE 37, 271 and *Solange II*, BVerfG (Federal Constitutional Court) 22.10.1986, BVerfGE 73, 339.

² *Maastricht* decision, BVerfG (Federal Constitutional Court) 12.10.1993, BVerfGE 89, 155.

³ *Lisbon* decision, BVerfG (Federal Constitutional Court) 30.06.2009, BVerfGE 123, 267.

the decision of the Hungarian Constitutional Court (HCC)⁴ about constitutional identity, delivered on the occasion of the EU refugee-relocation system in December 2016.

The decision intends to establish a trump card against the primacy of EU law on the grounds of national constitutional identity pursuant to Art. 4 (2) Treaty on European Union (TEU), and it follows the GFCC's case law in several aspects. However, the Hungarian ruling lacks any definition concerning the exact meaning of this identity and the HCC disregards the different context of the German constitutional system, especially the constitutional core defined by the eternity clause of the Grundgesetz.

Further, the HCC is trying to make up for lost time by establishing also the possibility of fundamental rights review and of "sovereignty control" in the very same decision. However, it is not that easy to catch up with the GFCC's long developed, doctrinally established case law.⁵ The HCC's attempt for that is especially weak: the decision does not seem to be motivated by the need for understanding the GFCC but rather by seeking the favour of politics.

In this paper, I attempt to illustrate some unintended effects of the decisions of the GFCC on fundamental rights, identity and *ultra vires* review while taking into account the most recent lively dialogue between the GFCC and the Court of Justice of the European Union (CJEU).

I do not insist that the GFCC is absolutely right in every single question discussed in this paper. My aim is to demonstrate that the Hungarian Constitutional Court – which has traditionally sought to adapt to the German case law in several fields⁶ – did not even try to think this time, but simply waived logical legal reasoning and hid behind the professional authority of the GFCC, in order to justify a decision that was actually motivated by political loyalism.

This paper consists of two sections. In Section II., I will sketch the background and the main findings of the HCC's "identity decision". The critical analysis of the judgement is found in Section III.: in point 1., 2. and

⁴ Alkotmánybíróság (AB) (Constitutional Court), Decision No. 22/2016 (XII. 5.), ABH (Journal of Constitutional Court decisions) 2016, 1418.

⁵ See also e. g. the *Honeywell* decision, BVerfG (Federal Constitutional Court) 6.7.2010, BVerfGE 126, 286 et seq.; the *Mr. R.* decision concerning a European Arrest Warrant, BVerfG (Federal Constitutional Court) 15.12.2015; BVerfGE 140, 317 et seq., or, the *OMT* reference, BVerfG (Federal Constitutional Court) 14.1.2014; BVerfGE 134, 366 et seq. and *OMT* ruling, BVerfG (Federal Constitutional Court) 21.6.2016, NJW 69 (2016), 2473.

⁶ See e. g. Z. Szente: Az Alkotmánybíróság értelmezési gyakorlata 1990-2010 (The Interpretive Practice of the Constitutional Court between 1990-2010), in: K. Szoboszlai-Kiss/G. Deli (eds.): Tanulmányok a 70 éves Bihari Mihály tiszteletére (Studies in Honour of the 70-years-old Mihály Bihari), 2013, 505 et seq.

3. the fundamental rights, the *ultra vires* and the identity review will be discussed respectively, with special regard to the most problematic arguments of the decision and to the comparison with the German case law.

II. The “Identity-Decision” of the Hungarian Constitutional Court

1. The Context: A Warmly Welcomed Decision After a Failed Constitutional Amendment

The question of identity review occurred in a quite specific political situation in Hungary. The Hungarian government has been a harsh opponent of the EU migration policy and of Council decision No. 2015/1601 about the relocation of 120,000 asylum applicants. The government issued an action for annulment⁷ before the CJEU against the Council decision and at the same time, the Hungarian commissioner for fundamental rights initiated an abstract interpretation of the constitution before the Hungarian Constitutional Court in December 2015. He raised the question whether the mass relocation of asylum seekers was contrary to the prohibition of collective expulsion pursuant to Art. XIV. of the Hungarian Basic Law. The commissioner further asked if this was the case, could have the Hungarian authorities constitutionally implemented the Council decision. In this regard, the motion of the Commissioner actually directed to fundamental rights review.

Further, the motion practically raised the possibility of an *ultra vires* review too by adding that the joint exercise of competences with the EU is limited “to the extent necessary” pursuant to Art. E) of the Basic Law. The commissioner argued that this constitutional provision might limit the implementation of such EU acts which are not based on conferred competences. It is clear that the motion of the commissioner did not direct to an identity review: neither constitutional identity nor Art. 4 (2) TEU was even mentioned in the text.⁸

⁷ Meanwhile, the CJEU refused the government’s motion in September 2017 and found that the Council could make the decision without a legislative process because there was an emergency situation. See joined cases no C-643/15 and C-647/15 (*Slovakia and Hungary v. Council of the European Union*), ECLI:EU:C:2017:631. In detail see point III. 2. c). below.

⁸ The motion is available in Hungarian at the website of the Constitutional Court: <<http://public.mkab.hu>>.

The case was pending before the Constitutional Court for months, as usual. Meanwhile, the government held a referendum about the refusal of the EU “refugee quota system”. It was unconstitutional on the one hand and made no sense on the other, as the issue has been regulated by EU law and Art. 8 (2) of the Basic Law foresees referendums only in questions which belong to the competence of the Hungarian National Assembly. The turnout remained under 50 %, so the referendum was legally invalid according to Art. 8 (4) of the constitution.

To make the referendum “politically valid”, the prime minister initiated a constitutional amendment. Next to the prohibition of settling “foreign population” in Hungary, the amendment would have introduced the duty for all state bodies to secure the constitutional identity of Hungary – without defining this concept. This explicit reference to constitutional identity obviously aimed to legally avoid the binding power of EU-law, by establishing a possible exception to Art. 4 (2) TEU. Until then, there has been no reference to “constitutional identity” in the constitution or in other legal norms, and the concept had almost no significance in the case law of the Constitutional Court either.⁹

Through the planned seventh constitutional amendment, the EU-clause of the constitution was also intended to be amended as the “joint exercise of competences” with the EU had to be in accordance with the fundamental rights and freedoms guaranteed by the Hungarian Basic Law, adding that and Hungary’s sovereign right to command on its population, territory and

⁹ Except the parallel reasoning of *László Trócsányi* to the *Lisbon* decision: AB decision No. 143/2010 (VII. 14), ABH 2010, 872. Since then, the concept has only been referred by Fidesz-appointed constitutional judges at the Fide Congress in spring 2016 – when the motion of the ombudsman was already pending before the Court. See the speeches of *András Zs. Varga* and *Tamás Sulyok* at the XXVII. FIDE Congress. See *A. Zs. Varga*, Final Conferral of Sovereignty or Limited Power-Transfer?, *Fontes Iuris* 2016, Special Edition on the FIDE Congress, 9 et seq.; *T. Sulyok*, Erga omnes Effect of Member States’ Constitutions and Composite Constitutionality, *Fontes Iuris* 2016, Special Edition on the FIDE Congress, 40. A brief remark must be taken concerning the appointment of the constitutional judges at this point: They are elected by the two-third majority of the parliament just like before 2010. But then, candidates were proposed by a parity based committee of all parliamentary groups. Therefore, even if a government would have had a supermajority in the parliament, it had to find a compromise with the opposition concerning the candidates. In July 2010, the new Fidesz supermajority amended the old constitution as the composition of this committee must represent the power relations in the parliament. Since then, no compromise had been needed to appoint constitutional judges – until the governing parties had the supermajority which they have lost through a midterm election in February 2015. *Zoltán Szente* empirically analysed the activity of the constitutional judges in the light of the political side they have been appointed and found a surprising extent of political adaptation between 2010 and 2014, especially after 2013. In detail see: *Z. Szente*, Die politische Orientierung der Mitglieder des ungarischen Verfassungsgerichts zwischen 2010 und 2014, *JOR* 57 (2016), 45 et seq.

state order could not be limited in this regard.¹⁰ Finally, the amendment failed because that time, the governing party did not bear the needed two-thirds majority in the parliament anymore, and no compromise could be found with the radical Jobbik.

Just a few weeks after the failed parliamentary vote, the Constitutional Court delivered its decision¹¹ about the abovementioned motion of the commissioner for fundamental rights. However, the timing is not the only suspicious factor concerning the decision. First, the Court separated the concrete interpretation of the prohibition of collective expulsion (Art. XIV of the Basic Law) from the abstract question of the relationship between national constitutional law and EU law. Much more interesting is that – while identifying that the question of the commissioner referred to fundamental rights review and to an *ultra vires* review – the Court took some considerations about the theoretical opportunity of the identity review too, without being requested.

2. Constitutional Dialogue: A Selective List Without Real Legal Comparison

The main finding of the ruling is the following:

“If human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution can be presumed to be violated due to the exercising of competences based on Art. 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” (para. 69).

The Court separated (para. 29) the concrete question of the commissioner from the abstract interpretation of the constitution and concentrated only to the latter in this decision. The commissioner’s question whether Hungary could constitutionally contribute to the EU refugee-reallocation mechanism unless it violated the prohibition of collective expulsion has not been answered. The case is still pending in this regard.

The Constitutional Court is aware of the fact that the CJEU has defined EU law as an independent, autonomous legal order. However, the ultimate basis of this legal order are the Treaties. Finally, the member states as the

¹⁰ Draft legislation No. T/12458. The text is available in Hungarian at <<http://www.parlament.hu>>.

¹¹ AB decision No. 22/2016, constitutional identity decision (note 4).

masters of the Treaties define in their domestic laws, to what extent they give priority to EU law – the HCC goes on (para. 32), referring to the *Kloppenburg* decision¹² of the German Federal Constitutional Court.

The Court considers the constitutional dialogue within the EU to be “extremely important”, so it examined the opinion of other member states’ constitutional courts on fundamental rights and *ultra vires* exceptions. The reasoning continues with a list of several rulings of constitutional courts and the highest courts of other EU member states: for example, pieces of the Italian, French, Estonian, Polish, British or Spanish case law are mentioned. However, these references are in fact short summaries in a couple of sentences, without evaluating or even mentioning the context of the referred decisions. Any parallels to the present Hungarian case have not been shown either (paras. 33-44).

On this list, two decisions of the German Federal Constitutional Court have explicitly been referred (paras. 43-44): on the one hand, headnote 4 and 5 of the *Lisbon* ruling is cited completely.¹³ Further, the HCC explored the GFCC’s judgement on the counter-terrorism database but only indirectly, insofar as it was referred by a decision of the United Kingdom (UK) Supreme Court (para. 43). The HCC cited the sentence, according to

¹² *Kloppenburg* decision, BVerfG (German Federal Constitutional Court), 2 BvR 687/85, BVerfGE 75, 223.

¹³ “European unification on the basis of a treaty union of sovereign states may not be achieved in such a way that not sufficient space is left to the Member States for the political formation of economic, cultural and social living conditions. This applies in particular to areas which shape the citizens’ living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop within public discourse in the party political and parliamentary sphere of public politics. The Federal Constitutional Court examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral [...], whilst adhering to the principle of subsidiarity under Community and Union law [...]. Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected [...]. The exercise of this review power, which is rooted in constitutional law, follows the principle of the Basic Law’s openness towards European Law (*Europarechtsfreundlichkeit*), and it therefore also does not contradict the principle of sincere cooperation (Article 4.3 Lisbon TEU); otherwise, with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area.” BVerfG *Lisbon* (note 3), Leitsatz 4-5. Alkotmánybíróság (AB) decision No. 22/2016 (note 4), para. 44.

“as part of a cooperative relationship between the Federal Constitutional Court and the European Court of Justice, this [*Åkerberg Fransson*] decision must not be read in a way that would view it as an apparent *ultra vires* act or as if it endangered the protection and enforcement of the fundamental rights in the Member States in a way that questioned the identity of the Basic Law’s constitutional order”.¹⁴

The HCC has not made any reference to the original context of the cited *obiter dictum* of the GFCC-decision. In fact, this remark regarded the scope of application of the EU Charter of Fundamental Rights, and the necessary restrictive interpretation of an ECJ ruling that applied the Charter in an extremely wide scope in a concrete case.¹⁵

The role of the CJEU in the “extremely important” constitutional dialogue is mentioned only in one sentence. The CJEU respects the competences of the member states and takes their constitutional claims into account – as the HCC stated (para. 45), referring to the *Omega* case¹⁶ and, for a mysterious reason, to the *Tobacco Advertisement* judgement¹⁷ and the judgement in *Aranyosi and Căldăraru*.¹⁸ While citing such – regarding the topic, less relevant¹⁹ – decisions, the HCC has forgotten to mention for example the *Melloni* case²⁰ which could have brought a significant additional perspective into the reasoning by forcing the HCC to make some counterarguments. However, it must be admitted that the German Federal Constitutional Court itself often goes against the findings of the CJEU too, but at least pretending to take its judgements into account.²¹

Before going into details about the fundamental rights, *ultra vires* and identity reviews, the HCC takes an important comment, limiting the application of these instruments for exceptional cases as *ultima ratio* tools. About the latter, the Court only remarks that the *ultima ratio* nature means that the constitutional dialogue between the member states must be respected. A further interesting point is that the introduction of these

¹⁴ *Counter-Terrorism Database*, BVerfG case No. 1 BvR 1215/07, BVerfGE 133, 277, para. 91. Alkotmánybíróság (AB) decision No. 22/2016 (note 4), para. 43.

¹⁵ C-617/10, *Åkerberg Fransson* ECLI:EU:C:2013:105.

¹⁶ C-36/02, *Omega*, European Court Reports, 2004 I-09609.

¹⁷ C-376/98, *Tobacco Advertisement*, European Court Reports 2000 I-08419.

¹⁸ C-404/15 and C-659/15, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198.

¹⁹ Similarly *L. Blutman*, Szürkületi zóna. Az Alaptörvény és az uniós jog viszonya (Twilight Zone. The Relationship of the Basic Law and EU Law), *Közjogi Szemle* 2017/1, 5.

²⁰ C-399/11, *Melloni*, ECLI:EU:C:2013:107.

²¹ Concerning the cited *Melloni* case, see the GFCC’s decision in *Mr. R.* (note 5), paras. 82-83.

reviews is not based on the text of the Basic Law but on the case law of other member states' constitutional courts (para. 46).

3. Different Reviews – No Consequences

Concerning fundamental rights, the Court's starting point is that the state power is bound to fundamental rights and

“it is the primary obligation of the state to protect the inviolable and inalienable fundamental rights” (paras. 47-48).

It is worth remarking that the other dimension, namely, the understanding of fundamental rights as guarantees of individual freedom against the state power does not occur in the judgement.²²

Recalling the *Solange II* judgement of the GFCC, the HCC admits that through the CJEU and the EU Charter of Fundamental Rights, the EU usually safeguards satisfactory, or even the same level of fundamental rights protection than that of the national constitutions. However, the HCC could not renounce the *ultima ratio* protection of human dignity and of the essential content of fundamental rights (para. 49). After this short statement, the Court turned to the *ultra vires* and identity reviews, without explaining any detailed aspects of the fundamental rights review.

Before going into details about its own competences on reviewing EU law, the HCC reminds that the parliament and the government have the opportunity to take action according to the subsidiarity protocol and Art. 16 (2) TEU, respectively. Further, the government may lead an action before the CJEU because of the disrespect of the subsidiarity principle, the Court added (paras. 50-51).²³

Then the Court turns to Art. E (2) of the Basic Law which reads as follows:

“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.”

²² Similarly *V. Kéri/Z. Pozsár-Szentmiklósy*, Az Alkotmánybíróság határozata az Alaptörvény E) cikkének értelmezéséről (The Decision of the Constitutional Court on the Interpretation of Article E of the Basic Law), JeMa 2017/1-2, 11.

²³ The government actually initiated a nullity suit but did not allude to the subsidiarity argument. In detail see point III. 2. c).

It must be emphasised that the wording is not about *sovereignty transfer* but only about the *joint exercise of competences*. Further, it is worth to note that there are no general constitutional provisions for the transfer of competences – either within the frames of international treaties.²⁴ Art. E is the only provision in the Hungarian Basic Law concerning this question.

Art. E (2) safeguards the validity of EU law in Hungary on the one hand and limits the “transferred or jointly exercised” powers on the other – as the Court pointed out. Through the interpretation of Art. E (2) of the Basic Law, but basically on the grounds of Art. 4 (2) TEU, the HCC found two limits of the joint exercise of competences with the EU: it may hurt neither the sovereignty of Hungary nor its constitutional identity (paras. 53-54).

Before specifying anything about sovereignty and identity review, the Court made it clear that reviewing directly EU law could not come into question: the responsibility of Hungarian state institutions are emphasised in this regard. Namely, the parliament and the government must respect the sovereignty and constitutional identity also by participating in EU decision making mechanisms, and the Constitutional Court is the primer guarantor of sovereignty and constitutional identity according to Art. 24 of the constitution. The subjects of sovereignty and identity review are not *directly* the acts of the EU, so the HCC decides neither about the validity, nor about the primer application of EU law – as the Court goes on (paras. 55-56 – my italics).

Despite its importance and dogmatical complexity, the *ultra vires* review – or, as the HCC calls it: sovereignty control – is discussed in the reasoning only briefly. The Court first recalls Art. B of the Basic Law which declares the principle of popular sovereignty and the independent sovereign statehood of Hungary. The Court points out that these principles cannot be emptied by the EU clause of Art. E (para. 59). The reasoning further reiterates that by joining the Union, Hungary did not renounce its sovereignty but only made possible to jointly exercise some competences. At this point, the Court established the “presumption of maintained sovereignty”. Namely, by assessing the joint exercise of further competences beyond the scope defined by the treaties, Hungary’s upheld sovereignty has to be presupposed.

²⁴ The relationship between domestic and international law is addressed by Art. Q of the Basic Law. According to this provision, Hungary accepts the generally recognised rules of international law, and the compliance with international legal obligations has to be ensured through domestic legislation. In this Article, there is no word about any competence transfer to international organisations.

According to the Basic Law, sovereignty is the ultimate source of competences but not a competence itself – as the Court goes on. Therefore, the joint exercise of competences could not result that the people lost their possibility to ultimately control the exercise of public power. In this regard, the HCC refers to Art. E (4) of the Basic Law. It prescribes that for accepting an amendment of the EU treaties, the consent of two thirds majority of all members of the National Assembly is needed – this is the same majority that is required for constitutional amendments. The Court further refers to Art. XXIII (7) of the Basic Law which safeguards the right to participate on referendums (para. 60). This reference is hard to understand in the context of “ultimate popular sovereignty” for a simple reason: neither EU acts nor constitutional amendments could be subject to referendums according to Art. 8 of the Basic Law – however, this fact is not mentioned in the reasoning.²⁵

The Court starts its discussion about the identity review with a reference to Art. 4 (2) TEU about the obligation of the EU to respect the national identity of the member states. This reference also supports my view, that the HCC interprets the identity review primarily as a formal competence question, as a special sort of *ultra vires* review.

By citing the text of the TEU, the HCC makes clear that it understands national identity and constitutional identity as synonyms²⁶ and in the rest of the reasoning, the term “constitutional identity” is used consequently. Constitutional identity is defined merely tautologically in the ruling:

“The Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary’s self-identity and it unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Art. R) (3) [the interpretation provision] of the Fundamental Law.” (para. 64)

The Court sets out a non-taxative, but merely illustrative list of the values that Hungary’s constitutional identity is consisted of: fundamental freedoms, the separation of powers, the republican state form, the respect of autonomous public bodies, the freedom of religion, the legally bound exercise of power, parliamentarism, equality, respect of judicial power and

²⁵ This point is also criticised by Judge *István Stumpf* in his parallel reasoning to AB decision No. 22/2016 (note 4), para. 106. In detail see Section III. point 2. a) below.

²⁶ The citation in para. 62 of the original, Hungarian version of the decision is about the member states’ “national (*constitutional*) identity” – my italics. Interestingly, the word “constitutional” in parentheses simply disappeared in the English version published at the HCC’s website.

the protection of ethnic minorities (para. 65). Neither of these principles are Hungarian specialities but rather universal values.²⁷

At the end of the list, one single Hungarian speciality is mentioned, but this raises more questions: according to the HCC, the achievements of the historical constitution, which the Basic Law and the Hungarian legal system is built on are also parts of the constitutional identity. Even if nobody really knows what exactly these achievements are: the reference to the historical constitution is a novum of the new Basic Law, the Constitutional Court does not have a settled case law regarding the significance of the historical constitution, and the legal scholarship is divided in the question too.²⁸

The reasoning continues with the almost literal quotation of the GFCC's *Lisbon* ruling without explicitly alluding to it: the protection of constitutional identity might occur in fields

“which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of personal and social security, protected by fundamental rights”.

However, the HCC does not even mention the original source of this sentence and the different context of German constitutional law.²⁹ This “plagiarism” is complemented with a reference to the linguistic, historical and cultural traditions of Hungary.

Finally, the Court states that constitutional identity is a fundamental value which has not been constituted by the Basic Law: it has merely been *acknowledged* by the constitution. Therefore,

“constitutional identity could not be waived by way of an international treaty. Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood” (para. 67).

As sovereignty and constitutional identity overlap on several points, the sovereignty- and identity-control have to be exercised with regard to each other in some cases – the Court concluded without further specifying these overlaps (para. 67).

²⁷ V. Kéri/Z. Pozsár-Szentmiklósy (note 22), 14.

²⁸ See e. g. I. Vörös: A történeti alkotmány az Alkotmánybíróság gyakorlatában (The historical constitution in the case law of the Constitutional Court), *Közjogi Szemle* 2016/4, Z. Szakály: Történeti alkotmány és az alkotmányos identitás az Alaptörvény tükrében (Historical Constitution and the Constitutional Identity in the Light of the Basic Law), *Pro Publico Bono – Magyar Közigazgatás* 2015/2.

²⁹ See AB decision No. 22/2016 (note 4), para. 66 and BVerfG *Lisbon* ruling (note 3), para. 249.

At the end of the reasoning, the Court reiterates its main findings. Namely, if the violation of human dignity, of other fundamental rights, or of the constitutional identity or sovereignty of Hungary is likely through the joint exercise of competences according to Art. E (2) of the Basic Law, the Constitutional Court may examine the case upon a motion.

Furthermore, it is worth to remember a procedural anomaly regarding the case. The decision was delivered in a process called “abstract interpretation of the constitution”. This process may be initiated by a few actors, including the Commissioner for Fundamental Rights – as it happened in the concrete case.

However, regarding the established fundamental rights, sovereignty and identity reviews, the Court does not specify, in which processes these reviews could come into question at all. As the institution of *actio popularis* has been abolished by the new Basic Law, this practical question is not irrelevant at all. Concerning EU primary law, these reviews would fit at best to the preliminary norm control – the only problem is, that this could not apply for EU legal norms being already in effect, but only to future implementing laws. The *ex post facto* norm control of (secondary) EU norms is not foreseen by the law on the Constitutional Court³⁰ and such an extensive interpretation of the constitutional complaint is unlikely too.³¹ Solving competence conflicts may come into play for the first sight, but it only applies to conflicts between Hungarian states actors.³²

In the light of these formal procedural and competence rules, it is highly questionable how the HCC wants to practice its newly established review possibilities “in the course of exercising its competences” – as the ruling reads (para. 69).

³⁰ §§ 23-24 of Act CLI of 2011 on the Constitutional Court.

³¹ § 26 of Act CLI of 2011 on the Constitutional Court. The HCC gave no signals that it would be willing to follow the German Federal Constitutional Court by actually establishing a “right to democracy” in order to protect constitutional identity. See para. 61 of the *Maas-tricht* ruling (note 2) and paras. 168, 193 of the *Lisbon* ruling of the GFCC (note 3). See further *D. Murswiek*, Art. 38 GG als Grundlage eines Rechts auf Achtung des unabänderlichen Verfassungskerns, JZ 65 (2010), 704 et seq.; *C. Schönberger*, Der introvertierte Rechtsstaat als Krönung der Demokratie? – Zur Entgrenzung von Art. 38 GG im Europaverfassungsrecht, JZ 65 (2010), 1161.

³² § 36 of Act CLI of 2011 on the Constitutional Court.

4. Diverse Parallel Reasonings Attached to a Minimalist Majority Reasoning

The divisive nature of the topic is reflected through the fact that five parallel reasonings and a dissenting opinion have been attached to the decision: at the time of delivering the judgement, the Constitutional Court consisted of ten judges. This might be the practical explanation on why the majority reasoning is so minimalist and superficial at some points.

Some judges resented the separation of the abstract constitutional interpretation from the concrete question of the Commissioner:³³ Judge *Salamon* also referred that it should have been declared that *ultra vires* EU law cannot be applied.³⁴ Others pointed out to the lacking competences of the HCC for reviewing EU law³⁵ and argued for clearing the procedural requirements of applying an *ultra vires* or an identity review.³⁶

The parallel reasonings regarded some significant substantial questions too: judges argued for the extension³⁷ and the limitation of the presumption of maintained sovereignty,³⁸ and resented the lack of a detailed analysis of the level of EU fundamental rights protection from the reasoning.³⁹ Especially the parallel reasoning of *István Stumpf* must be highlighted: it is rather like to a dissenting opinion, correctly pointing out several substantial controversies of the reasoning – I will refer to his comments on the relevant points later.

³³ Parallel reasoning of *I. Juhász* to AB decision No. 222/2016 (note 4), para. 84 and dissenting opinion of *L. Salamon* to AB decision No. 22/2016 (note 4), para. 119.

³⁴ Dissenting opinion of *L. Salamon* (note 33), para. 120.

³⁵ Parallel reasonings of *E. Dienes-Oehm* to AB decision No. 222/2016 (note 4), paras. 76-77 and *I. Stumpf* (note 25), para. 99.

³⁶ Parallel reasonings of *E. Dienes-Oehm* (note 35), para. 80 and *I. Stumpf* (note 25), para. 100. *Béla Pokol* advised that only the government should be entitled to initiate an *ultra vires* review, as in other procedural forms, it would not make sense (parallel reasoning of *B. Pokol* to AB decision No. 222/2016 [note 4], para. 92).

³⁷ Parallel reasoning of *A. Zs. Varga* to AB decision No. 22/2016 (note 4), para. 114.

³⁸ Parallel reasoning of *E. Dienes-Oehm* (note 35), para. 81.

³⁹ Parallel reasoning of *I. Juhász* (note 33), paras. 86-88.

III. How the Hungarian Constitutional Court Recycled the German Case Law – A Critical Analysis

1. Fundamental Rights Review: Citing the *Solange* Case Law but Forgetting About Its Consequences

Unlike in Germany, where the fundamental rights review has had a long history in the case law of the Constitutional Court since the *Solange* rulings, the Hungarian Constitutional Court dealt with the possibility of fundamental rights review for the first time only in its present analysed decision: and it did so in a quite inconsequent and unclear way.

a) The “Essence of Fundamental Rights” and Human Dignity

Referring to the *Solange* rulings of the GFCC, the HCC upheld its right and obligation to protect human dignity and the “essence” of fundamental rights as an “*ultima ratio*” tool. The aim was to guarantee that the “joint exercise of competences” pursuant to the EU-clause of the Basic Law did not hurt human dignity and the “essence” of fundamental rights (para. 49).

Contrary to its importance, the issue of fundamental rights is discussed in the ruling only shortly and superficially. Neither it has been defined what should be understood under an “*ultima ratio*” situation, nor anything has been said about the possible consequences of a fundamental rights review. (Logically, the Court should have to deny the primacy of application of EU law in some singular cases, but this option has been refused in the reasoning later.)⁴⁰ Further, the decision does not indicate the special status of human dignity. This would have been necessary not only because of the lack of an eternity clause in the Hungarian constitution but also taking into account the former consequent case law of the HCC. The established case law of the HCC considers human dignity to be inviolable only if it is connected to the right to life, but it has not been interpreted to be absolute in itself, or as an aspect of other fundamental rights at all.⁴¹

⁴⁰ See point III. 2. b) bb) below.

⁴¹ See *T. Drinóczi*, A 22/2016 (XII. 5.) AB határozat: mit (nem) tartalmaz, és mi következnek belőle. Az identitásvizsgálat és az *ultra vires* közös hatáskörnyakorlás összehasonlító elemzésben (AB decision No. 22/2016 (XII.5.): What Is Included and What Will Be Its Consequence? Identity Review and *ultra vires* Joint Exercise of Competences in a Comparative Analysis), MTA Law Working Paper 2017/1, 11.

Here occurs the problem of the distinction between the human dignity-content and the essence of fundamental rights. Hungarian commentators usually make a difference between them, arguing that the absolutely untouchable human dignity content is still a tighter category than the essential content of fundamental rights.⁴²

Unlike in Germany,⁴³ human dignity does not have an eternity clause-like status in the Hungarian legal system and the Court does not set it up among the elements of Hungary's constitutional identity (para. 65). So it follows that – in a rather theoretical case – human dignity could be protected against the EU on the basis of fundamental rights review instead of identity review. In Germany on the contrary, these tools may overlap regarding human dignity, as it is both a fundamental right, belonging at the same time to the constitutional core defined in Art. 79 (3) of the German Basic Law.

The only “successfully applied” identity review in Germany so far has also been established on human dignity: in the case of *Mr. R.*, the German Federal Constitutional Court ordered to refuse a European arrest warrant.⁴⁴ Some commentators have drawn a parallel to fundamental rights review by regarding this decision simply as an application of *Solange II*, labelling it as “*Solange III*”.⁴⁵ However, others more convincingly point out that the *Mr. R.* decision concerns human dignity as an element of the constitutional core, which has to take precedence in relation to EU law absolutely, while the findings of the *Solange* case law refer to other fundamental rights so they underlie to certain conditionality.⁴⁶ Even if the *Mr. R.* decision would have been important in this regard, it is referred only in a less significant aspect by the Hungarian Constitutional Court (para. 49): concerning the openness towards EU law (*Europarechtsfreundlichkeit*), which was not established but only reaffirmed in the *Mr. R.* decision.⁴⁷

⁴² See e. g. Z. Balogh, Az emberi méltóság: jogi absztrakció vagy alanyi jog? (Human Dignity: Legal Abstraction or Subjective Right?), in: *Iustum Aequum Salutare*, 2010/4, 37, T. V. Ádány/N. Balogh-Békesi/Zs. Balogh B. Hajas, Rights and Freedoms, in: A. Zs. Varga/A. Patyi/B. Schanda (eds.), *The Basic (Fundamental) Law of Hungary. A Commentary of the New Hungarian Constitution*, 2015, 82.

⁴³ See Art. 79 (3) of the German Grundgesetz.

⁴⁴ BVerfGE 140, *Mr. R.*, 317 et seq.

⁴⁵ M. Hong: Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: *Solange-III* and *Aranyosi*, *Eu Const. L. Rev.* 12 (2016), 549 et seq.

⁴⁶ J. Nowag, EU Law, Constitutional Identity, and Human Dignity: A Toxic Mix?, *Bundesverfassungsgericht, Mr. R.*, *CML Rev.* 53 (2016), 1447 et seq.

⁴⁷ See para. 225 of the *Lisbon* decision (note 3) and paras. 58-59 of the *Honeywell* decisions of the GFCC (note 5), 5.

b) Who Cares About the EU Charter of Fundamental Rights?

If the fundamental rights review admittedly follows the *Solange* case law of the GFCC – as this intent of the HCC is obvious from the reasoning –, specifying certain requirements against EU law would be necessary. Namely, under what conditions could be the fundamental rights review recalled at all.

The definition of such conditions would be important; especially taking into account the fact that – unlike at the time of the *Solange* case law – now the EU has a binding fundamental rights catalogue: the EU Charter of Fundamental Rights. Moreover, the fundamental rights section of the Basic Law has been formulated explicitly having regard to the Charter⁴⁸ – this fact is not insignificant when fundamental rights review is in question. Further, the HCC does not refer to Art. 53 of the Charter about the level of protection. Similarly, the respective case law of the CJEU has completely been left out of consideration. Unlike the GFCC that has for example made clear that it was not willing to buy some pieces of the CJEU’s case law,⁴⁹ the HCC said no word about the CJEU’s most relevant recent rulings.⁵⁰

It is worth to recall that the fundamental rights review has not actually been applied in the HCC’s analysed ruling. The concrete question whether the Council decision was contrary to the prohibition of collective expulsion and whether it could be constitutionally executed by the Hungarian authorities, has been separated from the abstract constitutional interpretation: so, the other, concrete part of the case is still pending. In this regard, *Nóra Chronowski* and *Attila Vincze* point out to an interesting question that was raised neither by the Commissioner nor by the Court – for now. Namely, whether an *expulsion* is possible within the Schengen area. If not, there is no ground to exercise any fundamental rights review. If yes – as it is supposed by the motion – then the government should have had to oppose the Turkey-EU agreement on irregular migration (closed in March 2016) alluding to constitutional concerns too.⁵¹

⁴⁸ This was also highlighted by Fidesz politicians who codified the text of the Basic Law, see e. g. *Gergely Gulyás* in the interview book of *B. Ablonczy*, *Gespräche über das Grundgesetz*, 2012, 99.

⁴⁹ *D. Sarmiento*, *Awakenings: the “Identity Control” Decision by the German Constitutional Court*, *Verfassungsblog*, 27.1.2016, <<http://verfassungsblog.de>>.

⁵⁰ *Melloni* (note 20), ECJ Opinion No. 2/13, ECLI:EU:C:2014:2454.

⁵¹ *N. Chronowski/A. Vincze*, *Alapjogvédelem, szuverenitás, alkotmányos önazonosság: az uniós jog érvényesülésének új határai? (Fundamental Rights Protection, Sovereignty, Constitutional Identity: New Borders of the Effect of Union Law?)*, in: *N. Chronowski* (ed.), *Szuverénitás és államiság az Európai Unióban. Kortárs kérdések és kihívások (Sovereignty and*

Further, another significant problematic point can be found. The reallocation of asylum seekers according to a Council decision obviously means the implementation of EU law in the sense of Art. 51 (1) of the EU Charter of Fundamental Rights.⁵² My point is that the question, whether the term “collective expulsion” could be applied for the transfer of groups within the Schengen area has to be decided on the grounds of the Charter instead of the Hungarian Basic Law. But the interpretation of the Charter is up to the CJEU instead of the HCC. So, what the HCC should do when dealing with the second part of the case is to initiate a preliminary procedure and ask the CJEU to interpret Art. 19 (1) of the Charter.

Will the HCC do so? That is not very probable for more reasons. On the one hand, for now, the HCC has consequently avoided to apply EU law and to issue a preliminary reference,⁵³ and Hungarian courts are generally very uncertain even in identifying cases when the Charter should be applied at all.⁵⁴ On the other, the approach of the HCC towards the Charter is well illustrated by the analysed decision, too: more precisely, by the reference to the GFCC’s ruling in the counter-terrorism database case. The HCC cited this decision only in so far as the GFCC refers to the possibility of a CJEU decision being *ultra vires*, if it is interpreted extensively.⁵⁵ However, there is much more in that decision that the HCC could have learnt. Namely, the

Statehood in the European Union. Contemporary Questions and Challenges), 2017, 101 et seq.

⁵² The Charter and the Basic Law use the same wording regarding the prohibition of collective expulsion: “Collective expulsions are prohibited.” (Art. 19 (1) of the EU Charter of Fundamental Rights and Art. XIV. (1) of the Hungarian Basic Law.) However, the same wording does not necessarily imply exactly the same meaning and legal dogmatical background behind a concept or a fundamental right. The case of human dignity is a good example for this: contrary to its same formulation in the German and the Hungarian constitutions and in the EU Charter of Fundamental Rights, the doctrine behind is quite different in each legal system. For details see e. g. *S. Rixen: Würde des Menschen als Fundament der Grundrechte*, in: S. M. Heselhaus/C. Nowak (eds.), *Handbuch der Europäischen Grundrechte*, 2006; *P. Wallau, Die Menschenwürde in der Grundrechtsordnung der Europäischen Union*, 2010; *Horst Dreier to Art. 1 GG in H. Dreier (ed.), Grundgesetz. Kommentar*, 2015; *C. Dupré, Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity*, 2003.

⁵³ On this matter, see also the detailed analysis of *F. Gárdos-Orosz, Preliminary Reference and the Hungarian Constitutional Court: A Context of Non-Reference*, GLJ 16 (2015), 1569 et seq.

⁵⁴ In detail see also *B. Bakó, Uniós alapjogok a tagállamokban. Az Alapjogi Charta alkalmazási és értelmezési problémái (EU Fundamental Rights in the Member States. Application and Interpretation Problems Regarding the EU Charter of Fundamental Rights)*, in: *Iustum Aequum Salutare* 2015/1, 194 et seq.

⁵⁵ AB decision No. 22/2016 (note 4), para. 43, *Counter-Terrorism Database* decision (note 14), para. 91.

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GFCC clearly considers the possibility of the application of the Charter and of issuing a preliminary reference. Through a proper argumentation – that can be and has already been criticised, anyway⁵⁶ – it concludes that it is the German Basic Law that has to be applied instead of the Charter and it is the GFCC who has the competence to decide instead of the CJEU.⁵⁷ Unlike the GFCC, the Hungarian Constitutional Court simply ignores this part of the problem to save the argumentation.

Anyway, exercising the fundamental rights review in the concrete case will require clarification on whether the Charter is applicable and to declare what the Charter exactly says in this issue. An attempt to allude to a fundamental rights exception will only make sense after it is proven that the Charter would safeguard a lower level of protection than the Hungarian Basic Law.

2. “Sovereignty Control” – Of What, On Which Ground and to What Extent?

The Hungarian Constitutional Court had already dealt with the conflict of sovereignty and the European integration formerly, but “sovereignty control” has only been established in decision No. 22/2016.

Like the German and many other European constitutional courts, the Hungarian Constitutional Court also examined the constitutionality of the Lisbon Treaty, or more precisely, the respective implementing law.⁵⁸ The

⁵⁶ See e. g. *F. Fontanelli*, *Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog*, *Eu Const. L. Rev.* 9 (2013), 327 et seq.; *A. Baraggia*, *Paths of Dialogue Between the ECJ and Constitutional Courts on Fundamental Rights Protection: A Still-Puzzling Scenario*, *Tul. J. Int'l & Comp. L.* 24 (2015), 81 et seq.

⁵⁷ *Counter-Terrorism Database* decision (note 14), paras. 88-91. Another interesting case from the same field is worth to mention too. By annulling the provisions of the Telecommunication Act based on the EU Data Retention Directive, the GFCC did not apply either the Charter or a fundamental rights review against the directive, but examined strictly the implementing law and argued that the directive left enough space for the German legislator to implement data protection guarantees in a constitution-conform way. *Telecommunications Data Retention*, BVerfG case No. 1 BvR 256/08, BVerfGE 125, 260, paras. 183-187. The opportunity of a similar approach is absent from the analysed decision of the Hungarian Constitutional Court. However, the optimistic approach of the GFCC was not shared even by the CJEU itself that annulled the whole directive later. Joined cases No. C-293/12 and C-594/12 (*Digital Rights Ireland Ltd and Kärntner Landesregierung*), ECLI:EU:C:2014:238).

⁵⁸ AB decision No. 143/2010 (note 9). The Fourth Amendment of the Fundamental Law repealed the HCC decisions delivered under the old constitution, but the Court later declared that in cases when the affected constitutional provision has not been changed in its merits in the new Basic Law, the former decisions could be taken into account. See AB decision

Court found no violation of the principle of popular sovereignty and refused the *actio popularis* motion. According to the reasoning, the Lisbon Treaty and especially its Protocol 2 on subsidiarity and proportionality guaranteed that the Hungarian National Assembly could actively contribute to control whether the sovereignty transfer remains between the frames of the “necessary extent” pursuant to § 2/A of the constitution.⁵⁹

The problem whether EU law could affect core constitutional principles, was not included in the decision – it is only mentioned in the parallel reasoning of Judge *László Trócsányi* who used the terms identity and sovereignty as mutually interdependent concepts.⁶⁰ He argued that if the EU would be turned into a federal state, such a reform had necessarily demanded a constitutional amendment because the decline of sovereignty could not happen without that. EU legislation could not empty § 2 of the constitution (declaring democracy, popular sovereignty, rule of law, and independent statehood) by leading to the transformation of the constitutional system without a constitutional amendment – he concluded.⁶¹

a) Popular Sovereignty and Democracy: The Link Between the *Ultra Vires*- and the Identity-Argument

The wording of decision No. 22/2016 is somewhat stricter than the parallel reasoning of *Trócsányi* to the Lisbon Treaty.

“As long as Art. B) of the Fundamental Law contains the principle of independent and sovereign statehood and indicates the people as the source of

13/2013 (VI. 7.) (ABH 2013, 440). Regarding the EU clause of the former constitution (§ 2/A) and the present Basic Law (Art. E) this is the case exactly.

⁵⁹ AB *Lisbon* decision (note 9), point IV. 2.5.

⁶⁰ “The member states reserved their right to dispose over such principles of their constitution that are needed to uphold statehood and constitutional identity.” Parallel reasoning of *László Trócsányi* to the *Lisbon* decision (note 9). See also *T. Drinóczi*, *Az alkotmányos identitásról* (On Constitutional Identity), MTA Law Working Paper 2016/15, 22.

⁶¹ Parallel reasoning of *László Trócsányi* to the Lisbon decision of the HCC (note 9). It is worth to compare his words with the wording of the German *Lisbon* ruling from the previous year. The German constitutional judges implicitly referred to the adoption of a new constitution in such a scenario by mentioning a federal referendum: “The Basic Law does not grant powers to bodies acting on behalf of Germany to abandon the right to self-determination of the German people in the form of Germany’s sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to a new subject of legitimation that goes with it, this step is reserved to the directly declared will of the German people alone.” *Lisbon* decision (note 3), para. 228. See also Art. 146 of the German Grundgesetz.

public power, these provisions shall not be emptied out by the Union-clause in Art. E)” – para. 59 of the reasoning reads.”

The similar wording to the famous *Solange* rulings of the GFCC is also a bit odd, regarding that the condition defined by the HCC – the exact content of Art. B of the Basic Law – depends on the Hungarian constitution amending power (namely, the two thirds majority of the parliament) exclusively. Except if these principles form a part of the so called constitutional identity. But if it is the case then the “as long as” remark makes no sense because theoretically, the constitutional identity should be inviolable and permanent.

Art. B) of the Basic Law sets out very similar principles to the German eternity clause: next to the independent statehood and popular sovereignty, the rule-of-law-principle and the republican state form is listed here. However, contrary to Germany, there is no hierarchy of norms within the constitution in the Hungarian constitutional system (neither pursuant to the old constitution nor to the new Basic Law).⁶² So giving absolute priority to Art. B) against Art. E) seems to be arbitrary.⁶³ By doing so, the HCC argues as the following: with the EU-accession, Hungary did not decline its sovereignty but only made it possible to jointly exercise some competences with the EU. The Court argued and added that sovereignty itself is not a competence but the ultimate source of competences.⁶⁴

Therefore, the joint exercise of competences cannot result that people lose their final control over the exercise of power – regardless of whether it happens exclusively by the member state itself, or together with the EU. At this point, the Court alludes to Art. E (4) of the Basic Law which prescribes

⁶² Z. Szente: Az “alkotmányellenes alkotmánymódosítás” és az alkotmánymódosítások bírósági felülvizsgálatának dogmatikai problémái a magyar alkotmányjogban (Dogmatic Problems of “Unconstitutional Constitutional Amendments” and Judicial Review Over Constitutional Amendments in Hungarian Constitutional Law), in: F. Gárdos-Orosz/Z. Szente (eds.), *Alkotmányozás és alkotmányjogi változások Európában és Magyarországon* (Constitution Making and Constitutional Changes in Europe and Hungary, 2014, 226. The former president of the Constitutional Court argues the contrary, alluding to the rather blurry “invisible constitution”. See L. Súlyom, Normahierarchia az alkotmányban (Hierarchy of Norms Within the Constitution), in: *Közjogi Szemle* 2014/1, 2 et seq.

⁶³ Unlike the GFCC, the Hungarian Constitutional Court has never had the competence for reviewing constitutional amendments, so declaring some constitutional provisions stronger than others could have maximally been a *lex imperfecta* – in the Hungarian constitutional culture it means it would not have made any sense. In detail B. Bakó, *Láthatatlan után inkoherens alkotmány. A korlátlan alkotmánymódosító hatalomról* (First Invisible, Then Incoherent Constitution. On the Unlimited Constitution Amending Power), in: *Magyar Jog* 2017/2, 105 et seq.

⁶⁴ See also point III. 2. b) below on this matter.

that the approval of EU-treaty changes requires two-thirds majority consent in the National Assembly.⁶⁵ The Court also refers to the constitutional provisions concerning referendums. This argument is especially strange regarding that obviously no referendums could be held on EU acts, as these do not fall into the competence of the National Assembly.⁶⁶ What makes this reference not only strange but moreover cynical is, that referendums on constitutional issues are also excluded.⁶⁷

Beyond cynicism, the arguments based on popular sovereignty raise some doctrinal questions too. Namely, the HCC alludes to *popular sovereignty* to support the idea of *ultra vires* review (or, its sub-category called sovereignty control). However, the problem of competence conflicts between the state of Hungary and the EU belongs to the realm of *state sovereignty*: some Hungarian authors call this approach to be a doctrinal catachresis.⁶⁸ I would not be that strict but rather prefer to say: the HCC has put its finger on the most interesting problem of the German case law in this regard. However, it did so probably by accident as the most relevant and recent findings of the GFCC has not been cited. At this point, the relevant German case law must briefly be overviewed.

The role of the democracy principle in the *ultra vires* review and especially the identity review, is strongly connected to the eternity clause of the German Basic Law. Art. 79 (3) refers *inter alia*, to Art. 20 of the German constitution as inviolable – either by the constitution amending power or by the EU.⁶⁹ Art. 20 includes – among others – the principle of democracy and popular sovereignty. The right to vote is not explicitly mentioned at this point but in its case law, the GFCC established an even stronger link between the democracy principle of the eternity clause and the right to vote.

Already in its *Maastricht* judgement, the German Federal Constitutional Court left open the theoretical possibility of a constitutional complaint based on the right to vote in connection to the inviolable democratic principles of the eternity clause. Art. 38 para. 1 safeguards not only the

⁶⁵ It practically means that in Hungary, the approval of treaty-changes generally requires the same majority as constitutional amendments. It is a stricter condition compared to the German Basic Law which prescribes to apply the rules of constitutional amendments for such acts of approval only in so far as the treaty change demands a constitutional amendment at the same time: see Art. 23 (1) of the Grundgesetz.

⁶⁶ See Art. 8 (2) of the Basic Law.

⁶⁷ Art. 8 (3) a) of the Basic Law. The prohibition was introduced and more times reaffirmed exactly by the Constitutional Court in the nineties yet. By codifying this in the Basic Law, the possibility of constitutional referendums is absolutely excluded.

⁶⁸ *N. Chronowski/A. Vincze* (note 51), 116.

⁶⁹ See also Art. 23 (1) of the German Basic Law.

right to vote but the “fundamental democratic content of this right” as well – as the Court concluded (para. 61).

The relationship between the right to vote and the principle of democracy occurred more concretely in the context of the Lisbon Treaty. Several proceedings were initiated against the ratification of the Treaty and the related legislative changes, including a constitutional amendment. Some applicants alluded to the principle of democracy and the statehood of Germany, citing the *Maastricht* judgement and alluding to their “right to democracy” derived from the right to vote. Contrary to the *Maastricht* judgement, this time the Court found the complaints admissible but unfounded (paras. 168, 193) – at least concerning the amendment of the constitution (para. 207). On the one hand, the Court admitted that the right to democratic participation might be violated if the state authority is reorganised in a way that the will of the majority actually cannot effectively rule (para. 210).

Later, in 2011, the GFCC identified the budget authority of the Bundestag also to be a part of the constitutional identity of Germany pursuant to the eternity clause of Art. 79 (3) of the Basic Law connected to the principle of democracy.⁷⁰ The literature is divided about the tendency of mixing the eternity clause, democratic principles and subjective rights in the Court’s case law.

Some authors welcome the establishment of the “right to democracy” as a ground for such individual claims.⁷¹ Others oppose the establishment of a “pouvoir constituant négatif” flowing from individual rights,⁷² and point out to the theoretical controversy of the “right to democracy”: namely, fundamental rights are exactly guarantees for individuals against the democratic majority decisions of the state (of many individuals). This way, the “right to democracy” may motivate politicians to choose the easier way and initiate processes before the Constitutional Court instead of fight for getting the democratic majority with the instruments of politics.⁷³ Ultimately, the “right to democracy” has the potential to basically change the relation between the state (the democratic majority) as a potential oppressor and the individuals protected by their fundamental rights. Namely, they will be able to validate their “right to democracy” also against actors who are far from

⁷⁰ BVerfG (Federal Constitutional Court) 7.9.2011, *Euro-Bailout* decision, BVerfGE 129, 124, para. 127.

⁷¹ D. Murswiek (note 31), 704 et seq.

⁷² C. Schönberger (note 31), 1163.

⁷³ M. Steinbeis, Staunenswertes aus Karlsruhe: zum OMT-Urteil des BVerfG, June 2016, Verfassungsblog: <<http://verfassungsblog.de>>.

the legitimising democratic majority, for example, against international or intergovernmental bodies.⁷⁴

In the Lisbon ruling, the GFCC also declared that Art. 79 para. 3 guaranteed not only the essence of democracy but also the sovereign statehood of Germany (para. 216). However, the Court reaffirmed that the EU did not require an absolute sovereignty transfer: rather, the transfer of powers to the EU was being strictly limited by the eternity guarantee (paras. 219, 230, 235).

Finally, the most recent judgement of the GFCC in the *OMT* case not only reaffirmed but also extended the right to democracy. However, the GFCC accepted the arguments of the CJEU – that the *OMT* programme of the ECB was not *ultra vires*,⁷⁵ but at the same time, it reaffirmed its consistent approach that the precedence of union law could be overwritten by national constitutional law. More precisely, by the eternity clause with special regard to the democratic principles and by the share of competences ruled by the relevant Act of Approval and the EU-clause of the German Basic Law (paras. 114-132).

The *OMT* ruling of the GFCC reflects a paradigm shift in so far as the “right to democracy” based on the link between the right to vote and democratic legitimacy being extended. It is a strong argument not only in relation to the strictly understood constitutional identity but it might also be alluded concerning *ultra vires* EU-acts with respect to the EU clause (Art. 23) of the German Basic Law.⁷⁶ The GFCC clearly declares that

“in order to secure the possibility of exercising democratic influence in process of the European integration, citizens generally have a right guaranteeing that a transfer of sovereign powers occur only in the ways envisaged by the Basic Law:”

in its provisions on the transfer of powers to the EU and on constitutional amendments (para. 134). Summarised, it seems that for the GFCC, the democratic principles of the eternity clause and the right to vote might be a

⁷⁴ See E. R. Zivier, Das OMT-Urteil des Bundesverfassungsgerichts. Anspruch auf Demokratie und Aufwertung der politischen Staatsorgane, RUP 52 (2016), 153.

⁷⁵ Case C-62/14 (*Peter Gauweiler and others v. Deutscher Bundestag*), ECLI:EU:C:2015:400.

⁷⁶ See M. Wendel, Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH, ZaöRV 74 (2014), 634.

basis not only for an identity review but also for an *ultra vires* review (para. 145) as they are guarantees for the emergence of popular sovereignty.⁷⁷

The HCC neither mentions the *OMT* case in the reasoning, nor makes any detailed considerations about the possible “right to democracy” and its relationship to the transfer of powers to the EU. Regarding the reference to Art. B) and the sovereign statehood it is especially striking that popular sovereignty has not been set up in the illustrative list of the elements of the suddenly created constitutional identity.⁷⁸ The reason for that might be the pursuit of a theoretical distinction between sovereignty- and identity review. Or, – more probably – it was the Court’s unreasonable adherence to the “achievements of the historical constitution” by defining constitutional identity: the principle of popular sovereignty just would not fit into this, so it has been relegated to the realm of (state) sovereignty control.⁷⁹

Another difference to the German case law is the systematic relationship between the identity review and the *ultra vires* reviews. The German Federal Constitutional Court has developed these instruments in more decisions through decades. Even if their exact boundaries are not always clear and the emphases are changing through the different pieces of the case law, but still, these concepts have been filled with substantial, dogmatical content. On the contrary, the Hungarian Constitutional Court established these three kinds of reviews without any significant doctrinal background in its former case law, in one single judgement – specifying each one only in 2-3 paragraphs in the reasoning. Therefore, their relationship to each other is more than blurry.

László Blutman has made an important remark regarding this problem. He argues that the HCC considers the difference between identity and sovereignty control to be the following: sovereignty is codified in the constitution while identity (or at least some elements of it) might be outside of the Basic Law.⁸⁰ Therefore, the Court wants to protect the two subjects with

⁷⁷ This approach was most recently reaffirmed in the PSPP reference of the GFCC. See German Federal Constitutional Court, (*Anleihenkaufprogramm der EZB*), BVerfGE 2 BvR 859/15, para. 50.

⁷⁸ In detail see point 3. below.

⁷⁹ The reference to the historical constitution occurs only in the preamble (National Avowal) and in the interpretation rule (Art. R) of the Basic Law, so in my view, the significance and the normativity of these “achievements” have been far overestimated in this decision. Moreover, the doctrinal consistency is also sacrificed on the altar of the “achievements of the historical constitution”. The reference to this blurry term may open the door before bringing in extra-constitutional elements into the scope of “constitutional identity”.

⁸⁰ See the HCC’s references to the acknowledged nature of constitutional identity, to the historical constitution and to the “historical, linguistic and cultural traditions of Hungary” (paras. 65-66 of the judgement), in detail see point 3. below.

two completely different tools.⁸¹ The uncertain, broadly understood constitutional identity might be dangerous from the point of view of the effectiveness of EU law. Namely, this approach reserves the possibility to allude to Art. 4 (2) TEU without borders, using it quasi as a “unilateral derogation”.⁸²

b) State Sovereignty and the Transfer of Competences

About the strictly understood state sovereignty, the Court said that by joining the Union, Hungary did not renounce its sovereignty but only made possible to jointly exercise some competences. By assessing the joint exercise of competences beyond the scope defined by the treaties, it shall be presupposed that Hungary has upheld its sovereignty – as the Court added, establishing the “presumption of maintained sovereignty”.

This concept was first used by Judge *András Zs. Varga* in his parallel reasoning attached to a former HCC decision that correctly refused a constitutional complaint of an opposition politician related to the initiation of another referendum on the EU refugee-quota system.⁸³ *Zs. Varga* mixed identity and sovereignty by stating that

“in the event of a dispute, the reservation of sovereignty should be presumed in order to protect the member state’s constitutional [sic!] identity admitted by Art. 4 (2) TEU”.⁸⁴

He also mentioned some situations, when this presumption should be applied. Following – but not citing – the *Maastricht* decision of the GFCC (especially its headnote 5), he took the example of *clausula rebus sic stantibus*. Further he mentioned situations that violate or endanger the inviolable essential content of fundamental rights – without specifying such a situation or giving any example (paras. 23–24). The composition of the population of the country surely belongs to the realm of reserved sovereignty, especially regarding that the EU-accession of a new – even very small – member state

⁸¹ *L. Blutman* (note 19), 11.

⁸² *M. Dobbs*, *The Shifting Battleground of Article 4 (2) TEU: Evolving National Identities and the Corresponding Need for EU Management?*, *European Journal of Current Legal Issues* 21 (2015).

⁸³ AB decision No. 3130/2016 (VI. 29) (ABH 2016, 795). The constitutional complaint was refused on formal grounds, because the initiating MP has been considered not to be affected personally.

⁸⁴ At the reference to Article 4 (2) TEU, the term “constitutional identity” is used instead of the correct wording “national identity”. Parallel reasoning of *A. Zs. Varga* to AB decision No. 3130/2016 (note 83), para. 22.

also requires the sovereign decision of the other member states – he concluded (para. 31).

However, the majority reasoning of the identity decision No. 22/2016 has not taken over *Zs. Varga's* specifications regarding the presumption of reserved sovereignty. In the lack of such a restrictive list, it might be understood as a general presumption for any competence transfer to the EU. However, this is not that easy; especially taking into account the exclusive and shared competences of the EU and Art. E (1) of the Hungarian Basic Law that contains the explicit command to contribute to the creation of the European unity.⁸⁵

The next sentence of the reasoning makes a strange curve by stating that according to the Basic Law, sovereignty is the ultimate source of competences but not a competence itself: on the other hand, the term “reserved sovereignty” was used in relation to competence transfer just in the previous sentence.⁸⁶

aa) The Hypocritical Denial of Reviewing EU Law

The German Federal Constitutional Court's case law from a competence focused point of view has been aptly summarised by *Sven Simon*: identity review concerns the borders of the *constitutionally transferable*, the *ultra vires* review directs to the adherence to the limits of *already transferred* competences. Therefore it logically follows that the actual subject of the identity review is always a piece of national legislation or administrative act that implements or approves EU-law,⁸⁷ and it is to be measured primarily to the national constitution: the identity clause of Art. 4 (2) TEU rather plays a legitimating background role here.

On the contrary, the *ultra vires* review logically and necessarily focuses to EU acts⁸⁸ which are to be measured to the whole system of the share of competences regulated by the Treaties and the attached protocols.⁸⁹ Therefore, examining the national legislation in the frames of an *ultra vires* review does not make much sense as it would mean that a national law (implementing an *ultra vires* EU act) would be measured to EU primary law.

⁸⁵ *N. Chronowski/A. Vincze* (note 51), 115 et seq.

⁸⁶ *V. Kéri/Z. Pozsár-Szentmiklósy* (note 22), 13.

⁸⁷ *S. Simon*, Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess, 2016, 90, 78. My italics.

⁸⁸ *T. Drinóczy* (note 41), 6.

⁸⁹ Similarly e. g. *J. Bast*, Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's *Ultra Vires* Review, GLJ 15 (2014), 174.

However, the Hungarian Constitutional Court rather illogically suggests such an approach as in its analysed identity-decision, it has been expressly emphasised that neither the identity nor the sovereignty control could direct to the revision of EU-law, concerning either its validity or its primer application (para. 56). It follows that only national legislation would be left as possible subject: but that simply makes no sense. While the German Federal Constitutional Court obviously refers the *ultra vires* review of EU acts – only insofar as “these acts provide the basis of actions taken by German authorities”,⁹⁰ – the Hungarian Constitutional Court did not dare to say the obvious anomaly.⁹¹ Namely, as the Hungarian law on the Constitutional Court does not allow the norm control over EU or international acts; the HCC does not have the competence to review EU law being already in effect.⁹² Of course, if the HCC admitted that, the whole decision on identity review and sovereignty control would lose its sense and relevance.

The Court did not even try to use some tricks in order to establish its competence; for example, by specifying whether Hungarian administrative or legislative acts as “products of the joined exercise of competences”⁹³ could be reviewed. In the identity decision, the HCC simply states: it wants to control whether EU acts hurt Hungary’s sovereignty, without examining the EU acts themselves. And what more mysterious is: the Court says nothing about the possible consequences of such a review. If the declaration not to review EU law either regarding its validity or its primer application could be taken seriously (see para. 56 of the decision), then no consequences could logically come into play. But this statement could hardly be taken seriously. As Judge *István Stumpf* also pointed out in his parallel reasoning: by examining whether an EU act is *ultra vires*, the Court necessarily examines the validity of this act at the same time (para. 103).

Of course, the revision of EU secondary law by national courts is not unproblematic at all, regarding that the Treaty on the Functioning of the European Union (TFEU) grants exclusive jurisdiction to the CJEU for reviewing EU acts and legislation. A few years before the GFCC established the *ultra vires* review in its *Maastricht* decision, the Luxembourg Court had already delivered a decision on the matter. According to its *Foto-Frost* doctrine, national courts may consider the validity of Community acts, however, such acts could not be declared as invalid by the national courts them-

⁹⁰ *OMT* reference (note 5), para. 23.

⁹¹ Similarly *V. Kéri/Z. Pozsár-Szentmiklósy* (note 22), 12.

⁹² See § 24 of Act CLI of 2011 on the Constitutional Court.

⁹³ *N. Chronowski/A. Vincze* (note 51), 108.

selves, as this power is reserved to the CJEU.⁹⁴ No wonder that this doctrine does not appear in the HCC's ruling. Contrary to the present one-sentence reference, a detailed analysis of the case law of the CJEU would have made it difficult to avoid the topic of issuing a preliminary reference. Instead, the HCC highlights the role of domestic constitutional law in conferring effectiveness to EU law.

bb) A Slight and Controversial Reference to the Principle of Conferral

By referring to the *Kloppenburg* decision of the GFCC from 1987 (see footnote 12), the HCC actually alludes to the principle of conferral without going into details (para. 32).

Namely, the German constitutional dogmatic verifies the GFCC's competence for an *ultra vires* review with the derived nature of EU law. The primacy of EU law concerns only the primacy of application, which is based (and at the same time, limited) by the empowerment of the German Basic Law.⁹⁵ It is reflected also in the wording of the *Maastricht* ruling of the GFCC:

“If, for example, European institutions or governmental entities were to implement or to develop the Maastricht Treaty in a manner no longer *covered by the Treaty in the form of it upon which the German Act of Consent is based*, any legal instrument arising from such activity would not be binding within German territory. German State institutions would be prevented by reasons of constitutional law from applying such legal instruments in Germany. Accordingly, the German Federal Constitutional Court must examine the question of whether or not legal instruments of European institutions and governmental entities may be considered to remain within the limits of the sovereign rights *accorded to them*, or whether they may be considered to exceed those limits.”⁹⁶

The German doctrine of *ultra vires* review can be summarised that actually, the standard for *ultra vires* review is the EU primary law itself; however, it is referred through the “bridge-function”⁹⁷ of the empowering provision of national constitutional law and the democratic legitimacy behind it.

Related to the *Kloppenburg* decision, the HCC only remarks that as the member states are the lords of the treaties, the emergence and primacy of EU law is up to their domestic empowerment provisions ultimately (para.

⁹⁴ Case C-314/85, (*Foto-Frost v. Hauptzollamt Lübeck-Ost*), E.C.R. 1987, 04199, paras. 14-17. See also point III. 2. b) bb) below on this matter.

⁹⁵ *S. Simon* (note 87), 85.

⁹⁶ *Maastricht* decision (note 2), para. 106. My italics.

⁹⁷ *S. Simon* (note 87), 85.

32). However, there are some points that have been left out of consideration by the HCC.

First, at the time of the *Kloppenburg* decision, the European Union did not exist in its present form. So, some arguments of the decision – strongly related to the statement cited by the HCC – are not valid anymore: for example, the share of competences and the EU’s “sovereignty” as a legal person under international law have been significantly changed since then.⁹⁸ However, it would not be such a big problem in itself as the GFCC itself still regularly alludes to its *Kloppenburg* decision.

Exactly here comes the second problem. The developments of the German case law since the cited *Kloppenburg* decision are absent from the HCC’s reasoning. The most important example is the *Honeywell* decision of the GFCC (see footnote 5): here the German Federal Constitutional Court reaffirmed the principle of conferral (para. 55) but at the same time it has set out a quite strict system of criteria in order to apply the *ultra vires* review in the spirit of openness towards European law (*Europarechtsfreundlichkeit*, para. 58). First, the CJEU is

“to be afforded the opportunity to interpret the Treaties [...] in the context of preliminary proceedings” (para. 60).

A further requirement is that the EU institutions should have acted *manifestly* outside the competences conferred to them. The GFCC considered a transgression of competences to be manifest if it happened

“in a manner specifically violating the principle of conferral (Art. 23.1 of the Basic Law), the breach of competences is in other words sufficiently qualified”.

Finally, the impugned act has to be

“*highly significant in the structure of competences* between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law” (para. 61, my italics).

However, these interim restrictions are not even mentioned by the Hungarian Constitutional Court and the HCC itself has not set up any requirements for exercising sovereignty review either.

The most significant ones are the third and the fourth controversies. Namely, if the principle of conferral is really taken so seriously by the HCC, then why does it establish the fundamental rights, identity, and sovereignty reviews primarily to Art. 4 (2) TEU and to the case law of other member states’ constitutional courts (paras. 46, 54) instead of the Hungarian

⁹⁸ See para. 58 of the *Kloppenburg* decision (note 12).

constitution itself? Why does the EU clause of the Hungarian Basic Law appear only as an interpretive assistance in a decision which is exactly about the Hungarian constitutional identity?

And finally, by referring to the principle of conferral, an important difference between the German and the Hungarian legal system should be taken into account. Conferring powers to the EU usually happens on the highest level: Treaty changes that affect the share of competences between member states and the EU mostly and logically require not only reforms on the level of the ordinary legislation but also a respective constitutional amendment. For example, in Germany, the famous *Maastricht* and *Lisbon* rulings were delivered in connection to constitutional reforms, also amending the EU clause (Art. 23) of the German Basic Law.

The case of Hungary was different: the only relevant EU related constitutional amendment was made before the EU accession. As there was no general rule in the constitution regarding the transfer of sovereignty in the frames of international organisations, a special EU-clause has been implemented into the old constitution⁹⁹ in 2002, that has practically been taken over by the new Basic Law.¹⁰⁰ The Lisbon Treaty was promulgated in a simple law (adopted by two-third majority), while the constitution had been amended only at a technical point.¹⁰¹ Exactly the lack of any significant constitutional revisions made it possible for the Constitutional Court to review the constitutionality of the Lisbon Treaty, regarding that the Court never had the competence to review constitutional amendments, but only simple laws. So, the Court reviewed the promulgation law and found no violation of the constitution.¹⁰²

At the time of the Lisbon ruling, the prohibition of reviewing constitutional amendments was based merely on the self-restraint of the HCC:¹⁰³ meanwhile, the substantial review of constitutional amendments has explic-

⁹⁹ Act LXI of 2002 and § 2/a of the old constitution. In detail see *P. Sonnevend*, *Offene Staatlichkeit: Ungarn*, in: A. von Bogdandy/P. Cruz Villalón/P. M. Huber (eds.), *Handbuch. Ius Publicum Europeum*, Bd. II, 2008, paras. 22-30.

¹⁰⁰ Art. E) of the new Basic Law. The wording is the same regarding the “joint exercise of competences with EU institutions and other member states”, “to the extent necessary”. Treaty changes shall still be adopted by the two thirds majority of the National Assembly – this rule has remained unchanged too. Compared to the old § 2/A, the extra provision of Art. E) is that EU law may lay down generally binding rules of conduct” (but only within the necessity requirement laid down by the very same Article).

¹⁰¹ The *nullum crimen sine lege* principle had been amended with a reference to EU law. See Act CLXVII. of 2007.

¹⁰² AB *Lisbon* decision 143/2010 (note 9).

¹⁰³ In detail see *B. Bakó* (note 63), 105 et seq.

itly been forbidden.¹⁰⁴ This fact is significant especially in the light of the following solemn statement of the HCC's analysed identity decision:

“Respecting and safeguarding the sovereignty of Hungary and its constitutional identity is a must for everybody (including the National Assembly contributing to the European Union's decision-making mechanism and the Government directly participating in that mechanism), and, according to Art. 24 (1) of the Fundamental Law, the principal organ for the protection is the Constitutional Court” (para. 55).

The question occurs, how the Court intends to fulfil this important task if it is not entitled to review either directly EU law or any constitutional amendments that would transfer too much competences to the EU in a concrete case. If the parliament decides to amend the EU clause of the Basic Law to renew the extent of conferral in the future – either related to a treaty change, or without that – such amendment will not underlie sovereignty and identity control, because the Court does not have the power to review it. This is an important difference regarding the effectiveness of sovereignty and identity review, compared to that of the GFCC.

To summarise the controversies: the HCC introduced new legal instruments in order to protect national constitutional principles and sovereignty against EU law, but by doing so, it relied upon EU law. So, in the HCC's understanding, EU law allows the HCC to apply identity and sovereignty review which may be directed only against national legislation, moreover merely against ordinary laws. That is not the most logical and effective way of the protection of national constitutional identity against EU measures, I suppose.

c) “Constitutional Dialogue” as It Is Imagined in Hungary: The CJEU Was Not Asked by the HCC but Only by the Government

Although the HCC emphasises the importance of constitutional dialogue in the analysed decision (paras. 33 and 46), it proves to have a quite specific understanding of it. It seems that the Court considers the selective listing of other member states' case law without actual analysis and legal comparison (paras. 34-44) to be a contribution to this dialogue. On the other hand, the

¹⁰⁴ See the Fourth Amendment of the Basic Law and its present Art. 24 (5): “The Constitutional Court may review the Fundamental Law or the amendment of the Fundamental Law only in relation to the procedural requirements laid down by the Fundamental Law for its making and promulgation.”

Court does not find it necessary to request a preliminary ruling from the CJEU. Even the mere opportunity of a preliminary request does not occur in the reasoning: neither regarding the present constitutional interpretation, nor with reference to the future applications of identity or sovereignty control.

It is not that difficult to guess why the Court did not want to turn to the CJEU or at least explain why it did not find this step to be necessary. A possible reason is the allocation of the concrete question from the abstract constitutional interpretation. The other, more telling one is that a preliminary ruling would probably declare some obvious reference points that could not be avoided later. On the contrary, the present unspecified, general and superficial reasoning of the HCC is practically more useful as it may be flexibly reused or concretised in the future.

Anyway, a parallel process was running before the CJEU in the subject, but with a bit different emphasis. Namely, the Hungarian and the Slovakian governments issued an action for annulment against the Council decision on the relocation of asylum applicants within the member states.¹⁰⁵ This case was pending before the CJEU when HCC delivered its decision. However, the HCC mentioned neither this process nor the arguments of the parties.

In the nullity action before the CJEU, the government did not argue with the national identity and Art. 4 (2) TEU, or with the principle of sovereignty. Neither the idea of a fundamental rights exception occurred concerning the possible “mass-expulsions”, nor the argument of *ultra vires* nullity was explicitly mentioned in the motion. The Hungarian government considered the Council decision to be unlawful primarily because of the violation of the principle of proportionality. Using the proportionality argument implicitly presupposes that the Hungarian government admitted that the EU had competence to regulate the topic. The government also resented that national parliaments did not have the opportunity to issue an opinion according to Protocols 1 and 2, as the challenged EU act was not adopted in ordinary legislative procedure.

Months after the HCC’s “identity-decision”, the CJEU dismissed the actions of Hungary and Slovakia in September 2017. The CJEU declared that the Council had the competence to decide on the temporary relocation of asylum seekers. As the motions did not focus on Art. 4 (2) TEU and national identity, nor the CJEU did so: the reasoning concentrates on the propor-

¹⁰⁵ Joined cases no C-643/15 and C-647/15 (*Slovakia and Hungary v. Council of the European Union*) (note 7). This nullity process is distinct from the infringement case led by the Commission against Hungary, Poland and the Czech Republic because of the non-compliance to the Council decision on the relocation of refugees, see MEMO 17/1577.

tionality of the challenged decision. The CJEU found that Art. 78 (3) TFEU was a proper basis for the Council to adopt the contested decision and it was necessary to respond effectively to the sudden inflow of third country nationals.¹⁰⁶

At this point it is worth pointing out that the Hungarian Constitutional Court still has not answered the concrete question of the commissioner for fundamental rights: whether the constitutional prohibition of collective expulsion is violated through the reallocation of refugees foreseen by the Council decision. The decision about the second part of the case will be interesting for this reason too. How will HCC react to the CJEU's ruling that logically excludes further *ultra vires* arguments? Will the HCC choose the strategy of withdrawal with the maintained possibility of opening a new front soon? Or, will it turn to the last instrument left by applying the identity review?

3. Identity Review: Decoupled from the Constitution Itself?

About the identity review, the HCC first alludes to Art. 4 (2) TEU, referring to the EU's obligation to respect "national (constitutional) identity"¹⁰⁷ The term suggests that national and constitutional identity are considered to be identical in the HCC's view, but the Court does not further specify the conceptual relationship between constitutional identity and Art. 4 (2) TEU.¹⁰⁸ At this point, it is worth to refer to the German Federal Constitutional Court again, as its *Lisbon* ruling is eagerly cited in this part of the HCC decision too.

The GFCC itself is not consequent in this question either. In its *Lisbon* ruling, the Court emphasised that the duty of the EU to respect the member states' national identity and the duty under the German constitution to respect constitutional identity "goes hand in hand" (see footnote 3, para. 240). A few years later in its *OMT* reference, the GFCC already argued that these two are fundamentally different and the concept of national identity under Art. 4 (2) TEU

¹⁰⁶ CJEU decision in joined cases C-643/15 and C-647/15 (*Slovakia and Hungary v. Council of the European Union*) (note 7).

¹⁰⁷ AB decision No. 22/2016 (note 4), para. 62 – the word "constitutional" in parentheses is only present in the original, Hungarian version of the decision.

¹⁰⁸ Only in a dissenting opinion, but the argument of constitutional identity has even been raised against the ECHR, beyond the scope of EU law. See the dissenting opinion of *A. Zs. Varga* to AB decision 23/2015 (VII. 7.), ABH 2015, 1043, para. 90. In detail see also *T. Drinóczi* (note 60), 23 et seq.

“does not correspond to the concept of constitutional identity within the meaning of Art. 79 (3) GG but reaches far beyond”.¹⁰⁹

Later, in the case of *Mr. R.*, the GFCC returned to the EU-friendly version and stated that identity review was “inherent in the concept of” Art. 4 (2) TEU and “corresponds to the special nature of the European Union” (para. 44). This statement has been reaffirmed in the *OMT* judgement (para. 140).

The HCC follows the approach of the Lisbon ruling, and regards constitutional identity and the subject of Art. 4 (2) TEU the same. However, the HCC does not explain its reasons unfortunately. Such an explanation – especially in relation to the German case law – could not ignore the most important difference between the German and the Hungarian constitutional system in this regard: the absence of an identity clause in the Hungarian Basic Law.

a) The Meaning of Constitutional Identity in a Constitution Without an Identity Clause

There is no eternity or identity clause in the Hungarian constitution. The planned seventh constitutional amendment would not have exactly defined the concept of constitutional identity either. At least references to the territory, population and state organisation were foreseen, but this would have appeared in Art. E) as a special limit to the “joint exercise of competences with the EU” so it rather seemed to be a legal basis for “sovereignty control” instead of a substantial identity clause. The attempt of the constitutional amendment raises a controversial question, as *Nóra Chronowski* and *Attila Vincze* pointed out. If constitutional identity as a limit for EU competences already existed without being mentioned by the Basic Law – as the Constitutional Court interpreted it –, why was it necessary to amend the constitution with it? And *vice versa*, if it required a constitutional amendment, how could it still be derived from the constitution without the amendment?¹¹⁰

The HCC did not define what constitutional identity means – except the tautological remark that under constitutional identity, the Court under-

¹⁰⁹ *OMT* reference (note 5), para. 29. On this matter, see also the detailed critical analysis of *M. Claes/J.-H. Reestman*, The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case, GLJ 16 (2015), 931 et seq.

¹¹⁰ *N. Chronowski/A. Vincze* (note 51), 104.

stands the constitutional self-identity of Hungary (para. 64). Moreover, the decision explicitly declares that the constitutional identity of Hungary is not a static and closed list of values. The Court only sets up an exemplary list of the elements of the constitutional identity: e. g. fundamental freedoms, separation of powers, republican state form, parliamentarism, equality. The list is complemented with a rather blurry reference to the achievements of the historical constitution (para. 65). The Court further added that the elements of constitutional identity would be specified by the Constitutional Court on a case by case basis (para. 64).

This daring vindication of definitive power concerning the constitutional identity is especially interesting in the light of the Court's consequent self-restrained case law regarding the review of constitutional amendments. For now, the Court has declared many times not to be competent to review constitutional amendments, and even if it had the competence, there would have been no standards for measuring such amendments.¹¹¹ However, admitting the existence of certain constitutional identity logically requires constitutional amendments to be in compliance with this identity.¹¹² This problem does not even occur in the majority reasoning – it is only referred in the parallel reasoning of Judge *András Zs. Varga* but he links the unchangeable constitutional identity to the blurry “achievements of the historical constitution” in a questionable way (para. 112).

Commentators convincingly criticise the decision because it links constitutional identity to the historical constitution instead of the text of the Basic Law.¹¹³ Further, the Court notes that constitutional identity is not constituted but only acknowledged by the Basic Law, therefore it could not be waived by way of an international treaty: the deprivation of constitutional identity could be imagined only in the case of the termination of independent and sovereign statehood (para. 67). From this argumentation it seems that the Court considers constitutional identity to be distinct from the text of the Basic Law:¹¹⁴ however, the idea of over-constitutional principles – that should logically limit the constitution amending power too – was consequently absent from the Court's settled case law until now.¹¹⁵

As Judge *István Stumpf* points out in his parallel reasoning (para. 109), by referring to these acknowledged, over-constitutional principles, the Court actually established an “invisible Basic Law”. That might be even

¹¹¹ In detail see *B. Bakó* (note 63), 105 et seq.

¹¹² Similarly *T. Drinóczi* (note 41), 16.

¹¹³ See e. g. *T. Drinóczi* (note 41), 14.

¹¹⁴ *V. Kéri/Z. Pozsár-Szentmiklósy* (note 22), 14.

¹¹⁵ Similarly *L. Blutman* (note 19), 11.

more uncertain than the “invisible constitution” of the early, activist Constitutional Court in the nineties.¹¹⁶ Moreover, *László Blutman* identified another significant problem too: distinguishing between constitutional identity and the constitution itself implies that EU law violating constitutional identity is not necessarily unconstitutional at the same time. This way, the identity review could easily lose its normative basis.¹¹⁷

By creating such over-constitutional standards, the Court established very broad competences for itself to decide what is constitutional and what not – separated from the text of the Basic Law. If used in a consequent way, this review-competence should not only apply to competence transfers to the EU, but it may be an instrument against the constitution-amending, or even constitution-making power of the parliament too.¹¹⁸ But only theoretically. In reality, the logic breaks on the aforementioned fact that the Court has no means against the two latter.

b) The HCC and the GFCC Against the EU: With Different Weapons, on Another Terrain

The strong powers vindicated against the EU would logically require having the same strong position against the national parliament which could change the extent of conferral at any time theoretically. This requirement is obviously fulfilled in Germany – and clearly not in Hungary. The Hungarian Constitutional Court just tries to follow the “bold rebel” GFCC, without having the same weapons, and without realising the difference between the situations.

¹¹⁶ The idea of the invisible constitution stems from *László Sólyom*, the former president of the Constitutional Court. As he formulated, the “invisible constitution” has been built by the Constitutional Court itself, through the establishment of a system of coherent case law and self-reference. *L. Sólyom, Az Alkotmánybíróság első éve* (The First Year of the Constitutional Court), in: *L. Sólyom: Az alkotmánybíráskodás kezdetei Magyarországon* (The Beginning of the Constitutional Jurisdiction in Hungary), 2001, 27.) The idea divided the Hungarian legal scholarship, see e. g. the criticism of *G. Halmai, Az aktivizmus vége? A Sólyom-bíróság kilenc éve* (The End of Activism? The Nine Years of the Sólyom-Court), *Fundamentum* 1999/2, 24, or, *C. Varga, Megvalósulatlanul megvalósult jogállam? (Rule of Law Coming True Unrealised?)*, in: *C. Varga, Jogfilozófia az ezredfordulón* (Legal Philosophy at the Millennium), 2004, 349. Even *László Sólyom* admitted in an interview that “our constitutional jurisdiction is on the border of constitution writing in difficult cases, in order to keep the coherence”. A “nehéz eseteknél” a bíró erkölcsi felfogása jut szerephez (The Moral Perception of the Judge Has a Role in “Difficult Cases”) – an interview with *László Sólyom* by *Attila Gábor Tóth*, *Fundamentum* 1997/1, 37.

¹¹⁷ *L. Blutman* (note 19), 10.

¹¹⁸ Similarly *N. Chronowski/A. Vincze* (note 51), 118.

The most striking example of ignoring contextual differences is the following sentence in the HCC's reasoning:

“The protection of constitutional self-identity may be raised in the cases having an influence on the living conditions of the individuals, in particular their privacy protected by fundamental rights, on their personal and social security, and on their decision-making responsibility” (para. 66).

This is an almost literal quotation of the GFCC's *Lisbon* ruling (footnote 3, para. 249), without alluding to it.

In the original context, the German Federal Constitutional Court discussed how the undermining of the democracy principle (as protected by Arts. 20 and 79 (3) of the German Basic Law) through the European integration could be avoided (paras. 244-249). The second part of the cited (or rather copied) sentence also explains a lot, by referring to

“political decisions that rely especially on cultural, historical and linguistic perceptions and which develop in public discourse in the party political and parliamentary sphere of public politics” (para. 249).

The Hungarian Constitutional Court did not take over this part of the sentence literally but probably has been inspired by that too, as it made a short remark to the historical, linguistic and cultural traditions of Hungary afterwards (para. 66). That might sound similar to the GFCC's wording for the first sight but actually, already established *traditions* have not much to do with *perceptions* that develop democratic public discourse.

The cited sentence in its entirety has a clear meaning in the German legal system in the light of the *Solange* case law (footnote 1), of Germany's self-definition as a social state according to Art. 20 (1) of the German Basic Law, and especially of the abovementioned debate about the “right to democracy”.¹¹⁹

But in the Hungarian Constitutional Court's ruling, this reference to social security and to fundamental rights is unreasonably broad and totally out of context. As *István Stumpf* pointed out in his parallel reasoning (para. 108), this is simply a copy of the GFCC's statement, without being derived from the Hungarian Basic Law. It is no wonder that the Court did not relate this sentence to the democracy principle: it would have been difficult as democracy has not even been identified as an element of constitutional identity by the Court – for now. Sad, but as it is an illustrative list, it might be extended in the future.

¹¹⁹ See point III. 2. a) above.

IV. Conclusion: The Difference Between Comparative Constitutional Reasoning and Political Adaptation

After all, while the Hungarian Constitutional Court often alludes to the “constitutional dialogue between member states” in its analysed identity-decision, the HCC seems to maintain more lively dialogue with the governing parliamentary majority than with the GFCC or the CJEU. With this decision, the Court obviously wanted to help the parliamentary majority after it failed to adopt a constitutional amendment about constitutional identity.¹²⁰ Such a constitutional amendment would have perfectly fitted into the government’s main political product: the fight against “Brussels” and the refugee reallocation system. It is very telling what Prime Minister *Orbán* said in an interview, after the Constitutional Court delivered its identity-ruling:

“When I heard this, I first tipped my hat to the decision of the Constitutional Court and the Hungarian constitutional judges; and then I threw my hat up in the air, because I’ve been given an enormous amount of help in the battle which I’ll have to fight in Brussels.”¹²¹

However, it seems, this “enormous amount of help” was still not enough for the Prime Minister. After the Fidesz won its third two-third majority at the election in April 2018, they amended the constitution already at the end of June. It was not a surprise that the provisions of the failed constitution amending proposal from October 2016 were included literally in this amendment.¹²²

Anyway, constitutional lawyers have much less ground to throw their hats in the air by reading this ruling. The Constitutional Court tried to avoid the appearance of direct political adaptation, therefore it eagerly cited other European constitutional courts’ and highest courts’ case law, primarily, that of the GFCC. But what the HCC actually did is everything but a thorough comparative analysis: it is more like setting a mere list. Most “comparative” arguments are hanging in the balance: the sentences taken from the relevant decisions of the GFCC often do not make sense in the context of the Hungarian legal environment, and the HCC has not even

¹²⁰ Similarly *G. Halmai*, The Hungarian Constitutional Court and Constitutional Identity, *Verfassungsblog*, 10.1.2017, <<https://verfassungsblog.de>>.

¹²¹ Interview with Prime Minister *Viktor Orbán* on the Kossuth Rádió programme “180 Minutes” on 5.12.2016, interview by *Éva Kocsis*, available in English at the government’s website: <<http://www.kormany.hu>>.

¹²² Arts. 2, 3 and 5 of the Seventh Amendment of the Hungarian Basic Law (28.6.2018).

made a try to interpret the German case law in a reasonable way. The HCC established the fundamental rights-, sovereignty- and identity review in one single decision without clearly differentiating between them.

It is worth noting that the established three reviews have not been applied by the Court, as the concrete question of the commissioner for fundamental rights still has not been answered. The Court created some instruments for deciding on the constitutionality of the refugee quota system but did not use any of them.

Practically, these reviews do not have too much chance in the concrete case – even not after the seventh amendment of the Basic Law. Since the judgement of the CJEU in the nullity action on the topic (footnote 7), the Constitutional Court will probably not openly go against the findings of the CJEU in dogmatical interpretations of EU law and competences. Taking a substantial approach will be much easier. However, fundamental rights review could be used in an EU law-conform way only after a preliminary reference, as it will presuppose the interpretation of Art. 19 of the Charter. According to Art. 267 TFEU, the CJEU should be involved – even if the HCC is not willing to admit that, or at least, to address this possibility. Namely, before deciding the question whether the relocation of refugees is contrary to the prohibition of mass expulsion, the exact content of Art. 19 of the Charter must be cleared – and it can only be cleared by the CJEU.

Finally, the existence of the identity review would logically require the HCC to control the constitution-amending power too. It is hard to protect the constitutional identity (whatever it means), if the constitution-amending power (the two-thirds majority of the parliament that has just been re-elected) could change any constitutional provisions without limits. The Constitutional Court itself waived its last chance to substantially review constitutional amendments regarding the fourth amendment of the Basic Law.¹²³ It is a bit controversial, that the Court now vindicates strong powers against the EU, while it is obviously not able to guard the mysterious constitutional identity against the constitution amending power on the national level.

¹²³ AB decision No. 12/2013 (V. 24), ABH 2013, 390.