Part VI
Hungarian State Practice

Constitutional Identity in Hungary

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Abstract

The concept of constitutional identity appeared in the Hungarian Constitutional Court's jurisprudence along with the fundamental rights reservation and the protection of sovereignty in 2016. This paper critically analyzis the interpretative issues raised by the Hungarian concept of constitutional identity as developed by the Constitutional Court and attempts to outline how the Hungarian notion relates to the doctrinal solutions established in other legal systems. To do so, the paper first places the events associated with the concept of identity in a chronological order; it then presents and analyses the two identity decisions adopted by the Constitutional Court thus far; and finally, it makes some concluding remarks on the possible future doctrinal development of the Hungarian concept of constitutional identity.

Keywords: constitutional identity, national identity, constitutional interpretation, Constitutional Court, Hungary

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1. Introduction

The Hungarian Constitutional Court (HCC) has consistently sought to ignore the EU law aspects of the cases before it: it has neither reviewed the constitutional conformity of EU law (apart from the amendment of the founding treaties) nor did it assess the conformity of national legislation with EU law.

With regard to the first point, in its decision on the constitutionality of the Lisbon Treaty, the HCC stated the following:

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> "The CJEU has jurisdiction to give an authentic interpretation of the founding and amending treaties of the European Union and of the legislation known as secondary or derived legislation, regulations, directives and other norms of European law.
> However, there is nothing to prevent the Constitutional Court from relying on the specific provisions of the founding and amending treaties of the European Union, and in this case the Treaty of Lisbon, in relation to the case before it, without giving or requiring their own interpretation."[1]

With regard to the second point, in *Decision No. 8/2011. (II. 18.) AB* on the dismissal of government officials without justification, the HCC confirmed that "the Constitutional Court has no jurisdiction to examine whether a [national] law violates Community law".[2]

Initially, it seemed that the entry into force of the new constitution of Hungary, the Fundamental Law of Hungary would not change this approach: in *Decision No. 33/2012. (VII. 17.) AB* on the issue of the forced retirement of judges, a case of particular rule of law relevance, the HCC maintained its reticence towards the scrutiny of EU law.[3] One particularly interesting attribute of the case is that, in parallel with the proceedings before the HCC, infringement proceedings were pending before the CJEU. The HCC, however, in line with its attitude of distancing itself from EU law, relied on a creative interpretation of the law and adjudged the case as a purely constitutional case by developing the right to judicial independence as guaranteed by the Fundamental Law of Hungary.[4]

Despite this reluctant attitude,[5] the HCC has forced ordinary courts to justify their decisions when not initiating a preliminary ruling procedure. In fact, in *Decision No. 26/2015. (VII. 21.) AB*, the examination of the CILFIT conditions[6] was brought to the fore in the context of the right to

1 Decision No. 143/2010. (VII. 14.) AB, ABH 2010, 698, 703.
2 Decision No. 8/2011. (II. 18.) AB, ABH 2011, 49, 96.
3 Attila Vincze, 'Odahull az eszme és a valóság közé: az árnyék az szuverenitás-átruházás az Alkotmánybíróság esetjogában', *MTA Law Working Papers,* 2014/23, p. 11.
4 The legislation in question was also later found by the CJEU to be contrary to EU law: Judgment of 6 November 2012, *Case C-286/12, Commission v Hungary,* ECLI:EU:C:2012:687.
5 László Blutman & Nóra Chronowski, 'Hungarian Constitutional Court: Keeping Aloof from European Union Law', *ICL Journal,* Vol. 5, Issue 3, 2017, p. 341; Ernő Várnay, 'Az Alkotmánybíróság és az Európai Unió joga', *Jogtudományi Közlöny,* Vol. 62, Issue 10, 2007, p. 436.
6 Judgment of 6 October 1982, *Case C-283/81, CILFIT,* ECLI:EU:C:1982:335.

fair trial in relation to the obligation to provide reasoning. Surprisingly, in this decision, the HCC itself examined the EU law context of the case and concluded that "in the specific case, Community law was not applicable and, therefore, there was no possibility to initiate a preliminary ruling procedure".[7]

Nevertheless, the real turning point in the HCC's approach took place in 2016, when the concept of constitutional identity appeared in the HCC's jurisprudence along with two other reservations: the fundamental rights reservation and the protection of sovereignty, which, in light of other international examples, can be termed an *ultra vires* reservation.[8]

By the time the Hungarian concept of constitutional identity emerged, other European constitutional courts had also formulated their concepts. This has attracted interest in academic literature, and an increasing number articles are being published both in Hungary and abroad on the subject matter. This phenomenon is accompanied by an increasing reliance of litigant parties on the identity clause, Article 4(2) TEU, before the CJEU.[9] The growing prominence of the issue of constitutional identity may be interpreted as a result of the migration of constitutional ideas,[10] cross-fertilization of legal systems,[11] constitutional borrowing,[12] or it could be described as a trend[13] since no normative change (neither in the founding treaties nor in the Fundamental Law of Hungary) explains the way in which the HCC changed its jurisprudence in 2016.

7 Decision No. 26/2015. (VII. 21.) AB, Reasoning [42].

8 Beáta Bakó, 'The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires- and Fundamental Rights Review of Hungary', *ZaöRV*, Vol. 78, Issue 4, 2018, p. 866.

9 Endre Orbán, 'Constitutional Identity in the Jurisprudence of the Court of Justice of the European Union', *Hungarian Journal of Legal Studies*, Vol. 63, Issue 2, 2022, pp. 142–173.

10 Sujit Choudhry (ed.), *The Migration of Constitutional Ideas*, Cambridge University Press, Cambridge, 2006.

11 Luke Dimitrios Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi Between the Court of Justice and National Constitutional Courts', *Common Market Law Review*, Vol. 57, Issue 2, 2020, p. 365.

12 Rosalind Dixon & David Landau, *Abusive constitutional borrowing: Legal globalization and the subversion of liberal democracy*, Oxford University Press, Oxford, 2021, p. 144.

13 Monica Claes & Jan-Herman Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of Gauweiler Case', *German Law Journal,* Vol. 16, Issue 4, 2015, p. 919.

In this context, a significant part of the literature stresses that the Hungarian use of the concept of constitutional identity is illegitimate due to the changes that took place concerning the competences and composition of the HCC[14] and, when interpreted in the illiberal domestic context,[15] it is seen as a weapon of populist constitutionalism.[16] Nevertheless, this prevalent interpretative framework is not employed in this paper, mainly for consequential reasons, that is, whichever view is taken, the concept of the Hungarian constitutional identity was born and has become an established phenomenon that the literature must contend with, especially in pointing out the weak and problematic points of the interpretation provided by the HCC.[17] Accordingly, while putting this framing aside, this paper attempts to critically assess the interpretative issues raised by the Hungarian concept of constitutional identity as developed by the HCC and – as no two concepts of identity are identical – to outline how the Hungarian notion relates to the doctrinal solutions established in other legal systems. To do so, the paper first places the events associated with the concept of identity in a chronological order; it then presents and analyses the two identity decisions adopted

14 Gary J. Jacobsohn & Yaniv Roznai, *Constitutional Revolution*, Yale University Press, New Haven, 2020, p. 95; Zoltán Szente, 'Constitutional identity as a normative constitutional concept', *Hungarian Journal of Legal Studies*, Vol. 63, Issue 1, 2022, p. 18; Zoltán Szente & Fruzsina Gárdos-Orosz, 'Judicial Deference or Political Loyalty?' *in* Zoltán Szente & Fruzsina Gárdos-Orosz (eds.), *New Challenges to Constitutional Adjudication in Europe. A Comparative Perspective*, Routledge, London-New York, 2018, p. 99; Kriszta Kovács, 'Reconceptualising Constitutional Identity: The Case of Hungary' *in* Kriszta Kovács (ed.), *The Jurisprudence of Particularism. National Identity Claims in Central Europe*, Hart, New York, 2023. p. 159.

15 Gábor Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Basic Law', *Review of Central and East European Law,* Vol. 43, Issue 1, 2018, pp. 23–42; Tímea Drinóczi, 'Constitutional identity in Europe: the identity of the constitution. A regional approach', *German Law Journal,* Vol. 21, Issue 2, 2020, p. 124; Tímea Drinóczi & Agnieszka Bień-Kacała (eds.), *Rule of Law, Common Values, and Illiberal Constitutionalism. Poland and Hungary within the European Union*, Routledge, London, 2021; Julian Scholtes, *The Abuse of Constitutional Identity in the European Union*, Oxford University Press, Oxford, 2023, p. 201; Petra Bárd *et al.*, 'Use, Misuse, and Abuse of Constitutional Identity in Europe' *in* Mark Tushnet & Dimitry Kochenov (eds.), *Research Handbook on the Politics of Constitutional Law*, Edward Elgar Publishing, Cheltenham, 2023, pp. 612–634.

16 Luigi Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity', *European Constitutional Law Review,* Vol. 12, Issue 1, 2016, pp. 6–26.

17 Liora Lazarus, 'Constitutional Scholars as Constitutional Actors', *Federal Law Review*, Vol. 48, Issue 4, 2020, p. 483.

by the HCC thus far; and finally, it makes some concluding remarks on the possible future doctrinal development of the Hungarian concept of constitutional identity.

2. Timeline

The notion of constitutional identity was first used by Justice Trócsányi in his concurring opinion attached to the decision scrutinizing the Treaty of Lisbon in 2010.[18] After a relatively long pause, it appeared again in a dissenting opinion in 2015[19] and then once more in another concurring opinion in 2016,[20] both written by Justice Varga.

Following the new emergence of the concept, the Government tabled its 7th Amendment to the Fundamental Law in 2016, which sought to make the protection of constitutional identity part of the constitution's text. However, the Government did not have a two-thirds parliamentary majority at that time, and the amendment failed. This was followed by the adoption of *Decision No. 22/2016. (XII. 5.) CC* (*first identity decision* or *2016 Decision*) just a few months later and, therefore, it has been widely shared in the literature that the HCC took its decision in order to bail out the Government.[21] Nevertheless, it is also important to note that the petition for the first identity decision had, in fact, already been placed before the HCC a year earlier.

Until the 2016 decision, constitutional identity was only sporadically mentioned in Hungarian academic literature.[22] Yet, following the HCC's

18 Decision No. 143/2010. (VII. 14.) AB, concurring opinion of László Trócsányi.

19 Decision No. 23/2015. (VII. 7.) AB, dissenting opinion of András Zs. Varga. Interestingly, here the idea of constitutional identity did not arise in the context of EU law, but in the context of the case law of the ECtHR.

20 Order No. 3130/2016. (VI. 29.) AB, concurring opinion of András Zs. Varga.

21 Zoltán Pozsár-Szentmiklósy, 'Informal Concentration of Powers in Illiberal Constitutionalism: The Case of Hungary', *Hague Journal on the Rule of Law,* 2024.

22 Barna Berke, 'Közösségi jog és a tagállamok jogrendszere: vonzások és taszítások', *Magyar Jog,* 1995/4, p. 240; Márton Sulyok, 'Nemzeti és alkotmányos identitás a nemzeti alkotmánybíróságok gyakorlatában' *in* Anna Mira Jakó (ed.), *Nemzeti identitás és alkotmányos identitás az Európai Unió és a tagállamok viszonylatában*, Generál, Szeged, 2014, pp. 58–62.

decision, the number of publications related to the concept increased significantly, mainly focusing on the analysis of the above decision.[23]

Following the 2018 elections, the Government gained a two-thirds majority in the National Assembly once more, which finally led to the enactment of the 7th Amendment to the Fundamental Law of Hungary,[24] incorporating the protection of self-identity into the constitution's text. Since then, according to Article R(4), 'the protection of Hungary's constitutional identity is the duty of all organs of the state.' In addition, the preamble to the Fundamental Law of Hungary, titled the National Avowal, expresses that 'the protection of our identity (as) rooted in our historic constitution is a fundamental obligation of the State.'

As a result, the Fundamental Law of Hungary, uniquely in Europe, textually enshrines the obligation to protect constitutional identity, raising a relevant doctrinal question known from the literature: who is entitled to say what identity is? Can the constitutional court derive it from the constitution? Or is it rather the constitution-making power, or perhaps some other political actor?[25] In this sense, the Hungarian situation can be considered a mixed system, given that both the HCC and the constitution-making power have made use of the term. However, as Gary Jacobsohn puts it, the text is always just the starting point[26] and one must consider another layer, the interpretation of courts and other institutions. Indeed, this is what happened in Hungary; in 2021, a second identity decision was adopted by the HCC that interpreted the text inserted by the 7th Amendment of the Fundamental Law.

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23 László Blutman, 'Szürkületi zóna: az Alaptörvény és az uniós jog viszonya', *Közjogi Szemle,* 2017/1, pp. 1–14; Nóra Chronowski & Attila Vincze, 'Önazonosság és európai integráció – az Alkotmánybíróság az identitáskeresés útján', *Jogtudományi Közlöny,* Vol. 72, Issue 3, 2017, pp. 117–132; Halmai 2018; Veronika Kéri & Zoltán Pozsár-Szentmiklósy, 'Az Alkotmánybíróság határozata az Alaptörvény E) cikkének értelmezéséről', *JeMa,* 2017/1–2, pp. 5–15; Veronika Kéri, 'Gondolatok az alkotmányos identitásról', *Magyar Jog,* 2017/7–8, pp. 396–404; Barbara Kőhalmi & Anita Rozália Nagy-Nádasdi, 'Kimentés helyett kibúvás: nemzeti identitás és szolidaritás a relokalizációs határozat tükrében', *Fundamentum*, 2017/1–2, pp. 45–51.

24 Ernő Várnay, 'The Hungarian Sword of Constitutional Identity', *Hungarian Journal of Legal Studies,* Vol. 63, Issue 2, 2022, p. 86.

25 Federico Fabbrini & Oreste Pollicino, 'Constitutional Identity in Italy: Institutional Disagreements at a Time of Political Change', *in* Christian Calliess & Gerhard van der Schyff, *Constitutional identity in a Europe of multilevel constitutionalism,* Cambridge University Press, Cambridge, 2019, p. 206.

26 Gary J. Jacobsohn, *Constitutional Identity*, Harvard University Press, 2010, pp. 325 and 351.

3. The First Identity Decision

3.1. Presentation

In the wake of the migration crisis, the Council adopted the so-called *relocation decision*,[27] based on which the Hungarian Commissioner for Fundamental Rights requested that the HCC render an abstract constitutional interpretation. The decision, adopted with a single dissenting opinion and five concurring opinions,[28] undoubtedly demonstrates a multi-layered activism of powers but one which failed to decide on the underlying issue.[29]

The HCC issued a landmark decision, where it established three control mechanisms, interpreting Article E(2) of the Fundamental Law,[30] that may – in theory – be applied to EU acts. The first control mechanism is the so-called fundamental rights reservation, intended to protect the essential content of fundamental rights. The other two reservations are the sovereignty and identity tests which may be applied in relation to each other.[31] According to the operative part of the decision:

> "the Constitutional Court may examine upon a relevant petition – 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."

27 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.

28 The decision was taken by ten of the eleven judges of the Constitutional Court at the time. According to the signatories, Justice Czine did not participate in the vote.

29 In addition to the interpretation of Article E, the Commissioner for Fundamental Rights also requested the interpretation of Article XIV(1) of the Fundamental Law, but the HCC separated this question. *See* Decision No. 22/2016. (XII. 5.) AB, Reasoning [29] *(First identity decision)*. The separated issue was placed on the agenda only in early 2024 when the HCC terminated its procedure without a decision on its merit. *See* Order No. 3044/2024. (II. 23.) AB.

30 'In order to participate 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 set out in the founding treaties, exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the European Union.' The text in force in 2016 of Article E(2) of the Fundamental Law of Hungary.

31 *First identity decision*, Reasoning [67].

When it comes to the concept of identity, the questions is what it means and which identity elements it protects. In this regard, the decision refers to Article 4(2) TEU[32] and states that:

> "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 Article R(3) of the Fundamental Law."[33]

In addition, the decision emphasizes the dynamic and evolving nature of constitutional identity, highlighting some of its elements by way of example, which are

> "identical with the constitutional values generally accepted today [...] freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us."[34]

Furthermore, adopting the Lisbon decision of the German Federal Constitutional Court,[35] the HCC added to the list that

> "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, and

32 The reasoning of the decision equates the concept of national identity in the TEU with the concept of constitutional identity, which may be at least implied by the bracketed insertion in the quoted TEU text in the Hungarian version of the decision: 'According to Article 4(2) TEU, "the Union shall respect the equality of Member States before the Treaties as well as their national (constitutional) identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."' *First identity decision,* Reasoning [62]. For a discussion of the relations between the two concepts, *see* Elke Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU', *Netherlands Journal of Legal Philosophy,* 2016/2, pp. 82–83.

33 *First identity decision,* Reasoning [64].

34 Id. Reasoning [65].

35 The German doctrine was the model in the UK, the Czech Republic, Italy and Spain. Gerhard van der Schyff, 'Member States of the European Union, Constitutions, and Identity. A Comparative Perspective' *in* Calliess & van der Schyff (eds.) 2019, p. 324.

> when Hungary's linguistic, historical and cultural traditions are affected."[36]

The German reference draws attention to the importance of the comparative constitutional context as a source of Hungarian constitutional identity. Accordingly, we may observe that foreign references to constitutional courts's jurisprudence make up a significant part of the HCC's reasoning.[37] Consequently, with this decision, the HCC joined the choir of the constitutional courts and supreme courts, who had formulated constitutional reservations in respect of the application of EU law.[38] As for the use of its own tests, the HCC also made reference to their limits: they can only be applied in *ultima ratio* and in the framework of a constitutional dialogue 'based on the principles of equality and collegiality, with mutual respect to each other.'[39]

3.2. Critical Assessment

(i) First of all, it is worth stressing that the decision, like other identity-based decisions adopted by other constitutional courts, stems from a fundamental constitutional theoretical dilemma related to the principle of supremacy,[40] which the decision formulates as follows:

> "The Constitutional Court is aware of the fact that from the point of view of the CJEU EU law is defined as an independent and autonomous legal order (C-6/64 Costa v ENEL [1964] ECR 585). However, the European Union is a legal community with the power – in the scope and the framework specified in the Founding Treaties and by the Member States – of independent legislation and of concluding international treaties in its own name, and the core basis of this community are the international treaties concluded by the Member States. As the contracting parties are the Member States, it is their national enforcement acts that ultimately

36 *First identity decision,* Reasoning [66].
37 Id. Reasoning [33]–[45].
38 Béla Pokol names this in his concurring opinion as the constitutional courts' abstract right of resistance against the legal acts of the Union'. Id., concurring opinion of Béla Pokol, [89]–[90].
39 Id. Reasoning [33] and [63].
40 László Blutman & Nóra Chronowski, 'Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában (I.)', *Európai Jog*, 2007/2, p. 3.

> determine the extent of primacy to be enjoyed by EU law against the relevant Member State's own law in the Member State concerned (BVerfGE 75, 223 [242])."[41]

This means that although EU law has primacy regarding its application,[42] the HCC maintains the constitution's position of primacy regarding the legal validity of EU law. Behind this stance, protecting Hungarian statehood seems to be the ultimate justification.[43] According to the HCC's formulation:

> "the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot 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."[44]

(ii) Second, the above quote draws attention to the importance of the historical context. In the same vein, the operative part links constitutional identity to another vague concept of the Fundamental Law of Hungary, the historical constitution. In this respect, the Hungarian decision seems more akin to the French approach, which is also rooted in history.[45] By contrast, in the German jurisprudence, intertextually traceable in the Hungarian

41 *First identity decision,* Reasoning [32].

42 In Decision No. 2/2019. (III. 5.) AB, the HCC recognized *expressis verbis* that "EU law has a primacy of application over national law" and concluded that 'the creation of European unity,' the integration, sets objectives not only for the political bodies but also for the courts and the Constitutional Court, defining the harmony and the coherence of legal systems as constitutional objectives that follow from 'European unity'. To achieve the above, the laws and the Fundamental Law should be interpreted – as far as possible – in a manner to make the content of the norm comply with the law of the European Union." Decision No. 2/2019. (III. 5.) AB, Reasoning [21], [25] and [36].

43 The protection of statehood as an element of identity is also reflected in the decisions of other constitutional courts, *i.e.* in the jurisprudence of the Danish, French, Spanish, and German bodies. Van der Schyff 2019, p. 332.

44 *First identity decision,* Reasoning [67].

45 François-Xavier Millet, 'Constitutional Identity in France' *in* Calliess & van der Schyff (eds.) 2019, p. 148.

decision, history plays a negative role: the essence of the eternity clause is the rejection of the historical context.[46]

In the Hungarian decision, 'self-identity based on the historical constitution' refers to another concept of the Fundamental Law of Hungary, 'the achievements of the historical constitution.'[47] Accordingly, when the HCC provided the list of values behind this concept, it added: "These are, among other things, the achievements of our historical constitution, the Fundamental Law and thus [on which] the whole Hungarian legal system is based upon."[48]

It follows from the term *achievements* that constitutional identity cannot be defined generally by the historical constitution but only by its elements that are compatible with the framework of the Fundamental Law. However, in this respect, the 2016 decision seems incomplete, as the HCC failed to link its statement to those earlier decisions in which it identified certain elements as achievements of the historical constitution.[49]

(iii) Third, the above paragraph in the first identity decision raises a further crucial question, that is, whether the HCC was ruling on the constitutional identity of the Fundamental Law or on the constitutional identity of Hungary. Internationally, there are examples for both: the German constitutional court discusses the identity of the constitution, while its French counterpart talks about the identity of the state.[50]

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46 Such an anti-historical approach is also present in the Irish identity. Van der Schyff 2019, p. 322.

47 Zoltán Szente, 'A historizáló alkotmányozás problémái – a történeti alkotmány és a Szent Korona az új Alaptörvényben', *Közjogi Szemle,* 2011/3, p. 6; András Zs. Varga, 'Történeti alkotmányunk vívmányai az Alaptörvény kógens rendelkezésében', *Iustum Aequum Salutare,* 2016/4, p. 87; Imre Vörös, 'A történeti alkotmány az Alkotmánybíróság gyakorlatában', *Közjogi Szemle,* 2016/4, pp. 44–57; Zsuzsa Szakály, 'A történeti alkotmány és az alkotmányos identitás az Alaptörvény tükrében,' *Pro Publico Bono,* 2015/2, pp. 36–37.

48 *First identity decision,* Reasoning [65].

49 In the HCC's jurisprudence, the achievements of the historical constitution appeared in the following decisions: Decision No. 33/2012. (VII. 17.) AB, Reasoning [76]–[79]; Decision No. 21/2014. (VII. 15.) AB, Reasoning [35]; Decision No. 28/2014. (IX. 29.) AB, Reasoning [13]–[14]; Decision No. 34/2014. (XI. 14.) AB, Reasoning [79]; Decision No. 17/2015. (VI. 5.) AB, Reasoning [87]; Decision No. 26/2015. (VII. 21.) AB, Reasoning [50]; Decision No. 29/2015. (X. 2.) AB, Reasoning [36]–[37]; Decision No. 16/2016. (X. 20.) AB, Reasoning [19]; Decision No. 17/2017. (VII. 18) AB, Reasoning [39].

50 Selma Josso, 'Le caractère social de la République, principe inhérent à l'identité constitutionnelle de la France?', *Civitas Europa,* Vol. 21, 2008, p. 198; Millet 2019, p. 147.

The Hungarian jurisprudence is not clear in this regard. On the one hand, the latter approach seems to be supported by the statement that the Fundamental Law only recognizes Hungary's constitutional identity.[51] This seems to be substantiated also by the fact that although the HCC's decision interprets the Fundamental Law, the reasoning on identity control is primarily based on Article 4(2) TEU, which deals with the national identities of the Member States.[52] In fact, in the reasoning the notion of constitutional structure quoted from the TEU is converted to Hungary's constitutional identity.[53]

On the other hand, the reasoning could also lead to the conclusion that the HCC is working with a concept related to the identity of the constitution. According to the reasoning, the HCC "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".[54]

(iv) Fourth, the question regarding the substance of Hungarian constitutional identity may be raised. In this regard, it should be stressed that the HCC has only highlighted "constitutional values generally accepted"[55] when providing examples for the content of constitutional identity. This is to be welcomed since generally accepted elements are probably less conflictual in nature. Nevertheless, the question arises as to what extent these values mean more or less than the common European values contained in Article 2 TEU, and whether it is possible to regard these values as identity-defining elements if the concept of identity is expected to have some distinguishing power *vis-á-vis* other constitutional identities.[56] This issue is also raised in Justice Varga's concurring opinion, which lists some Hungarian consti-

51 This obviously runs the risk of the HCC's concept of identity becoming detached from the text of the Fundamental Law. According to Justice Stumpf, such an interpretation would threaten to create an 'invisible Fundamental Law.' *First identity decision,* Reasoning [109]. However, there are extra-constitutional sources of constitutional identity elsewhere, too, *e.g.* Austria, Belgium, UK. *See* Van der Schyff 2019, p. 311. This is qualified by Spieker as 'idiosyncratic' identity review. Spieker 2020, p. 369.

52 *First identity decision,* Reasoning [62].

53 Id. Reasoning [64].

54 Id.

55 Id. Reasoning [65].

56 Julien Sterck, 'Sameness and Selfhood: The Efficiency of Constitutional Identities in EU Law', *European Law Journal*, Vol. 24, Issue 4–5, 2018, p. 281.

tutional-historical peculiarities that, in his opinion, define the Hungarian constitutional identity, but to which he also connects universal values.[57]

Furthermore, it is worth pointing out the risky nature of the open-ended list provided by the HCC. As the reasoning states, the "constitutional self-identity of Hungary is not a list of static and closed values",[58] implying that it is subject to change. This opens up the potential for anything to be interpreted as an identity element in the future.

(v) Fifth, three doctrinal shortcomings of the decision may also be highlighted. (a) The decision does not specify in which procedure the HCC intends to conduct any investigation related to the three reservations. In this respect, the divergence of the positions of the HCC's members in their concurring opinions is striking.[59] (b) Moreover, according to para. [56] of the Reasoning, the HCC

> "emphasizes that the direct subject of sovereignty and identity control is not the legal act of the Union or its interpretation, therefore the Court shall not comment on the validity, invalidity or the primacy of application of such Union acts.

It is, therefore, questionable as to what remains to be examined if the CC does not examine EU acts when applying these tests. A possible conclusion from para. [56] of the Reasoning is that the HCC would maintain its cautious attitude towards interpreting EU law, even when it does apply the formulated tests. It also could follow that the HCC will respect the authentic interpretative position of the CJEU as outlined in the *Lisbon decision [Decision No. 143/2010. (VII. 14.) AB]* of the HCC, and a possible conflict between EU law and the Fundamental Law may result in a preliminary ruling reference as suggested by some of the concurring opinions.[60] In this regard, however, the decision remained silent: the possible use of prelimi-

57 *First identity decision,* Reasoning [112].

58 Id. Reasoning [65].

59 According to Justice Dienes-Oehm, the HCC can only make use of the abstract interpretation procedure of the Fundamental Law and can only express its opinion before EU law is adopted. According to Justice Pokol, the examination can only take place in the *ex ante* review procedure and the Government should have the exclusive right to submit petitions in respect of EU acts. According to Justice Stumpf, besides the treaty reforms, the HCC can act based on the constitutional complaint procedure and may annul the judicial decisions contrary to the Fundamental Law, regardless of whether they applied EU law.

60 See the concurring opinions of Justice Dienes-Oehm and Justice Stumpf. *First identity decision,* [76] and [103].

nary references was neither mentioned nor excluded by the 2016 decision. *(c)* Last but not least, the possible legal consequence of applying the formulated tests also remains unelaborated. In the penultimate paragraph of the decision, the HCC merely states that it "may examine […] the existence of the alleged violation".[61]

4. The Second Identity Decision

4.1. Presentation

Almost exactly five years after the promulgation of the first identity decision, the HCC adopted another decision with EU law relevance, acting again in the abstract interpretation procedure. *Decision No. 32/2021. (XII. 20.) AB (second identity decision* or *2021 Decision*) was awaited with great anticipation, as it was born in a period when the challenges appearing in the European judicial landscape were increasing.[62]

Unsurprisingly, both the 2016 and the 2021 decisions were inspired by asylum-related EU acts.[63] This time, the petition was prompted by a CJEU decision that declared the so-called *push-back procedure* codified by the Hungarian legislator to be contrary to EU law.[64] Nevertheless, there are also differences between the two identity decisions. The petitioner of the 2016 decision was the Commissioner for Fundamental Rights, while in the second case it was the Government. In the meantime, the text of the Fundamental Law of Hungary has also changed in that the control mechanisms formulated in the 2016 decision have appeared in the text of Article E) of the Fundamental Law.[65] Moreover, while the 2016 decision

61 According to Justice Dienes-Oehm, in such cases only a declaratory decision can be taken, and no legal consequence can be applied. According to Justice Pokol, a prohibition of application may be imposed. In Justice Varga's view, in case an EU act is contrary to the Fundamental Law, a two-thirds affirmative decision of the National Assembly shall remedy the issue.

62 Jan Zglinksi, 'The new judicial federalism: the evolving relationship between EU and Member State courts', *European Law Open,* 2023/2, pp. 361–364.

63 In fact, there was a third abstract interpretation on a similar subject between the two identity decisions: Decision No. 2/2019. (III. 5.) AB.

64 Judgment of 17 December 2020, *Case C-808/18, Commission v Hungary,* ECLI:EU:C:2020:1029.

65 The 7th Amendment of the Fundamental Law inserted another sentence into Article E(2) of the constitutional text back in 2018: "Exercise of competences under this

did not answer all the questions raised by the petitioner, an opposite trend can be observed in the present case: although the HCC stressed that "the relevant competence of the Constitutional Court should be interpreted restrictively,"[66] it went far beyond the scope of the petition by interpreting the right to human dignity and the primary obligation of the Hungarian state to protect fundamental rights enshrined in Articles I and II of the Fundamental Law of Hungary.

The HCC reformulated the questions raised by the Government in a highly hypothetical manner by stating that

> "in the present case, when interpreting Article E(2), in the light of the wording of Article E(2) as supplemented by the Seventh Amendment to the Fundamental Law, the Constitutional Court had to assess whether, if the incomplete effectiveness of the joint exercise of competences based on Article E(2) was realized, as mentioned in the petition, such incomplete effectiveness could lead to a violation of Hungary's sovereignty, constitutional identity or fundamental rights and freedoms enshrined in the Fundamental Law (including, in particular, human dignity, which must be assessed also in the context of constitutional identity)."[67]

Accordingly, the reasoning of the second identity decision consists of three parts. First, the HCC examined whether the shortcomings of the joint exercise of powers within the EU could violate the right to human dignity.[68] Related to this, the HCC derived from the right to human dignity the so-called right to a traditional social environment. According to the decision's reasoning, the right to a traditional social environment is part of the right to self-identity and self-determination deriving from human dignity. As the HCC has put it,

> "(t)he State has an obligation of institutional protection to ensure that fundamental rights are respected. Identity and the right to self-determination deriving from human dignity can only be achieved through a process of mutual reflection upon the relevant social factors, given that

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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.' *See also* Decision No 32/2021. (XII. 20.) AB, Reasoning [25] *(second identity decision)*.

66 Id. Reasoning [16].

67 Id. Reasoning [26].

68 Id. Reasoning [27]–[60].

> the individual exercises his or her constitutional rights, including certain component rights deriving from the fundamental right to human dignity, as a member of the community."[69]

In the second part of its reasoning, the HCC considered whether the deficiencies in the joint exercise of powers within the EU have any consequences for Hungary's sovereignty.[70] In this regard, the HCC formulated a Solange-type principle provided for in the first operative part of the judgment, namely that Hungary may withdraw the exercise of the powers conferred on the EU as long as the joint exercise of those powers is not effective:

> "(w)here the joint exercise of competences specified in this paragraph is incomplete, Hungary shall be entitled, in accordance with the presumption of reserved sovereignty, to exercise the relevant non-exclusive field of competence of the EU, until the institutions of the European Union take the measures necessary to ensure the effectiveness of the joint exercise of competences."

The procedural condition for withdrawing a competence is "drawing the attention of the EU or its institutions to the need to exercise the competence, which is to be exercised jointly, and the EU or its institutions failing to do so."[71] The substantive condition is the manifest error of the European legal system:

> "Article E(2) of the Fundamental Law cannot be interpreted as meaning that Hungary has definitively transferred the right to exercise a given competence to the institutions of the EU if the institutions of the EU manifestly disregard their obligation to exercise a competence transferred for joint exercise in accordance with Article E(2) of the Fundamental Law, or if such joint exercise of competence is only ostensibly carried out in such a way that it manifestly does not ensure the effectiveness of EU law.[72]

In the third part, the HCC interpreted the concept of constitutional self-identity. On the one hand, it emphasized the European identity of Hungary by making reference to *Decision No. 2/2019. (III. 5.) AB* adopted in the period between the two identity decisions. In the latter decision, the HCC

69 Id. Reasoning [39].
70 Id. Reasoning [61]–[86].
71 Id. Reasoning [80].
72 Id. Reasoning [79].

showed a pro-European approach and briefly discussed the European identity of Hungary:

> "The formation of the State of Hungary had been the first act by which the Hungarian nation expressed its European identity and throughout the historical events experienced by the country this has matured to become a solid national conviction. […] As a direct consequence of this European identity, Hungary made consistent efforts after the change of the political system to take part in the European integration and our accession was approved by a decisive national referendum."[73]

On the other hand, and this is elaborately detailed in the decision, the HCC linked constitutional identity to the concept of sovereignty.[74] As a result, the HCC concluded in the operative part of the decision that the new sentence of Article E(2) forms part of constitutional identity: "the protection of the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure shall be part of its constitutional identity."

4.2. Critical Assessment

(i) First, the context of the decision should be emphasized. The petition of the Government suggested that the HCC could rule that Hungarian public authorities should not enforce the judgment of the CJEU. On the one hand, the petitioner brought the Public Sector Purchase Programme (PSPP) decision of the German Federal Constitutional Court to the attention of the HCC,[75] aiming to draw attention to the "rebellion of the constitutional courts",[76] notwithstanding the fact that the PSPP case was in no way related to the migration policy instruments that were relevant in the present case. On the other hand, it is noteworthy that shortly before the ruling was made, the infamous decision of the Polish Constitutional Court was published,[77] exhibiting open defiance towards the primacy of EU law. The question was,

73 Decision No. 2/2019. (III. 5.) AB, Reasoning [16]. Id. Reasoning [96].
74 Id. Reasoning [87]–[110].
75 BVerfGE 146, 216.
76 István Csongor Nagy, 'The Rebellion of Constitutional Courts and the Normative Character of European Union Law', *International and Comparative Law Quarterly*, Vol. 73, Issue 1, 2024.
77 Polish Constitutional Tribunal, K 3/21.

therefore, whether the Hungarian body would follow the Warsaw court's lead, or instead distance itself from the Polish position. Faced with this black-and-white question, the HCC chose an alternative path: while it did not deal with the CJEU judgment, which was the *á'propos* for the petition, when digging deeper into the reasoning of the decision, we can find several grey areas. Perhaps this explains why the reception of the decision has been largely positive, as different readers of the text can find the positions they can identify with in one or the other paragraph of the reasoning. Accordingly, on the part of the Government, the Prime Minister hailed the decision,[78] and the commentators also took a positive view, mainly because the ruling did not, at least not openly enter into conflict with the CJEU.[79]

(ii) Second, the expansive nature of the decision should be highlighted. The HCC went beyond the scope of the petition by analysing the right to human dignity and developing the right to a traditional social environment, which has surprising implications in the modern, globalized environment of the EU based on free movement and establishment. Until this decision, the HCC's jurisprudence treated human dignity as a fundamental right of the individual and a guarantee for the development of individual freedom.[80] In this decision, however, the HCC added a collective dimension to this right.[81] The essence of the obligation to protect the newly derived rights of the right to human dignity is that Hungary must ensure that not only must it refrain from restricting such rights, but it must ensure – even in the face of international commitments of the state – that no foreign institutions do so either.[82] As a result, in the context of European joint decision-making, the HCC held that

> "(w)here the incomplete effectiveness of the joint exercise of competences […] leads to consequences that raise the issue of violation of the right to identity of persons living in the territory of Hungary, the Hungarian

78 *See* the summary report of portfolio.hu, at www.portfolio.hu/gazdasag/20211210/meghozta-donteset-az-alkotmanybirosag-amirol-orban-viktor-reggel-beszelt-515502.

79 Nóra Chronowski & Attila Vincze, 'Full Steam Back: The Hungarian Constitutional Court Avoids Further Conflict with the ECJ', *Verfassungsblog*; Kim Lane Scheppele, 'Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament', *Verfassungsblog.*

80 The classical understanding of the right to human dignity is represented by Justice Marosi and Justice Schanda. *Second identity decision,* Reasoning [226] and [259]–[264].

81 "[The] 'dignity of communities' cannot be understood as a fundamental right in its own right." Decision No. 96/2008. (VII. 3.) AB, part II.3.

82 *Second identity decision,* Reasoning [37].

> State shall be obliged to ensure the protection of this right within the framework of its obligation of institutional protection."

(iii) Third, the HCC has unprecedentedly took into account EU law: it has embraced the principle of effet utile and reversed the principle of pre-emption. The HCC stressed that the principle of effectiveness must be guaranteed not only by the Member States but also by the EU institutions.[83] It emphasized that

> "the purpose of conferring the exercise of competence is not to take the competence away from the Member States, but to ensure that the European Union, or some of its institutions, exercise them more effectively than the Member States."[84]

The HCC went on to highlight that, for the exercise of powers to be in accordance with the Fundamental Law of Hungary, it is not sufficient to establish secondary sources of law, but their effective application must also be ensured: "(o)nly in this case does the exercise of the competence comply with the condition laid down in the enabling provision in Article E(2) of the Fundamental Law."[85]

The ineffectiveness of secondary legislation or 'the ineffectiveness of the joint exercise of competences'[86] as interpreted by the HCC is a novelty in the Hungarian jurisprudence, as it has turned the principle of effectiveness against the functioning of the European legal order. Moreover, this has also allowed the HCC to create a national counterpart to the principle of pre-emption: the principle of *re-emption*. This is a *Solange*-type requirement, set out in the first operative part of the judgment, which states that national public authorities may temporarily take back competences in certain areas of EU law that have been transferred to EU institutions as long as the effectiveness criterion set by the HCC is met.

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83 Id. Reasoning [67].

84 Id. Reasoning [77]. This line of reasoning is surprising partly because the HCC mentally separates the Member States and the joint exercise of competences (*i.e.* the Member States and the EU). The wording implies that there could be an exercise of shared competences without the Member States, aiming to deprive them of their rights. However, there is no EU legislation without the participation of Member States: their representatives may remain in a minority position in the Council, but Member States still adopt the legislative acts together with the other Member States.

85 Id. Reasoning [78].

86 Id. Reasoning [51].

Such a situation sounds like a negative type of *ultra vires* which may be caused either by an omission on the part of the EU legislator or by an ineffective piece of EU legislation.[87] Nevertheless, the 'principle of re-emption' offered by the HCC as an answer to such a scenario seems to contradict the last sentence of Article 2(2) TFEU, according to which: "Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence." On top of that, where Hungary fails to comply with its EU legal obligations, in a possible procedure under Article 260 TFEU, this certainly does not constitute a valid defence before the CJEU as it has been demonstrated precisely with regard to the push-back procedure related decision, case C-808/18, lately.[88].

(iv) Fourth, the HCC placed the concept of constitutional identity in a new framework by bringing the elements of the Jellinek definition of the state into the scope of identity. The HCC also emphasized that "constitutional identity and sovereignty are not complementary concepts, but are interrelated in several respects."[89] This means that, according to the HCC, *(a)* the preservation of constitutional identity is made possible by the preservation of sovereignty; *(b)* constitutional identity is manifested primarily through a sovereign act, that is, constitution-making; *(c)* the desire to preserve the sovereign decision-making powers of the country, the national holidays forming part of constitutional identity; and *(d)* the main elements of sovereignty as recognized in international law are closely linked to constitutional identity.[90]

At the end of the reasoning, the HCC argued similarly to Justice Varga's concurring opinion annexed to the first identity decision. Here, he stated that the historical documents marking the struggle for the country's sovereignty just like national holidays are part of the constitutional identity as they are achievements of the historical constitution.[91] Thus, in light of the decision, identity and sovereignty seem to be in a part-whole relationship, where identity is understood as the right of self-determination about the most fundamental aspects of sovereignty and the essential functions of the state.

87 Endre Orbán & Patrik Szabó, 'A 'visszafoglalás elve'. Az Alkotmánybíróság 32/2021. (XII. 20.) AB határozata az uniós jog hazai érvényesüléséről', *Közjogi Szemle*, Vol. 15, Issue 2, 2022, pp. 103–111.
88 *C-123/22, Commission v Hungary*, ECLI:EU:C:2024:493.
89 *Second identity decision,* Reasoning [99].
90 Id. Reasoning [99].
91 Id. Reasoning [101]–[110].

(v) Fifth, just like in the case of the first identity decision, it is worth examining the doctrinal shortcomings of the decision. (a) In *Decision No. 26/2020. (XII. 2.) AB*, another decision adopted in the period between the two identity decisions, the HCC ruled that

> "[the Constitutional Court's] right to initiate preliminary ruling proceedings can be derived from the Fundamental Law, in particular, if a case involves the risk of a restriction of the fundamental rights and freedoms or of the inalienable right of Hungary under Article 4(2) to dispose of its territory, population, form of government and organisation of the State.[92]

However, the credibility of this commitment stated barely one year before the 2021 decision seems questionable: the second identity decision was indeed a case in which the HCC had to interpret Article E(2), yet it still did not make a reference for a preliminary ruling to the CJEU.

(b) When it comes to legal consequences, the decision is more specific regarding the incomplete or ineffective joint exercise of powers:

> "the Constitutional Court states [...] that the enforceability of EU acts recognised as binding under Article E of the Fundamental Law may be compromised by the ineffectiveness of competences exercised jointly with the EU."[93]

This statement, in essence, anticipates the legal consequence of the inapplicability (*Unanwendbarkeit*) familiar from German doctrine. Under the German doctrine, however, such a conclusion could only be drawn by the Constitutional Court. By contrast, the HCC's decision empowered the Government to reach such a conclusion, which may raise serious concerns about legal certainty:

> "The Constitutional Court reiterates, however, that it is beyond its competence to review in the present procedure whether the statements made in the petition are correct in this respect. Accordingly, the findings of the present decision of the Constitutional Court can implicitly be fully applicable only if the arguments presented in the petition are factually correct, the assessment of which is primarily the task of the petitioner and other organs of the Hungarian State."[94]

92 Decision No. 26/2020. (XII. 2.) AB, Reasoning [26].
93 *Second identity decision,* Reasoning [84].
94 Id. Reasoning [48].

5. Final Thoughts

The reform of the identity clause in the Lisbon Treaty in 2009 saw the rise of the constitutional identity discourse. The spread of national reservations based on constitutional identity can be seen as the latest stage in the constitutional debate on the supremacy of EU law. For a long time, this has largely been a theoretical issue only, but recently, it has also led to decisions with serious consequences.[95] As a result, the different constitutional identities of the Member States might pose a potentially existential threat to EU law, especially if decisions denying the primacy of EU law proliferate and constitutional courts of questionable legitimacy such as the Polish Constitutional Tribunal[96] adopt decisions restricting EU law.

As far as the Hungarian constitutional practice is concerned, the HCC's jurisprudence raises several coherency issues, as outlined in the analysis above. In light of the dilemmas presented, the extent to which the 2016 decision reflected a firm vision on the part of the members of the HCC is at least questionable. The many concurring opinions and the different concepts indicate that individual constitutional judges disagreed on the direction to follow. The same is also true for the second identity decision: the two dissenting opinions and the nine concurring opinions indicate that the adopted text is a compromise of the HCC's members.

As a consequence, the two identity decisions can be evaluated mainly as 'noise creation' without any concrete consequences thus far: both identity decisions resulted from a process known as abstract interpretation of the constitution, which means that the decisions have theoretical relevance but no other concrete consequences were derived from them. As a result, the 2016 decision can be evaluated as a symbolic gesture, one which set out a theoretical reservation similar to those that have been created by other constitutional courts in Europe and which attempted to connect Hungarian constitutional identity with universal values. By contrast, the 2021 decision placed less emphasis on the comparative constitutional context and attempted to find national relevance in universal values. By relying intensively on the Hungarian struggles for freedom and linking identity with the core elements of sovereignty, the 2021 decision placed a bigger emphasis on

95 ÚS 5/12 Landtova XVII, 31 January 2012; 15/2014 Ajos 6 December 2016; BVerfGE 146, 216 (PSPP); K 3/21. The Federal Constitutional Court blocked a European arrest warrant in a December 2015 decision on the grounds of a breach of German constitutional identity, *see* 2 BvR 2735/14.

96 Xero Flor v Poland (4907/18), 7 May 2021.

the historical context of Hungarian identity. In this regard, the decision does not even name all the achievements of the historical constitution as elements of the constitutional identity, only those parts that relate to the struggle for sovereignty.

As for the future, I consider three big doctrinal questions regarding the evolution of the Hungarian concept of constitutional identity to be of relevance. *(i)* The first is the initiation of preliminary ruling procedures, following the idea of Ingolf Pernice, where the resolution of constitutional conflicts through dialogue is a shared responsibility of the courts.[97] In this regard, it is noteworthy that fourteen out of the eighteen constitutional courts operating in the EU have already engaged in such a formal dialogue with CJEU.[98] In a similar tone, the 2016 decision seems to attach great importance to establishing a dialogue between the courts, but the HCC has never referred a question before the CJEU until now.

(ii) The second issue relates to the absolute or relative nature of Hungarian constitutional identity. The decisions are silent on this aspect. However, there are strong arguments as to why the Hungarian concept should be relative. On the one hand, constitutional amendments cannot be subject to identity analysis since Article 24(5) of the Fundamental Law excludes any review of the substance of constitutional amendments. On the other hand, Hungarian identity also includes EU membership, as underlined by the HCC. Given that the HCC emphasised Hungary's European identity, it follows that constitutional identity should be assessed as part of the multilevel constitutional system,[99] where it cannot take always precedence. To underline this approach, the HCC could introduce a proportionality test in its identity-based analysis, or, following the French jurisprudence, it could rely on constitutional amendments that would remedy identitarian breaches.

(iii) Finally, the third question is rather meta-juristic or sociological: how will the jurisprudence develop, now that the former President of the

97 Ingolf Pernice, 'The Autonomy of the EU Legal Order – Fifty Years after Van Gend' *in* Antonio Tizzano *et al.* (eds.), *Court of Justice of the European Union: 50th Anniversary of the Judgment in Van Gend en Loos, 1963–2013,* Office des publication de l'Union européenne, Luxembourg, 2013, p. 64.

98 Marek Pivoda, 'Constitutional Courts Asking Questions: A Deliberative Potential of Preliminary Reference Mechanism', *Cambridge Yearbook of European Legal Studies*, 2023, p. 7.

99 Ingolf Pernice, ‚Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?', *Common Market Law Review*, Vol. 36, Issue 4, 1999, pp. 703 – 705.

HCC, who was the reporting judge of both analysed decisions, left the bench and became President of the Republic in 2024? Since, in the HCC's interpretation, the concept of identity is inherently dynamic and therefore subject to change, the Court's (and its subsequent presidents') attitude could strongly determine the future of the notion: jurisprudence could turn towards a more conflictual direction, remain symbolic as it is now, or be denounced.

Last but not least, zooming out from Hungary to the European constitutional space, the rise of constitutional identity could also lead to a further constitutionalization of EU law, the key to which is Article 4(2) TEU, which has been invoked by several constitutional courts as a legal basis of their concept of constitutional identity. Thus, Article 4(2) TEU could function as a device or a link between national constitutional claims and the European constitutional framework.

In this respect, it should be noted that a new chapter of the CJEU's jurisprudence has been opened: the practice based on Article 4(2) TEU has met with a recently developed series of cases based on Article 2 TEU, the founding values of the EU. It was precisely Hungary (and Poland) that finally linked identity-based case law with value-based jurisprudence. In 2021, both Member States challenged the so-called Conditionality Regulation on measures to be taken in case of a breach of the rule of law in a Member State to protect the EU budget.[100] In its decision, the CJEU embraced the concept of identity and held that the fundamental values enshrined in Article 2 TEU define the identity of the EU itself, from which normative obligations toward Member States derive. According to the CJEU,

> "the Member States have defined and share the values enshrined in Article 2 TEU. They define the identity of the Union as a common legal order. The Union must therefore be able to defend those values within the limits of its powers under the Treaties."[101]

Furthermore, according to the CJEU,

100 Judgment of 16 February 2022, *Case C-156/21, Hungary v European Parliament and the Council,* ECLI:EU:C:2022:97; Judgment of 16 February 2022, *Case C-157/21, Poland v European Parliament and the Council,* ECLI:EU:C:2022:98. László Detre, 'Összeálló kép: előrelépés a jogállamiság európai értelmezésében és alkalmazásában – Az Európai Unió Bíróságának a C-156/21. számú Magyarország kontra Parlament és Tanács ügyben hozott ítélete', *EU Jog online,* 2022/4.

101 *Case C-156/21, Hungary v European Parliament and the Council*, para. 127.

> "Article 2 TEU is not simply a statement of political guidelines or intentions, but a synthesis of values which […] form part of the identity of the Union as a common legal order and which are embodied in principles which impose legally binding obligations on the Member States."[102]

The CJEU recalled that the Union respects the national identities of the Member States, which are an integral part of their fundamental political and constitutional orders, in accordance with Article 4(2) TEU. This implies that Member States have a certain margin of discretion in the application of rule of law principles.[103] Still, this is limited by the commonly shared identity of the Union: that is, the elements that can be invoked under Article 4(2) TEU are framed by Article 2 TEU.

From a European constitutional perspective, I believe that this evolution of the identity discourse is closest to the trajectory of the fundamental rights reservation: in the 1970s, the CJEU responded to the lack of protection of fundamental rights, due to apprehension coming from the German and Italian constitutional courts, by developing its own fundamental rights protection as a general principle of EU law. Now, fifty years later, one can observe that the CJEU has once again found a legal tool in primary EU law to frame the new challenge, the identity claims invoked by national constitutional courts: Article 2 TEU.

102 Id. para. 232.
103 Id. para. 233.