

# Hungary

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Since 2015, migration has become a crucial issue for Hungary.<sup>1</sup> In 2015, the biggest wave of migrants ever reached the country. The number of asylum claims submitted in Hungary multiplied a hundredfold;<sup>2</sup> however, these claims were largely abandoned, as the applicants left the country within a few days. Nonetheless, in 2015 Hungarian state officials began calling asylum seekers ‘illegal migrants’,<sup>3</sup> and Act CXLII of 2015 on the amendment of Act LXXX of 2007 on Asylum was adopted to enact the ‘state of crisis caused by mass migration’ and to make it possible to renew the state of crisis indefinitely at six-month intervals in order to protect the sovereignty and cultural identity of the Hungarian nation. This contribution covers how the state institutions (Parliament, ombudsman, National Election Committee, Supreme Court ‘Curia’, and the Constitutional Court) were involved in handling the migration crisis.

As a first step in 2015, the government launched a countrywide campaign. A national consultation on ‘illegal immigration’ and terrorism was initiated and Hungarian language billboards were displayed, which read, “If you come to Hungary, you have to obey our laws!” or “If you come to Hungary, you shouldn’t take the jobs of Hungarians!”<sup>4</sup> Soon afterwards, a governmental decree declared a list of ‘safe countries of origin’ or ‘safe third countries’ from which asylum applications can use an accelerated procedure,<sup>5</sup> and amendments<sup>6</sup> provided for the erection of a fence on the southern border. Within a few months, a 175-km-long border fence was built on the Hungarian-Serbian border, and new laws made the crossing of the closed border without proper papers illegal, criminalizing illegal entry into the country. The new laws allowed the government to set up ‘transit zones’ within sixty meters of the national borders for processing applications for

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1 This review covers the years 2015–2017.

2 N. Boldizsár, ‘Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation’, *German Law Journal*, Vol. 17, No. 6, 2016, p. 1035. See also Information Note by the Hungarian Helsinki Committee, ‘Two Years After: What’s Left of Refugee Protection in Hungary?’, September 2017, available at: [www.helsinki.hu/wp-content/uploads/Two-years-after\\_2017.pdf](http://www.helsinki.hu/wp-content/uploads/Two-years-after_2017.pdf) (last accessed 28 March 2018).

3 Boldizsár, 2016, p. 1045.

4 See the English language official government website. Available at: [www.kormany.hu/en/prime-minister-s-office/news/national-consultation-to-be-launched-on-illegal-immigration](http://www.kormany.hu/en/prime-minister-s-office/news/national-consultation-to-be-launched-on-illegal-immigration) (last accessed 28 March 2018).

5 Governmental Decree 191/2015 on the national list of safe countries of origin and safe third countries.

6 Act CXXVII of 2015 on the establishment of temporary border security closure and on amending acts related to migration.

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entry to Hungary.<sup>7</sup> Asylum seekers are automatically detained<sup>8</sup> in the transit zones without any available legal remedies. Moreover, the government has started to transfer asylum seekers from open reception facilities to the transit zones, so that every asylum seeker would be within the transit zones.<sup>9</sup>

## 1. Introducing ‘State of Crisis Caused by Mass Migration’

In 2015, based upon a vague constitutional authorization,<sup>10</sup> the government declared ‘a state of crisis caused by mass migration’ in two southern regions of Hungary,<sup>11</sup> allowing it to shut down roads and speed up asylum court cases. Later, the ‘state of crisis caused by mass migration’ was extended to four more counties.<sup>12</sup> This extension would have expired in March 2016, but in that month a new decree<sup>13</sup> was adopted to declare ‘a nationwide state of crisis caused by mass migration’ for another 6 months, allowing tougher measures for police and the army to patrol borders and search for illegal migrants throughout the country. In September 2016, the nationwide state of crisis was further extended until March 2017.<sup>14</sup> As justification, the government argued that Slovenia, Croatia and Serbia had implemented extraordinary measures on their borders, allowing entry only under Schengen regulations, i.e. those wishing to enter must have valid passports and visas. In the government’s view, it was uncertain what reactions these measures could create from the refugees and ‘illegal migrants’ who were already in

7 Act CXL of 2015 on the amendment of certain Acts in connection with the handling of the mass migration.

8 The European Court of Human Rights in the case of *Ilias and Ahmed v. Hungary*, Application no. 47287/15, judgment of 14 March 2017 held the detention unlawful.

9 The Hungarian Helsinki Committee requested the European Court of Human Rights to apply interim measures in the case of some children and women and the Court granted it. *Hersi Muhyadin and Others v. Hungary*, Application no. 22934/17, Request submitted by the Hungarian Helsinki Committee on 24 March 2017, the request granted on 27 March 2017. *Nalubega v. Hungary*, Application no. 23321/17, Request submitted by the Hungarian Helsinki Committee on 27 March 2017, the request granted on 27 March 2017.

10 Under Article 15 (1) of the Hungarian constitution called the Fundamental Law ‘the Government shall exercise powers which are not expressly conferred by laws on another state body’.

11 Governmental Decree 269/2015 on declaring a state of crisis caused by mass migration and on the rules in connection with the declaration, continuation and termination of the state of crisis (in counties Bács-Kiskun and Csongrád).

12 Governmental Decree 270/2015 on declaring a state of crisis caused by mass migration in counties Baranya, Somogy, Zala and Vas and on the rules in connection with the declaration, continuation and termination of the state of crisis.

13 Governmental Decree 41/2016 on declaring a state of crisis caused by mass migration to the entire territory of Hungary and on the rules in connection with the declaration, continuation and termination of the state of crisis.

14 Governmental Decree 272/2016 on the amendment of the Governmental Decree 41/2016.

these countries.<sup>15</sup> Later, the state of crisis was further extended until September 2017 without justification.<sup>16</sup>

Furthermore, a constitutional amendment was proposed by the prime minister, so that Hungary alone could determine asylum policy. The argument for adopting the constitutional amendment was that it would be necessary in order to manage the adverse results of the migration crisis, including threats of terrorism. The original text of the Fundamental Law adopted in 2011<sup>17</sup> contained a detailed set of prescriptions for the state authorities to respond to an emergency. It specified five instances (state of national crisis, state of emergency, state of war, state of preventive defence, unexpected attack) that allowed special measures to be enforced for national security reasons. The constitutional text contained an exhaustive list of those situations when the country was disturbed or endangered, but it did not provide for suspension of constitutional rights in other situations.

The new constitutional amendment, called the Sixth Amendment of the Fundamental Law,<sup>18</sup> included Article 51/A on the 'state of terrorist threat' in the constitution. It provides for special emergency powers in case of a high threat of terrorist attack. The government may request the Parliament to declare a state of terrorist threat after a terrorist attack or during a period of high threat of terrorism. However, the government can start exercising emergency powers as soon as it makes the request for Parliament to declare the state of emergency. It is for the government to decide on how to respond to the emergency: it may pass decrees that can deviate from the laws on public administration, on the Hungarian Defence Force, on the police, or on the national security agencies. The measures introduced by the government remain in force until Parliament decides to declare a state of terrorist threat, but for a maximum of fifteen days. During this period, even the army can be used to assist the police and the national security guard.

In connection with the Sixth Amendment, the parliamentary majority altered several statutory provisions. Act LVII of 2016 amended the laws on the police, national security services and defence in connection with the new emergency situation, providing specific authorization to those forces to use new powers in the event of a terror threat. The amendment to the defence legislation lays down the measures that the government can introduce after requesting the Parliament to declare a state of terrorist threat. These include, for instance, the imposition of a curfew, traffic restrictions, prohibition of organizing events and demonstrations in public spaces, evacuation of the population, stricter border controls and increased control of the internet, letters, and baggage and mail traffic. The government may rule on overtime in public administration and on filling posts in public administration, in defence management, and the Hungarian Defence

15 Website of the Hungarian Government, available at: [www.kormany.hu/hu/belugyminiszterium/parlamenti-allamtitkarsag/hirek/indokolt-a-valsaghelyzet-fenntartasa](http://www.kormany.hu/hu/belugyminiszterium/parlamenti-allamtitkarsag/hirek/indokolt-a-valsaghelyzet-fenntartasa) (last accessed 28 March 2018).

16 Governmental Decree 36/2017 on the amendment of the Governmental Decree 41/2016.

17 For more on this, see G. A. Tóth (Ed.), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law*, CEU Press, New York-Budapest, 2012.

18 Sixth Amendment of the Fundamental Law, adopted on 14 June 2016.

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Force. The government may also introduce military air traffic control and deploy defence forces as well as law enforcement forces to protect the country and the critical infrastructure of public services. After the Parliament has declared a terrorist threat situation, the aforementioned measures can also include a measure requiring a permit to the travel to, across, or out of certain parts of the country.<sup>19</sup>

The 'terrorist threat' is a vague notion; its interpretation is up to the government. And as the prime minister put it, "[a]ll terrorists are basically migrants."<sup>20</sup> Accordingly, a Syrian EU resident, Ahmed H., who took part in 2015 Rösztke unrest,<sup>21</sup> has been convicted of committing an 'act of terror'. In Rösztke on the Hungarian-Serbian border, a violent clash happened between migrants and the Hungarian authorities one day after Hungary closed its border and tightened migration laws. Frustrated refugees tried to enter Hungary, throwing empty water bottles and stones at the police; the police responded with water cannons and tear gas. Ahmed H. admitted in court that he was involved in stone throwing. The court of first instance sentenced him to 10 years in prison, but the court of appeal has ordered a retrial in the case, citing inconsistent evidence in the original trial.<sup>22</sup>

Although the state of crisis caused by mass migration has been in place in at least some parts of Hungary since September 2015, Hungary has never registered its emergency with the Council of Europe as it is required to do under Article 15 of the ECHR.<sup>23</sup> The omission of this notification means that Hungary is not entitled to claim derogation when it is brought before the European Court of Human Rights.

## 2. The Hungarian Reaction to the EU Council Decision on the Quota System

In September 2015, an EU Council Decision was adopted, which introduced a quota system for the distribution and settlement of asylum seekers and migrants among the member states.<sup>24</sup> The EU refugee relocation system was believed by the Hungarian government to impose the model of multicultural society that the government opposes; hence, the parliamentary majority adopted an Act calling on

19 See e.g. the English language official government website, available at: [www.kormany.hu/en/news/parliament-has-incorporated-state-of-terrorism-threat-into-fundamental-law](http://www.kormany.hu/en/news/parliament-has-incorporated-state-of-terrorism-threat-into-fundamental-law) (last accessed 28 March 2018).

20 M. Kaminski, "All the Terrorists are Migrants": Viktor Orbán on How to Protect Europe from Terror, Save Schengen, and Get along with Putin's Russia', *Politico*, 23 November 2015, available at: [www.politico.eu/article/viktor-orban-interview-terrorists-migrants-eu-russia-putin-borders-schengen/](http://www.politico.eu/article/viktor-orban-interview-terrorists-migrants-eu-russia-putin-borders-schengen/) (last accessed 28 March 2018).

21 J. Reynolds, 'Migrant Crisis: Clashes at Hungary-Serbia Border', *BBC News*, available at: [www.bbc.com/news/world-europe-34272765](http://www.bbc.com/news/world-europe-34272765) (last accessed 28 March 2018).

22 L. Bayer, 'Szeged Appeals Court Orders Retrial in Case of Ahmed H.', *The Budapest Beacon*, 15 June 2017, available at: <https://budapestbeacon.com/szeged-appeals-court-orders-retrial-case-ahmed-h/> (last accessed 28 March 2018).

23 Council of Europe Treaty Office, 'Notifications', available at: [www.coe.int/en/web/conventions/notifications](http://www.coe.int/en/web/conventions/notifications) (last accessed 28 March 2018).

24 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

the government to initiate an action of annulment against the Council Decision before the Court of Justice of the European Union.<sup>25</sup> Accordingly, Hungary challenged the Council Decision.<sup>26</sup> Soon afterwards the European Commission opened an infringement procedure against Hungary<sup>27</sup> concerning its recently adopted legislation.

### 3. The Ombudsman's Petition on the EU Council Decision

In winter 2015, the Hungarian ombudsman turned to the Hungarian Constitutional Court over the issue of the EU relocation scheme. He asked the Court to interpret two constitutional provisions of the Fundamental Law. One of these articles prohibits collective expulsion, stating that foreigners staying in the territory of Hungary may only be expelled on the basis of a lawful decision (Article XIV(1)). The second is the so-called 'EU clause', which makes a limited transfer of the constitutional competences to the EU possible by virtue of the constitution and on the basis of international treaties (Article E(2)).

One of the issues asked by the ombudsman is whether Hungarian institutions can lend a helping hand in enforcing the 'illegal' expulsion decisions of other states. According to the ombudsman, after receiving a decision for expulsion from EU authorities, asylum-seekers have no chance to have their say against the move, which is against general EU legal principles. He argued that when the EU issues expulsion decisions for migrants en masse, this leads to collective expulsion, which is against basic EU treaties and that expulsion is only possible after processing applications on an individual basis. The ombudsman also claimed that the EU Council Decision violated the Geneva Convention relating to the status of refugees, by depriving applicants of their right to remain in the territory of the member state in which they made their application and by allowing their relocation to another member state. Last, but not least, the ombudsman suggested that, under the EU clause of the Fundamental Law, there are constitutional constraints as to the validity of the rules of the European Union in the Hungarian legal system. Accordingly, Hungarian institutions cannot enforce any EU measures that run into the Fundamental Law's human rights chapters. According to the ombudsman, it is the Constitutional Court, which, by interpreting the Fundamental Law, could empower itself to exercise *ultra vires* control by referring to powers granted to the European Union or to exercise control by referring to constitutional identity (Article 4(2) of the Treaty on the European Union). Thus, in the view of the ombudsman, the Fundamental Law protects the fundamental

25 Act CLXXV of 2015 on acting against the compulsory settlement quota system in defence of Hungary and Europe.

26 In its judgment in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* the CJEU dismissed the challenge by upholding the EU's right to oblige member countries to take in refugees.

27 The Commission has found the Hungarian legislation to be partly incompatible with EU law. European Commission Press Release, 'Commission Opens Infringement Procedure against Hungary Concerning Its Asylum Law', 10 December 2015, available at: [http://europa.eu/rapid/press-release\\_IP-15-6228\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6228_en.htm) (last accessed 28 March 2018).

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rights of the asylum seekers more than the EU law; therefore, the Hungarian Constitutional Court should be competent to declare secondary EU legislation inapplicable in the Hungarian legal order if and to the extent that they conflict with the national protection of human rights.

The ombudsman explained his move by saying that he sought to clear up legal concerns around the issue of the mandatory transfer of asylum seekers to the Hungarian territory. Although the ombudsman did not explicitly challenge the constitutionality of the Council Decision, the petition questioned its lawfulness.

#### **4. The Hungarian Quota Referendum**

Simultaneously, the government called for a referendum allowing the electorate to vote on the following question: “Do you want the European Union, without the consent of Parliament, to order the compulsory settlement of non-Hungarian citizens in Hungary?” Connected to this, a poster campaign was launched. Hungarian language billboards were displayed all over Hungary, which read, “Let’s send a message to Brussels, so that they can understand it as well.” On the top of the billboard, the text said, “Referendum 2016 against compulsory settlement.”

Citizens challenged the referendum question before the National Election Committee. In Hungary, the National Election Committee has the power to review the formulation and content of the referendum question. Its decision can be challenged before the Curia. The applicants raised concern over the question, particularly its inaccurate wording, contending that the notion of ‘compulsory settlement’ in the question does not exist either in Hungarian or in EU law. The terms used in connection with refugee matters are ‘transfer’ or ‘resettlement’. Despite these concerns, the referendum question was passed both by the National Election Committee and by the Curia. Therefore, in May 2016, the Hungarian Parliament adopted Parliamentary Resolution no. 8/2016 (V. 10.) and ordered the referendum.

#### **5. The Constitutional Court on the Quota Referendum**

In spring 2016, several applicants had asked the Court to declare the Parliamentary Resolution no. 8/2016 (V. 10.) unconstitutional. Under Article 8(2) of the Fundamental Law, national referenda may be held about “any matter within the tasks and competences of the Parliament.” The applicants’ main concern was that it was not within the Parliament’s power to pass such a resolution, since the referendum question affected EU common policy. Title V Chapter 2 of the Treaty on the Functioning of the European Union deals with policies on external border control, asylum and immigration as EU common policies. Consequently, the Hungarian Parliament has no direct competence over dealings between Hungary and the European Union on migration matters. The applicants also claimed that between the authentication of the question and the ordering of the referendum, circumstances had changed significantly in a manner that substantially affected the decision. On 4 May 2016, the European Commission presented legislative

proposals to reform the Common European Asylum System *inter alia* by providing “for tools enabling sufficient responses to situations of disproportionate pressure on Member States’ asylum systems” through a “corrective allocation mechanism.”

The Constitutional Court rejected the petitions on the basis that it only had the power to investigate the actions of Parliament, not the referendum question itself. Under the Act CLI of 2011 on the Constitutional Court, it is open to anybody to file a petition with the Court to review the constitutionality and lawfulness of the parliamentary resolution, but the scope of such constitutional review is limited by Section 33 of this Act. The Constitutional Court can examine the merits of the resolution if, between the authentication of the question and the ordering of the referendum, circumstances changed to a significant degree in a manner that may significantly affect the decision. The Court cannot examine the content of the referendum question itself.

Furthermore, the Court rejected the petitions on the grounds that the applicants did not have the right to challenge the resolution based on the arguments concerning the competencies of the Hungarian Parliament and the EU and the changed circumstances. They should instead have raised a constitutional right violation. With regard to the contention that the subject of the referendum concerned EU common policies, the Constitutional Court stressed that the merits of the referendum question should not be examined in the current proceedings.<sup>28</sup>

As the Constitutional Court’s decision upheld the parliamentary resolution, the referendum was held on 2 October 2016, but was invalid due to a low turnout: 41.32% of the Hungarian electorate casted valid votes in the referendum, less than the 50% threshold needed to validate the referendum. Although the prime minister claimed a victory,<sup>29</sup> and nearly 98% of those who took part supported the government’s call, the referendum was invalid.

## 6. Constitutional Amendment on Protecting Constitutional Identity

Subsequently, the prime minister proposed a new constitutional amendment to put the wished-for results of the referendum into the Fundamental Law, to define the “core element of the constitution, which is also a kind of check and limit to EU law.”<sup>30</sup> The Seventh Amendment leaned on ‘constitutional self-identity’ to gain exemption from EU law in the area of immigration. The Seventh Amendment would have added to the Fundamental Law the following sentence: “We hold that the defence our constitutional self-identity, which is rooted in our historical constitution, is the fundamental responsibility of the state.” Furthermore,

28 Alkotmánybíróság (AB) 12/2016. (VI. 22.) AB határozat (Hung.)

29 Viktor Orbán’s speech in which he claimed a referendum victory, 2 October 2016, available at: [www.miniszterelnok.hu/orban-viktor-sajtotajekoztatoja-a-nepszavazas-eredmenyhirdetese-utan/](http://www.miniszterelnok.hu/orban-viktor-sajtotajekoztatoja-a-nepszavazas-eredmenyhirdetese-utan/) (last accessed 28 March 2018).

30 Website of the Hungarian Government, ‘Non-Hungarians Cannot be Relocated to Hungary’s Territory’, 11 October 2016, available at: [www.kormany.hu/en/ministry-of-justice/news/non-hungarians-cannot-be-relocated-to-hungary-s-territory](http://www.kormany.hu/en/ministry-of-justice/news/non-hungarians-cannot-be-relocated-to-hungary-s-territory) (last accessed 28 March 2018).

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the EU clause would have been amended to emphasize that the exercise of the powers granted by the EU founding treaties must be in harmony with the fundamental rights and freedoms established in the Fundamental Law and must not curtail Hungary's inalienable right to determine its territory, population, or form of government.

The Seventh Amendment would have declared that it is the responsibility of every state institution to defend Hungary's constitutional identity. And last but not least, the refurbished Article XIV would have prohibited the settlement of foreign population in Hungary and regulate how foreign citizens, not including EEA citizens, might live in the territory of Hungary in accordance with the procedures established by the national Parliament, based on their documentation individually evaluated by Hungarian authorities.<sup>31</sup>

The governing majority no longer had its two-thirds majority in Parliament to amend the Fundamental Law, and political attempts to obtain extra votes had proven unsuccessful, including the attempt to pass the constitutional amendment. The so-called identity decision of the Hungarian Constitutional Court, however, achieved the required result.

## 7. The Identity Decision of the Constitutional Court

The decision of the Hungarian Constitutional Court on constitutional identity<sup>32</sup> introduced the notion of 'constitutional identity' into the Hungarian legal system. The decision<sup>33</sup> expressed that the common identity of the Hungarian people is equivalent to the constitutional identity of Hungary, which has not been created but only recognized by the Fundamental Law and, therefore, cannot be renounced by an international treaty.<sup>34</sup> The content of constitutional identity is to be determined on a case-by-case basis by the Constitutional Court. When the Court decides so, it should base its decision on the Fundamental Law. The Fundamental Law requires the judges to interpret the constitutional provisions in light of its Preamble called the 'National Avowal' and the 'achievements of the historical constitution' (Article R(3)).<sup>35</sup>

The concept of the historical constitution dates back to 1896, when Hungary (at that time part of the Austrian-Hungarian Empire) celebrated the millennial anniversary of the conquest of the territory of Hungary. At that time, a claim appeared that Hungary was the only nation in Central Europe to possess a thousand-year-old statehood built on the 'Millennial historical constitution'.<sup>36</sup> The

31 Available at: [www.parlament.hu/irom40/12458/12458.pdf](http://www.parlament.hu/irom40/12458/12458.pdf) (last accessed 28 March 2018).

32 Alkotmánybíróság (AB) 22/2016. (XII. 5.) AB határozat (Hung.), available at: [http://hunconcourt.hu/letoltések/en\\_22\\_2016.pdf](http://hunconcourt.hu/letoltések/en_22_2016.pdf) (last accessed 28 March 2018).

33 Although the ombudsman's petition contained several points (see earlier text), the Court dealt only with the issue of interpreting the EU clause and left the EU refugee relocation issue to another not-yet-adopted decision.

34 See note 32, III., para. 67.

35 *Ibid.*, para. 64.

36 J. M. Bak & A. Gara-Bak, 'The Ideology of a 'Millennial Constitution' of Hungary', *East European Quarterly*, Vol. 15, 1981, p. 307.



concept of the historical constitution is coupled with the Holy Crown doctrine, according to which the Holy Crown (allegedly the crown of St Stephen, the first Hungarian king) is seen as an ancient source of authority, a literal marker of collective Hungarian identity. Today the historical constitution and the Holy Crown feature prominently in the National Avowal. The Constitutional Court is deferential to the claim of the ruling majority, engraved into the Fundamental Law, in that the constitutional identity of Hungary is distinctively rooted in the historical constitution.

Even though the Court held that the constitutional identity of Hungary does not mean a list of exhaustively enumerated values, it nevertheless mentioned some of them without further clarifying their meanings:

freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, equality of rights, acknowledging judicial power, the protection of nationalities that are living with us.<sup>37</sup>

In addition, the decision declared without further explanation that the protection of constitutional identity may also emerge in connection with areas that shape citizens' living conditions, in particular, the private sphere of their responsibility, personal and social security, protected by fundamental rights, as well as in cases where the linguistic, historical and cultural traditions of Hungary are affected.<sup>38</sup> The sentence has been taken word for word from the Lisbon decision of the German Federal Constitutional Court, in which the Federal Constitutional Court held that when achieving European unification, sufficient space should be left for the Member States to outline economic, cultural and social living conditions.<sup>39</sup> The Court argues that this applies especially to areas that

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.<sup>40</sup>

This sentence became part of the Hungarian decision without any argument justifying its presence in the text.

Furthermore, the Hungarian decision emphasizes that since the principal organ for protecting the Fundamental Law is the Constitutional Court, it is the task of the Court to defend Hungary's constitutional identity.<sup>41</sup> For this purpose, the Constitutional Court developed the fundamental rights-reservation review and the *ultra vires* review (composed of a sovereignty review and an identity review) to decide whether the EU respects the national identity of Hungary and the limits of their conferred competences. The Court based the fundamental

37 See note 32, III., para. 65.

38 *Ibid.*, para. 66.

39 Bundesverfassungsgericht BVerfG, 30 June 2009, [2 BvE 2/08].

40 *Ibid.*, para. 4.

41 See note 32, III., para. 55.

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rights-reservation review on the EU clause and Article I(1) of the Fundamental Law on the state duty to protect fundamental rights. It argued that as the state is bound by fundamental rights, this binding force of the rights is applicable also to cases where public power is exercised together with EU institutions or other Member States.

Concerning the *ultra vires* review, the Court stressed without going into detail that there are two main limits for conferred or jointly exercised competencies: they cannot infringe either the sovereignty of Hungary (sovereignty review) or Hungarian constitutional identity (identity review).<sup>42</sup> According to the judicial reasoning, there are many overlaps between sovereignty and constitutional identity; the two reviews need to be employed considering one another. In the Court's view, the concept of 'state sovereignty' (supreme power, territory and population) follows from Article B of the Fundamental Law, and the EU clause should neither empty Article B, nor should the exercise of powers (within the EU) result in the loss of the ultimate oversight possibility of the people over the public power. Therefore, the Court empowered itself to examine whether the joint exercise of competences with the EU infringes human dignity, other fundamental rights, the sovereignty of Hungary, or Hungary's identity based on its historical constitution.

Consequently, the political claim to an ethnocultural understanding of identity was transformed as the judicial understanding of constitutional identity by this decision. The Constitutional Court took upon itself the responsibility to determine the constitutional identity of Hungary and authorized itself to exercise identity control.

Between 2015 and 2017, several laws were adopted, amended, a referendum was held, the state of terrorist threat was added to the constitution and defined as a special legal order, and even the Constitutional Court delivered decisions in order to handle the 'migration crisis' in Hungary.

42 See note 32, III., para. 54.