

# Practical Questions Concerning the Relationship Between a Member State's Constitution, EU Law and the Case-Law of the CJEU

## Decision No. 2/2019. (III. 5.) AB of the Constitutional Court of Hungary\*

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### Abstract

*In 2018, the Hungarian Parliament amended the Fundamental Law, which, among others, contains the principle of non-refoulement, and stipulated at constitutional level that “a non-Hungarian national shall not be entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution.” Partly due to this new provision of the Fundamental Law and partly based on other Hungarian laws, the European Commission initiated an infringement procedure against Hungary. According to the Hungarian Government, in this procedure the Commission misinterprets the Fundamental Law, therefore (inter alia) the authentic interpretation of this provision was requested from the Constitutional Court. In its Decision No. 2/2019. (III. 5.) AB, the Constitutional Court did not only interpret the provision in question, but it also elaborated on certain matters regarding its own competence in relation to EU law, as well as making relevant findings also in relation to Hungary's constitution and the interpretation thereof in accordance with the EU law, based on the doctrine of ‘constitutional dialogue’. In this paper, I analyze this decision of the Constitutional Court in detail.*

**Keywords:** Constitutional Court of Hungary, constitutional dialogue, non-refoulement, right to asylum, EU law and national law.

### 1. The Facts of the Case

The Hungarian Parliament adopted the Seventh Amendment of the Fundamental Law during its sitting on 20 June 2018. The amendment contained several elements that may be clearly distinguished from one another. The part of this amendment concerning the organization of the State set out at the level of the

\* Only the cited sentences of the decision can be considered as the official standpoint of the Constitutional Court.

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Fundamental Law that the highest-level body of the administrative justice system would be the separate Administrative Supreme Court, replacing the Curia of Hungary in this area of jurisdiction.<sup>1</sup> Furthermore, the amendment makes clear that in interpreting laws and their objectives courts shall rely on the preamble and the justification of the relevant law.<sup>2</sup>

In addition, the amendment set forth several important provisions with respect to fundamental rights. (i) It strengthened the constitutional protection of private life, including in particular, the privacy of the home, and set out expressly that the freedom of expression and the right of association shall not be exercised to the detriment of others' private and family life or home.<sup>3</sup> (ii) Furthermore, the Seventh Amendment prohibited habitation in public areas.<sup>4</sup> (iii) Finally, the Seventh Amendment set out at the level of the Fundamental Law that no foreign population shall be settled in Hungary; a foreign national, may only live in the territory of Hungary under an application individually examined by the Hungarian authorities. As regards the asylum procedure, the Fundamental Law now sets out that

“A non-Hungarian national shall not be entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution.”<sup>5</sup>

At the same time, Article XIV(3) of the Fundamental Law, which codified at constitutional level the principle of *non-refoulement* as an international obligation undertaken by Hungary and an element of universally recognized customary law, remained effective and unchanged (only its numbering has been modified).

Finally, the Seventh Amendment of the Fundamental Law contains important provisions also in respect of the relationship between Hungarian law and EU law: Article E(2) setting out the constitutional basis for Hungary's EU membership now incorporates a new provision to the effect that the

“Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.”

1 Subsequently, Act LXI of 2019 provided that Act CXXX of 2018 on the administrative courts will not enter into force and the Eighth Amendment of the Fundamental Law also changed the relevant provisions of the Fundamental Law.

2 See Article 28 of the Fundamental Law.

3 See Article VI(1) of the Fundamental Law.

4 See Article XXII(3) of the Fundamental Law. Having regard to this fact, the Constitutional Court could not subsequently find in its Decision No. 19/2019. (VI. 18.) AB that the misdemeanor of habitation in public area is contrary to the Fundamental Law as according to Article 24(5) of the Fundamental Law, the Constitutional Court may review the Fundamental Law only in relation to the procedural requirements (laid down in the Fundamental Law for adopting and promulgating such amendments).

5 See Article XIV(4) of the Fundamental Law.

In addition, the new Article R(4) sets out that “The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.”<sup>6</sup> Such amendments are closely related to the Constitutional Court’s *Decision No. 22/2016. (XII. 5.) AB*, which provided that

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

Following the adoption of the Seventh Amendment to the Fundamental Law, on 20 July 2018 the European Commission sent a formal notice to Hungary, for according to the Commission, the Fundamental Law and another Hungarian law<sup>7</sup> also raise the question of incompatibility with EU law. The Commission argued that the abovementioned Article XIV of the Fundamental Law violates Articles 2(d) (definition of refugee) and 2(e) (definition of refugee status) and 13 (refugee status shall be granted to a person who qualifies as a refugee) of Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, in the light of Article 18 (right of asylum) of the Charter of Fundamental Rights. According to the interpretation of the European Commission given to the Amendment to the Fundamental Law,

“any asylum seeker who transited another country prior to arriving to Hungary, be it a third country or another Member State, would become ineligible to be granted an asylum, unless he or she could prove that he or she was subject to persecution or to the imminent risk of it in the transit country.”

In connection with the Commission’s formal notice, the Government requested the Constitutional Court’s interpretation of the relevant provision of the Fundamental Law, as according to the Government, it was the first time an EU institution interpreted a Member State’s constitution. The Commission’s interpretation was considered to be erroneous by the Government. The Government requested that the Constitutional Court examine whether it may be established that: the Fundamental Law is both the basis for Hungary’s legal system and the source of legitimacy for all other sources of law in effect in Hungary, including EU law. Furthermore, the Government raised the question: what is the relationship between the authentic interpretation of the Fundamental Law by the Constitutional Court and the interpretation thereof by any other body

6 The attempt to set up an Administrative Supreme Court based on historical traditions is indirectly related also to this provision.

7 Act VI of 2018 on amending certain acts relating to measures to combat illegal immigration.

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(in this instance, the European Commission).<sup>8</sup> Finally, the Government requested that the Constitutional Court interpret the new Article XIV(4) of the Fundamental Law.

## 2. The Decision of the Constitutional Court

In its decision, the Constitutional Court first examined the relationship between the Fundamental Law and EU law. The Constitutional Court argued that according to Article R(1) of the Fundamental Law, the Fundamental Law is the basis of Hungary's legal system and Article E(1) specifies the country's participation in the development of European unity as a state goal. Article E contains the constitutional basis upon which Hungary participates, as a Member State, in the EU, and which serves as a permanent basis for the enforcement of the EU law as internal law.<sup>9</sup> According to the decision, with regard to the competences of the Constitutional Court, the international treaties according to Article E(2) and (4) of the Fundamental Law shall become, after their entry into force, a part of Union law, nevertheless, they shall also retain their origin as international treaties.<sup>10</sup> However, Article E of the Fundamental Law is *lex specialis* compared to Article Q, which is applicable to international law.<sup>11</sup> Union law as internal law, nevertheless, does not fit into the hierarchy of the domestic sources of law: it is a set of laws to be applied mandatorily on the basis of the constitutional order incorporated in the Fundamental Law and which may not be annulled by the Constitutional Court.<sup>12</sup> According to the Constitutional Court, some restrictions on the extent of EU law and the joint exercise of competences can also be identified in Article E of the Fundamental Law. Such restrictions include that the joint exercise of competences "shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure."<sup>13</sup> The joint exercise of competences as set out in the Fundamental Law is not general: it always refers to specific competences, exercised to the extent necessary. Parliament may take the initiative to play an active role in monitoring this 'necessary extent'.<sup>14</sup> Furthermore, in its *Decision No. 22/2016. (XII. 5.) AB*, the Constitutional Court found that in assessing the extent of joint exercise of the competences, it shall be presumed in accordance with the principle of the retention of the sovereignty that Hungary agreed to the joint exercise of competences only to the necessary extent. Moreover, even in the framework of the joint exercise of competences to the necessary extent, the limits set out in the Fundamental Law shall be respected, including in particular, the protection of fundamental rights and the inalienable elements of sovereignty as

8 Motion of the Minister of Justice, p. 2.

9 Decision No. 2/2019. (III. 5.) AB, Reasoning [14]-[15].

10 Id. Reasoning [18].

11 Id. Reasoning [19].

12 Id. Reasoning [20].

13 Article E(2) of the Fundamental Law.

14 Decision No. 143/2010. (VII. 14.) AB, ABH 2010, 698, 708-709.

set out in Article E(2).<sup>15</sup> Based on the above, the Constitutional Court concluded that the limitations enshrined in the Member States' constitutions determine the extent to which the application of EU law enjoys priority in the Member States over domestic law. Accordingly, under Article R(1) of the Fundamental Law, the applicability of EU law in Hungary is based on Article E of the Fundamental Law.<sup>16</sup>

As regards the interpretation of the Fundamental Law, the Constitutional Court pointed out the following. The Constitutional Court's interpretation of the Fundamental Law (just as the interpretations of the constitutions by other constitutional courts in the Member States) is of *erga omnes* character, and all bodies or institutions shall respect it in their own procedures as the authentic meaning of the constitution.<sup>17</sup> Incidentally, other domestic and international bodies, courts or institutions may interpret the Fundamental Law in the course of their own procedures, but such an interpretation may not deviate from the authentic interpretation of the Constitutional Court.<sup>18</sup> The Constitutional Court also found that in order to 'create European unity', the Fundamental Law shall be interpreted where possible in accordance with EU law and Hungary's obligations under international agreements.<sup>19</sup>

Finally, upon the Government's request, the Constitutional Court interpreted the sentence of Article XIV(4) of the Fundamental Law according to which

"A non-Hungarian national shall not be entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution."

The Constitutional Court found that the wording 'not entitled to' only means that the right to asylum shall not be regarded as a subjective right, but such applicant may still have a claim protected by fundamental rights to have his or her application examined and considered by the relevant authority in accordance with the applicable laws.<sup>20</sup> As such, while the applicant does not have a subjective right to asylum under the Fundamental Law if he or she arrives *via* a country where he or she was not subject to persecution or the imminent danger of persecution, in the course of the assessment of the application submitted, international commitments made by Hungary, in particular the principle of *non-refoulement* shall nevertheless be respected.<sup>21</sup> It should be noted that this prohibition is also set out in Article XIV(3) of the Fundamental Law.

15 Decision No. 2/2019. (III. 5.) AB, Reasoning [23].

16 Id. Reasoning [25].

17 Id. Reasoning [36].

18 Id. Reasoning [35].

19 Id. Reasoning [37].

20 Id. Reasoning [44].

21 Id. Reasoning [46].

### 3. Critical Remarks

In my view, the Constitutional Court's decision contains findings exceeding the scope of the three questions answered, therefore, these questions are worth investigating for they go beyond the specific decision in question.

#### 3.1. *The Nature of EU Law and the Competences of the Hungarian Constitutional Court*

The answer to the first question is merely stating the obvious: EU law was created by the Member States' express consent (conclusion of international treaties) and the Member States' constitutions provide the constitutional basis for the states to join the EU. While the Member States did not deem it necessary to formulate a separate 'Europe clause' at constitutional level upon the establishment of the European (Economic) Community, by now virtually all the constitutions of the EU Member States include a similar provision. As far as the Hungarian legal system is concerned, this means that according to Article R(1) of the Fundamental Law, "The Fundamental Law shall be the foundation of the legal system of Hungary" and the Fundamental Law (in its Article E) authorizes accession to the EU and the joint exercise of certain competences.

However, the Constitutional Court made a particularly relevant finding in respect of the exercise of its own competences stating that

"with regard to the competences of the Constitutional Court, the international treaties according to Article E(2) and (4) of the Fundamental Law shall become, after their entry into force, parts of the Union law, nevertheless they shall retain their origin as international treaties."<sup>22</sup>

This is crucial because the Act on the Constitutional Court confers several powers on the Constitutional Court in connection with international treaties, including above all verifying compatibility (of the law promulgating the international treaty) with the Fundamental Law either in the context of *ex post* constitutional review or a constitutional complaint. However, the Constitutional Court does not have such an express competence when it comes to EU law. This is the case notwithstanding the fact that in its *Decision No. 22/2016. (XII. 5.) AB* the Constitutional Court expressly stated that it may examine upon a relevant motion – in the course of exercising its competences – whether the joint exercise of powers under Article E(2) of the Fundamental Law would violate human dignity, another fundamental right, the sovereignty of Hungary or its identity based on the country's historical constitution.

In its *Decision No. 1053/E/2005 AB*, the Constitutional Court still took the view that "notwithstanding their treaty origins, it intended to deal with the founding and modifying documents of the European Union as non-international treaties."<sup>23</sup> This finding was clearly the result of the Constitutional Court's

<sup>22</sup> Id. Reasoning [18].

<sup>23</sup> Decision No. 1053/E/2005 AB, part III.2., ABH 2006, 1824, 1827-1828.

intention not to assess EU law questions on the merits. Subsequently, the Constitutional Court also recognized that a complete exclusion of EU law from its review may in fact be pointless and, where appropriate, even lead to harmful results, which is why it has subsequently 'softened' this approach in a number of respects. The most important one of these decisions was the Constitutional Court's *Decision No. 143/2010. (VII. 14.) AB* relating to the Lisbon Treaty<sup>24</sup> in which the Constitutional Court formally did not examine the constitutionality of the Lisbon Treaty, as a part of EU law, but that of the domestic promulgating act. Of course, this act included the promulgated international treaty, since the Hungarian legal system is of a genuinely dual-transformational character.

Therefore, in my view the abovementioned finding made by the Constitutional Court in its *Decision No. 2/2019. (III. 5.) AB* means that, due to the fact that in respect of EU law norms deriving from international agreements and by the way covered by Article E, Article E applies as a *lex specialis* compared to Article Q that regulates the relationship between the international law and the domestic law, the Constitutional Court's competences in relation to international law under Article Q shall (or may) be applicable accordingly also in respect of the EU law. All this means that while the Constitutional Court may use all of its competences recognized in the Act on the Constitutional Court in order to assess an international law norm covered by Article Q, only a specific scope of such competences as indicated in the Constitutional Court's *Decision No. 22/2016. (XII. 5.) AB* applies in respect of EU law norms deriving from international agreements and covered by Article E. In this respect, the Hungarian Constitutional Court essentially came to a conclusion similar to the *Solange II* decision of the German Constitutional Court. In *Solange II* it was established as a sort of self-restriction that the German Constitutional Court has competences also in relation to EU law deriving from international law, yet it only intends to exercise such competences in *ultima ratio* cases.

### 3.2. Interpretation of the Fundamental Law in the Procedures of EU Institutions

According to Article 267 TFEU, the CJEU shall have exclusive jurisdiction to interpret the Treaties, and rule on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. This also means that the bodies and courts of the Member States (including the constitutional courts of the Member States) shall not decide on the validity or interpretation of EU law and that the CJEU's position may not be reviewed by the Constitutional Court. However, the TFEU does not and cannot authorize the CJEU to give an authentic interpretation of the Member States' national laws, including the Member States' constitutions. Such national laws may be interpreted authentically (and in certain cases exclusively) by the Member States' constitutional courts.<sup>25</sup>

24 Decision No. 143/2010. (VII. 14.) AB, ABH 2010, 698.

25 In Hungary, the Fundamental Law shall be interpreted by the Constitutional Court under Section 38(1) of Act CLI of 2011 on the Constitutional Court.

When interpreting EU law, the CJEU in most cases, takes into account the Member States' constitutional rules.<sup>26</sup> The case in which Member States' (constitutional) courts interpret Member State law is, however, essentially different from the previous cases. Indeed, EU law also sets out the principle of indirect effect meaning that the national court shall interpret Member State law in the light of the text and purpose of EU law,<sup>27</sup> also because the national court shall presume that the State has the intention to fully meet its obligation deriving from EU law.<sup>28</sup> However, the interpretation obligation does not require a *contra legem* interpretation of Member State law: the national court shall be obliged to interpret Member State law in accordance with EU law only to the extent that it is possible.<sup>29</sup>

In this respect, in its *Decision No. 2/2019. (III. 5.) AB*, the Constitutional Court rendered its decision essentially in relation to the principle of indirect effect deriving from EU law and its relationship with the Member State's constitution. The decision contains an expressly Europe-friendly finding where it states that "the laws and the Fundamental Law should be interpreted – as far as possible – in a way that allows the substance of the norm to comply with the law of the European Union."<sup>30</sup> This formulation is essentially identical to the finding made by the CJEU in several cases, including *Marleasing*. The interpretation of the Fundamental Law in accordance with EU law, however, is limited by the Fundamental Law itself, including its text [*e.g.* Article E(2)] and substance established by way of interpretation, *e.g.* the already mentioned *Decision No. 22/2016. (XII. 5.) AB*.

However, the decision also contains a significant restriction of competences where it makes clear that only Hungary's Constitutional Court shall have the jurisdiction to interpret the Hungarian constitution and that the authentic interpretation given by the constitutional court must be respected not only by the national, but also by the international and EU institutions and bodies.<sup>31</sup> This finding is closely connected with the concept of 'constitutional dialogue' as described consistently by the Hungarian Constitutional Court, *i.e.* the Constitutional Court considers the theoretical findings of the CJEU and ECtHR to be applicable.<sup>32</sup> This is also confirmed by several decisions of the Hungarian Constitutional Court in which the Hungarian Constitutional Court decided to suspend its own procedure until the completion of litigation pending before the

26 One of the few exceptions is *e.g.* Article 6(3) TEU, according to which fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

27 *E.g.* Judgment of 10 April 1984, *Case C-14/83, von Colson*, ECLI:EU:C:1984:153, para. 26.

28 *E.g.* Judgment of 16 December 1993, *Case C-334/92, Wagner Miret*, ECLI:EU:C:1993:945, para. 20.

29 *See e.g.* Judgment of 13 November 1990, *Case C-106/89, Marleasing*, ECLI:EU:C:1990:395, para. 8: "as far as possible". Similarly *e.g.* László Blutman, *Az Európai Unió joga a gyakorlatban*, HVG ORAC, Budapest, 2010, p. 350.

30 *Decision No. 2/2019. (III. 5.) AB*, Reasoning [37].

31 *Id.* Reasoning [38].

32 *Decision No. 30/2015. (X. 15.) AB*, Reasoning [35].



CJEU.<sup>33</sup> However, constitutional dialogue is necessarily a two-way process: it also requires the EU institutions to take into account the authentic interpretation of national law given by the Member State's constitutional court when interpreting the national law, e.g. in the context of an infringement procedure. Such an interpretation may be tested in *infringement procedure C-821/19*, pending before the CJEU, which is closely related to the Seventh Amendment of the Fundamental Law according to the application.<sup>34</sup> A further potential aspect of the doctrine of constitutional dialogue is that in similar cases the Member State concerned may be obliged, under its own constitutional rules, to provide the CJEU with the authentic interpretation of the given norm during the procedure.

### 3.3. *The First Test of the 'Cooperative Interpretation of the Fundamental Law': Interpretation of Article XIV(4)*

Even though the most interesting element of the decision is the interpretation of Article XIV of the Fundamental Law, the finding itself is in fact the same as the explanatory notes attached to the Seventh Amendment of the Fundamental Law. The latter states that the Fundamental Law does not prevent Parliament from ensuring refugee status by law to asylum-seekers who arrived to the territory of Hungary through a 'safe transit country' where they were not subject to persecution or to the threat of persecution.<sup>35</sup> The Fundamental Law sets out only that providing such refugee status is not an obligation deriving from the Fundamental Law, but is much rather at the discretion of the legislature. Meanwhile, all applicants shall have the right to a fair administrative procedure, as guaranteed under Article XXIV of the Fundamental Law in connection with the asylum procedure. In connection with this interpretation, it is worth noting that the provision of the Fundamental Law (as construed by the Constitutional Court) was not found to be in violation with international obligations by the Venice Commission.<sup>36</sup> While the Constitutional Court's finding may seem questionable based on the sole assessment of Article XIV(4), taking into account the

33 See e.g. Order No. 3198/2018. (VI. 21.) AB, Order No. 3199/2019. (VI. 21.) AB and Order No. 3200/2018. (VI. 21.) AB.

34 *Case C-821/19, Commission v. Hungary* (pending).

35 It is interesting to mention that on 14 May 2020 the CJEU found that the placing of asylum seekers in a transit zone at the Serbian-Hungarian border shall be classified as detention under the laws of the EU, and that detention may not under any circumstances exceed four weeks. See Judgment of 14 May 2020, *Joined Cases C-924/19 PPU and C-925/19 PPU, Országos Idegenrendészeti Főigazgatóság Dél-Alföldi Regionális Igazgatóság*, ECLI:EU:C:2020:367. After the ruling the Government of Hungary decided to close these transit zones immediately. In November 2019 the Grand Chamber of the ECtHR found that "the applicants [staying in the transit zone] were not deprived of their liberty within the meaning of Article 5", meaning that the placing of asylum seekers in a transit zone (at least in the case of the applicants) cannot be considered as detention under the ECHR. *Ilias and Ahmed v. Hungary* (GC), No. 47287/15, 21 November 2019, para. 249. For an analysis of the judgment of the ECtHR see Ágnes Tóttós, "The ECtHR's Grand Chamber Judgment in *Ilias and Ahmed Versus Hungary*: A Practical and Realistic Approach. Can This Paradigm Shift Lead the Reform of the Common European Asylum System?", *Hungarian Yearbook of International Law and European Law*, Vol. 8 (2020).

36 CDL-AD(2018)013, Venice Commission and OSCE/ODIHR Joint Opinion on the Provisions of the So-called "Stop Soros" Draft Legislative Package Which Directly Affects NGOs, 25 June 2018.

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constitutional principle of *non-refoulement*, the official justification of the Seventh Amendment, as well as the principle and practice of the Europe-friendly interpretation obligation as specified by the Constitutional Court, in my view it can be established that the Constitutional Court applied its interpretation rules efficiently by providing an interpretation of Article XIV(4) that is fully in line with Hungary's obligations deriving from EU law and international law. Therefore, it is of exceptional significance that the interpretation of the Fundamental Law given by the Constitutional Court be authentic, binding both the legislature and those applying the law.

However, the question of whether the relevant provisions of the Fundamental Law are in compliance with international and EU obligations is independent from the compatibility of possible lower level domestic norms. Notwithstanding the fact that the Fundamental Law does not prohibit explicitly the refugee status in cases where the applicant arrives from a 'safe transit country', if the legislature adopts an act to that affect, such an act may be examined not only by the CJEU (*e.g.* in the context of an infringement procedure) or the ECtHR (in the case of certain applicants), but also by the Constitutional Court. Indeed, under Act CLI of 2011 on the Constitutional Court (amongst others) that court acting in the individual case may also request the examination of whether the rule applied in the given case is contrary to the international agreements. The examination of such matters, however, fell completely beyond the scope of the Constitutional Court's *Decision No. 2/2019. (III. 5.) AB*, for, owing to the special nature of the proceedings, this decision could only extend to the interpretation of the applicable provisions of the Fundamental Law.