

# THE PRACTICE OF THE HUNGARIAN CONSTITUTIONAL COURT ON ASYLUM

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## ABSTRACT

*The modern-day history of asylum in Hungary ranges from being the country of origin of refugees, through the country of asylum, to the country protecting the external borders of the European Union (EU) and rejecting the refugees. Asylum, which came into focus as a result of the Arab Spring in 2015, has raised numerous issues such as access to territory, pushbacks, procedural guarantees, detention, transit zones, the effectiveness of remedies, and sovereignty and free decision-making on the side of the state. These issues may also have a constitutional dimension. However, a review of the practice of the Hungarian Constitutional Court shows that asylum issues are not grouped along these lines, but rather as per the division of competences between the EU and Hungary. Consequently, some constitutional court procedures have been examined in the context of constitutional interpretation rather than that of constitutional complaint procedures. Furthermore, the constitutional context has changed, influencing the approach of the Constitutional Court. Based on this, the paper first interprets the relationship between asylum and sovereignty and the function of the Constitutional Court in asylum matters, placing the issue in the context of the history of asylum in Hungary. Second, it presents the related practice of the Constitutional Court according to three aspects, namely sovereignty and constitutional identity, the role of human dignity, and interpretation of asylum law by the Constitutional Court.*

## KEYWORDS

Constitutional Court of Hungary  
refugees  
asylum  
sovereignty  
constitutional identity

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## 1. Introduction

Asylum was for a long time closely linked to the Church and various holy places, originally protecting those who committed crimes and later those fleeing religious persecution. By the 19th century, with the decline of ecclesiastical power and the spread of state sovereignty, the modern institution of diplomatic asylum was established. Theoretically, it was based on the idea of territorial sovereignty: the state does not protect those in need within its own territory, but outside it, within the territory of one of its diplomatic missions. This was a practical expression of the inviolability of diplomatic representation and thus one of the most visible expressions of state sovereignty. By the 20th century, however, the idea of territorial sovereignty had been replaced by the institution of territorial asylum, whereby the state provides protection to those in need on its own territory, thus ending the applicability of diplomatic asylum.<sup>2</sup>

The right to asylum became a point of focus in the 20th century when the two world wars and other armed conflicts resulted in massive population movements, placing an enormous burden on host states in the absence of uniform rules. The desire for uniform regulation arose within the framework of the League of Nations, which contended with the fact that no uniform definition existed of the criteria for recognition as a refugee and the rights and obligations of actors (refugees and states). Thus, the earlier more social-oriented refugee protection became a supranational, legally regulated mechanism and international protection, first through the Convention relating to the International Status of Refugees of 28 October 1933 (although it was ratified by only nine states).<sup>3</sup> The 'turning point' was 1951, when the United Nations High Commission for Refugees (UNHCR) began its work and the Geneva Refugee Convention was adopted, the first to define the concept of a refugee and present its main rights.

Traditionally, the granting of asylum was a right of the state—and thus a sovereign decision of the state to whom and whom not to grant asylum. However, after World War II, this was removed from the absolute discretion of the state and assumed by states as an international legal obligation. Through this, the granting of asylum has become a legally bound decision-making process. Furthermore, territorial asylum is now more a right of the individual and may be constitutionally protected.

In this form, the right to asylum is a set of rights and obligations under international human rights and humanitarian law, which from the state's perspective, includes the following state actions: to admit a person to its territory; allow the person to sojourn there; refrain from expelling the person; refrain from extraditing the person; and refrain from prosecuting, punishing, or otherwise restricting the person's liberty. Although the right of asylum has been viewed as the right of a state and not the right of an individual, it now contains three elements: the

2 | Randelzhofer, 2003, p. 20; Szép, 2012, pp. 149–150.

3 | Jaeger, 2001, pp. 728–730.

authority of a state to grant asylum, right of an individual to seek asylum, and right of an individual to be granted asylum.<sup>4</sup>

This paper deals with an aspect of asylum law issues, namely the practice (or lack thereof) of the Hungarian Constitutional Court. To understand the degree of reluctance of the Hungarian Constitutional Court in the context of the right of asylum, the basic context is needed.

## 2. A brief history of asylum law in Hungary

The right to asylum is linked to the 1951 Geneva Refugee Convention and its becoming a living right. However, its effects in Hungary have been delayed.

From World War II until 1987, Hungary, like the other Soviet bloc countries, was more a country of origin. In other words, it emitted refugees, rather than receiving and protecting them. Except for the ideological admission of Greek and Chilean communists, the issue of refugees was not a key focus during this period. Refugees from other socialist countries were never granted asylum. Like the other countries of the socialist bloc, Hungary did not ratify the 1951 Geneva Refugee Convention until 1989<sup>5</sup>. Right after that, the wave of refugees caused by the Yugoslav Wars was a major challenge for the Hungarian authorities. First Croats, then Serbs and Bosniaks arrived. Many later returned home, others resettled through immigration programmes in Canada, the US, and Australia, while others stayed behind.<sup>6</sup> While initially only Hungarian nationals arrived, this changed radically later: Hungary became a host country and after the lifting of the territorial barrier<sup>7</sup> to the Geneva Convention<sup>8</sup>, there was no longer any barrier to the admission of refugees from outside Europe. One highlight of this was the ‘refugee flood’ that started in 2015 as a result of the Arab Spring.

During the change of regime, Act XXXI of 1989 on amending the Constitution made the right to asylum part of the Constitution<sup>9</sup>, adopting the Geneva concept,

4 | Boed, 1994, pp. 3–8.

5 | See Legislative Decree No. 15 of 1989 on the proclamation of the Convention relating to the Status of Refugees adopted on 28 July 1951, and the Protocol relating to the Status of Refugees adopted on 31 January 1967.

6 | Bokorné Szegő, 2003, p. 250; Tóth, 1994, pp. 69–73.

7 | Hungary exercised its right under the 1951 Geneva Refugee Convention, which allowed ratifying countries to recognise only refugees from Europe.

8 | See Parliamentary Resolution 113/1997 (XII. 17.) on the withdrawal of the Declaration to the Convention relating to the Status of Refugees adopted on 28 July 1951 and promulgated by Legislative Decree No. 15 of 1989.

9 | ‘Article 65. (1). In accordance with the conditions established by law, the Republic of Hungary shall ensure the right of asylum to foreign citizens or stateless individuals who, in their native country or place of residence, are subject to persecution based on their race, religion, nationality, language, or political convictions.

(2) Individuals granted asylum shall not be extradited to other states.

(3) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the right to asylum’.

which was later clarified and harmonised with the Geneva Convention in 1997<sup>10</sup>. The Constitution left it to the legislature to define the content of the right of asylum, and its substantive and procedural rules. However, it itself established what vulnerable status constituted and the criteria relevant to granting fundamental rights, which are constitutional prerequisites for the enjoyment of the right of asylum according to the criteria defined by law.

Subsequently, the first Asylum Act was adopted in 1997.<sup>11</sup> The Act, according to its general justification, provides a guaranteed right to asylum for foreigners seeking it. However, with Hungary's accession to the European Communities (European Union, EU) in 2004, a new law had to be adopted. Within the European Communities, asylum was initially regulated under the third pillar. However, the Treaty of Amsterdam brought significant changes, moving the issue of 'visas, asylum, immigration, and other policies related to free movement of persons' to the first pillar and requiring Member States to develop a common immigration and asylum policy within five years. The ultimate goal was to create a common asylum policy. At an extraordinary meeting of EU Heads of State and Government in Tampere in October 1999, they agreed to work towards establishing a Common European Asylum System. The aim was for the EU to have a common asylum policy by 2010. At the Council meeting in November 2004, it was agreed to launch the second phase, which was elaborated by the interior ministers of Member States at their conference in The Hague. One aim, among others, was to provide a single procedure, single form, single refugee status, and an exchange of information. The European Council called on the Council of Ministers and European Commission to put in place structures covering the asylum systems in Member States by 2005.<sup>12</sup> In this context, Hungary joined the EU and the new Asylum Act<sup>13</sup> was adopted in 2007, harmonising the Constitution, Geneva Convention as an international legal norm, and EU asylum legislation as a supranational system of norms, and meeting the obligations arising from these.<sup>14</sup>

10 | Article 65. (1). In accordance with the conditions established by law, the Republic of Hungary shall, if neither their country of origin nor another country provides protection, extend the right of asylum to foreign citizens who, in their native country or the country of their usual place of residence, are subject to persecution based on race or nationality, their alliance with a specific social group, religious or political conviction, or whose fear of being subject to persecution is well founded.

(2) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the right to asylum'.

11 | Act CXXXIX of 1997 on the Right of Asylum.

12 | Berkes, 2008, p. 89.

13 | Act LXXX of 2007 on the Right of Asylum.

14 | A good example of this is the institution of subsidiary protection, which can be placed between refugee and protected status under the Geneva Convention, by providing protection to persons not persecuted for a Geneva Convention reason but who are unable or unwilling to seek protection in their country of origin because they would be at risk of serious harm if they were to return.

The Fundamental Law, which came into force in 2012, has also maintained the constitutional level of asylum. Furthermore, Article XIV<sup>15</sup> is based on the Geneva Convention, the explanatory memorandum refers to international legal obligations, and it refers to the principle of non-refoulement.

Hungary automatically adopted the international asylum system without much debate. Again, noteworthy is that this period was relatively calm, with few asylum seekers arriving. Therefore, the handling of cases did not cause problems for the asylum authority or courts. However, from 2014, this is no longer the case. As a state response to the ‘refugee flood’ from 2014 but mostly from 2015, the Fundamental Law was amended in 2018—for the seventh time—introducing significant changes<sup>16</sup>. The amendment was both an opposing reaction to the EU’s plans to distribute refugees and a tightening of recognition. Based on Article 31(1) of the Geneva Refugee Convention,<sup>17</sup> it was enshrined in the constitution that asylum seekers should not be able to choose the country of asylum. The Fundamental Law has thus provided a constitutional basis for the safe third country and

15 | ‘Article XIV (1). Hungarian citizens may not be expelled from the territory of Hungary and may return from abroad at any time. Foreign nationals residing in the territory of Hungary may be expelled only based on a lawful decision. Collective expulsions are prohibited. (2) No one may be removed, expelled, or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture, or other inhuman or degrading treatment or punishment.

(3) Hungary shall, if neither their country of origin nor another country provides protection, extend the right of asylum to non-Hungarian citizens who, in their native country or the country of their usual place of residence, are subject to persecution based on race or nationality, their alliance with a specific social group, religious or political conviction, or whose fear of being subject to persecution is well founded’.

16 | ‘Article XIV (1). The settlement of foreign populations in Hungary shall not be allowed. Foreign nationals, other than persons with the right of free movement and residence, shall be allowed to reside in the territory of Hungary based on their applications adjudged by the Hungarian authorities on an ad hoc basis. The fundamental rules for the submission and evaluation of such applications shall be laid down in a cardinal law.

(2) Hungarian citizens may not be expelled from the territory of Hungary and may return from abroad at any time. Foreign nationals residing in the territory of Hungary may be expelled only based on a lawful decision. Collective expulsions are prohibited.

(3) No one may be removed, expelled, or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture, or other inhuman or degrading treatment or punishment.

(4) Hungary shall, if neither their country of origin nor another country provides protection, extend the right of asylum upon request to non-Hungarian citizens who, in their native country or the country of their usual place of residence, are subject to persecution based on race or nationality, their alliance with a specific social group, religious or political conviction, or whose fear of being subject to direct persecution is well founded. A non-Hungarian citizen who reached the territory of Hungary through a country where he or she did not face persecution or the immediate risk of persecution shall not have the right to seek asylum.

(5) The fundamental rules for the granting of asylum shall be laid down in a cardinal law’.

17 | ‘Article 31 (1). The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who coming directly from a territory where their life or freedom was threatened in the sense of Article I, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence’.

country of first asylum principles.<sup>18</sup> Asylum seekers who do not fall in this category are no longer constitutionally protected ('not have the right to seek asylum') and are subject to protection under the law. A minor clarification is that the fear of persecution has been supplemented by the addition that it must be based on direct persecution. However, I consider the addition redundant, as the link between persecution and well-founded fear would make it inherently difficult to interpret the reference.

Following the previous lack of interest, the institution of asylum is now the focus of debate, with the Hungarian government consistently opposing it. This was reflected in the legislation, which has also undergone several changes. Both the country of first asylum and safe third country concepts have significantly reduced the number of persons potentially eligible for asylum. In 2015, a special border procedure was introduced and transit zones were established based on Article 43 of Directive 2013/32/EU of the European Parliament and the Council on common procedures for granting and withdrawing international protection. This deals with where persons seeking recognition as refugees or beneficiaries of protection are placed to conduct asylum and alien procedures. The legislation has been modified several times, partly due to the pandemic, EU decisions, and ECHR decisions. Here, I highlight that according to the Asylum Act, an applicant in a transit zone does not have the right to stay in Hungary and is detained within 8 km of the border.<sup>19</sup> The logic of the regulation is that the decision to enter at the border is taken first, and only then can an asylum application be submitted. Those entering the country without following this procedure are escorted back to the other side of the border, and those who arrived via a safe third country are not accepted by the asylum system. However, at the moment, these rules do not apply because of a declared

18 | The principle of non-refoulement, through Article 33 of the Geneva Refugee Convention, significantly limits the sovereignty of individual states in relation to asylum. What remains of state sovereignty in the field of asylum is the possibility to recognise that another country—in practice, the first safe country—is considered more suitable to provide protection to the asylum seeker and therefore either not accept the application in the first place or refuse to grant protection on that ground. Kjaerum, 1992, pp. 514–516.

Exclusion on the basis of transit or the possibility of seeking protection in a third country during a stopover (safe third country) is generally not considered useful from a humanitarian viewpoint in addressing asylum issues, as it means that the entire burden is shifted to the countries that happen to be the first countries of asylum. On the other hand, if there are no universally accepted criteria for determining which state should deal with an asylum seeker's claim, the situation of 'refugees in orbit' arises. However, applying these solutions requires international agreements on responsibility to examine an application and burden-sharing arrangements. Hailbronner, 1993, pp. 59, 63.

19 | Act LXXX of 2007 on Asylum 'Article 71/A (1) Where an alien lodges an application:

a) before admission into the territory of Hungary, or  
b) after being apprehended inside the 8 km zone from the external border referred to in Point 2 of Article 2 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (hereinafter referred to as 'Schengen Borders Code'), or from any frontier sings, and after being escorted through the gate installed for the protection of State borders as defined in the Act on State Borders. In a transit zone, the provisions of this Chapter shall apply with the derogations provided for in this Section'.

state of emergency. Until 31 December 2024, a so-called 'declaration of intent to lodge an asylum application' must be lodged at the designated diplomatic mission or consular post. In case of a positive decision, the applicant will be granted an entry permit and will be able to submit an asylum application after entry.<sup>20</sup> However, in Case C-823/21<sup>21</sup>, the Court of Justice of the European Union (CJEU) has ruled that by making the possibility of lodging an application for international protection conditional on the prior submission of a declaration of intent at a Hungarian embassy in a third country, Hungary has failed to fulfil its obligations under EU law.

### 3. Role of the Constitutional Court in the field of asylum

Sovereignty is based on territory, public power, and population. Immigrants from voluntary and forced migration<sup>22</sup> change and can transform a society's cultural fabric. Unlike national minorities, for example, immigrants are less dominated by historical links with the state; however, there is greater scope for manoeuvre under state sovereignty. The state is a shaper of processes in that it has sole control over whom it allows into its territory and whom it allows to settle and become part of society.

Sovereignty is central to national state formation and the possibility of its transformation. Therefore, it has a crucial role in the realisation of human rights. However, the relationship between sovereignty and human rights is two-sided: some hold that human rights and their universalism erode sovereignty in the classical sense of the state acting at its discretion on its own territory. Others contend that because sovereignty is actually socially constructed, historically specific, and mutable, it is better understood as being transformed by human rights.<sup>23</sup>

This dual face of sovereignty is clear in migration issues: there is both the notion of the sovereign as the ultimate decision-maker and as the institutional guarantor of human rights, which may conflict. Immigration control, the traditional sovereign power of the state to control the entry and stay of aliens on their territory, is considered a crucial and fundamental aspect for the democratic functioning of the society.<sup>24</sup> International migration involves several states, and therefore, states must try to regulate these processes jointly at the international level while preserving their autonomous regulatory capacities.<sup>25</sup>

In the midst of these processes, the state can choose to be pro-immigration or to oppose it by (strictly) controlling it. However, state power is limited in terms of elements restricting the scope for action and that represent a degree of inertia.

20 | Act LVIII of 2020 on transitional rules and epidemic preparedness related to the end of the state of emergency' Article 267-275.

21 | Judgment of the Court (Fourth Chamber) in Case C-823/21, European Commission v Hungary, ECLI:EU:C:2023:504.

22 | Hautzinger, Hegedüs, and Klenner, 2014, pp. 12–13.

23 | Nash, 2009, p. 71.

24 | Slingenberg, 2014, p. 279.

25 | Mohay, 2016, p. 46.

These lead to diversity in society, whether against the will of the state or in excess of it. This could include the impact of illegal border crossing or residence, or the fulfilment of humanitarian obligations. Although states are taking measures to protect themselves against irregular border crossing or illegal residence (irregular migration), they are unable to eliminate the phenomenon completely and their solutions are often only incidental, as they are unable to identify and eliminate all possibilities for abuse in advance. Furthermore, ex-post solutions can lead to status neutralisation.

Regarding the role of the Constitutional Court, two factors are highlighted: traditional constitutional tasks (norm control, constitutional interpretation) and the examination of the constitutionality of individual cases (constitutional complaint procedure). As experience in Hungary shows, the former are more important. In Hungary, in individual cases, access to the Constitutional Court seems difficult. One reason is that the persons concerned seem to prefer going to the ECHR. Another is that for some of the emerging problems, it is questionable whether there is a basis for providing access to the courts at all (see the problem of access to territory, and question of action or inaction by state actors, e.g. a police officer escorts a person illegally entering the country back to the other side of the border). The persons concerned are themselves disinterested. They have no intention of staying in Hungary, and therefore do not wish to avail themselves of the protection the country could theoretically offer when turning to its authorities. Consequently, the latent problems are not brought to the attention of the courts and ultimately, the Constitutional Court. Overall, there is therefore little scope for the Constitutional Court to decide on the content (and limits) of the constitutional protection afforded by the right of asylum through concrete cases.

On the other hand, the role of the Constitutional Court as a bastion of sovereignty is gaining ground. The Constitutional Court, the guardian of the Fundamental Law, protects the framework and basis of the state's functioning, namely its legal system, thereby contributing to protecting the sovereign's functioning. Here, the issue of asylum is presented in a more abstract way. Based on the cases arising in the practice of the Constitutional Court, asylum issues have become a broader issue of competence-sharing and sovereignty between the EU and Hungary. Based on the abovementioned historical background, asylum issues avoided the Constitutional Court before 2016. There was only one case in 1996, under the previous Constitutional Court Act, in which an ex officio procedure was initiated based on Council of Ministers Decree No. 101/1989 (IX. 28.) on the recognition of refugees as a violation of the Geneva Convention as an international treaty. However, the Decree was repealed in 1998 and the new legislation differed significantly from the previous one, so the Constitutional Court terminated its procedure in 1999.<sup>26</sup>

## 4. Interpretation of Article XIV of the Fundamental Law and the questions of sovereignty and constitutional identity

The Constitutional Court first had the opportunity to interpret Article XIV of the Fundamental Law in 2015. Only then did the Constitutional Court have the opportunity to examine the substantive significance of the right of asylum to balance the fundamental rights of asylum seekers, constitutionally protected rights of residents on national territory, and main aim of the state such as maintaining public order and safeguarding national security. The opportunity was not harnessed.

The procedure underlying Decision 22/2016 (XII. 5.) (the so-called quota decision)<sup>27</sup> was initiated on the Ombudsman's motion. It concerned the plan for the distribution of refugees in the EU<sup>28</sup>, which Hungary did not support. The Ombudsman sought an interpretation of Article XIV(1) and (2)<sup>29</sup> and Article E(2)<sup>30</sup> of the Fundamental Law, partly concerning the prohibition of collective expulsion and possible unconstitutional involvement of Hungarian state bodies in the implementation of EU decisions.

Two reasons why the Ombudsman initiated this procedure are based on the motion. First, only a narrow group of petitioners can request an interpretation of the Fundamental Law.<sup>31</sup> Second, the Ombudsman, as a control body of the public administration, wanted to explore how Council Decision 1601/2015 could be interpreted to ensure that Hungarian institutions and bodies operate in accordance with the Fundamental Law. In his view, the obligations of these bodies to act in

27 | Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law [Online]. Available at: [https://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/\\$FILE/EN\\_22\\_2016.pdf](https://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/$FILE/EN_22_2016.pdf) (Accessed: 11 October 2023).

28 | On 22 September 2015, the Council of the European Union adopted Decision 2015/1601, which provides for the transfer of certain categories of asylum seekers residing in Italy and Greece to other Member States including Hungary as a transitional measure.

29 | 'Article XIV (1). Hungarian citizens may not be expelled from the territory of Hungary and may return from abroad at any time. Foreign nationals residing in the territory of Hungary may be expelled only based on a lawful decision. Collective expulsions are prohibited. (2) No one may be removed, expelled, or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture, or other inhuman or degrading treatment or punishment'.

30 | 'Article E (2). In its role as a Member State of the European Union and by virtue of international treaty, Hungary may—to the extent necessary for exercising its rights and discharging its obligations stemming from the founding Treaties—exercise certain competencies deriving from the Fundamental Law, together with the other Member States, through the institutions of the European Union'.

31 | 'Act CLI of 2011 on the Constitutional Court Article 38 (1). Where so requested by Parliament or its standing committee, the President of the Republic, the Government, or the Commissioner of the Fundamental Rights, the Constitutional Court shall provide an interpretation of a provisions of the Fundamental Law regarding a specific constitutional issue, provided that the interpretation can be inferred directly from the Fundamental Law'.

accordance with their tasks and powers may conflict with the content of the fundamental rights guaranteed by the Fundamental Law and may exceed the limits of the powers transferred by Hungary to the EU, creating legal uncertainty regarding additional powers.

In terms of the possible unconstitutional involvement of Hungarian state bodies in the implementation of EU decisions, the Ombudsman also questioned what legal institutions were entitled to declare this and whether the exercise of powers related to the founding treaties could restrict implementing an act not based on the competence conferred on the EU. The Ombudsman also asked whether the provisions of the Fundamental Law could be interpreted as authorising or restricting the transfer by Hungarian bodies and institutions, as part of cooperation within the legal framework of the EU, of a significant group of foreign nationals legally resident in an EU Member State, following an institutional procedure and without objectively prescribed criteria.

The Constitutional Court thus faced a complex problem, as the Ombudsman's petition, although related to the distribution of refugees, raised fundamental sovereignty issues. Ultimately, the Constitutional Court did not attempt to resolve the problem, as it had separated the motion for interpretation of Article XIV<sup>32</sup> and has not ruled on it since. This also means that the Constitutional Court, although it had the opportunity to examine the substantive significance of the right of asylum, has not taken it yet. As such, the decision pertained more to the limits of powers between the EU and Hungary, with asylum ultimately being only a stepping stone.

Regarding competences, the quota decision stated that the Constitutional Court may examine upon a relevant motion—when 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 (including the scope of the powers conferred on it), or its identity based on the country's historical constitution. This can happen only in exceptional cases and as a matter of *ultima ratio*, i.e. in compliance with the constitutional dialogue between Member States, within its own jurisdiction.<sup>33</sup>

In terms of the possible future assessment of asylum issues, the quota decision has implied considering two factors, namely sovereignty and constitutional identity. These were not previously considered in the practice of the Constitutional Court. Although not explicitly stated in the decision, its aftermath shows that asylum (in this case, the issue of the mass resettlement of asylum seekers), beyond its humanitarian aspects, has become interlinked with these two concepts. These decisions show a tendency of the Constitutional Court to approach the issue of international migration and the action of supranational institutions in this context from the perspective of the State, State power, and capacity of the State to act, rather than as an expression and guarantee of individuals and their human rights.

32 | '...because it deems it appropriate to examine and decide on the merits of the case separately', Ruling X/3327-31/2015 (new case number: X/1936/2016).

33 | Decision 22/2016 (XII.5.), Reasoning [33], [43]–[46].

For asylum issues, important is the element of sovereignty control that states the presumption of maintained sovereignty. According to this principle, Hungary did not relinquish its sovereignty when it joined the EU, but only made possible the joint exercise of certain competences; accordingly, Hungary's sovereignty must be presumed to be maintained when assessing the joint exercise of additional competences in relation to the rights and obligations laid down in the founding treaties of the EU. However, the Constitutional Court did not offer a more specific conclusion. While it did formulate the presumption of maintained sovereignty, it did not have to and did not derive any conclusions on what this implied for the implementation of the contested EU decisions, as its procedure was purely constitutional interpretation.

The protection and interpretation of sovereignty emerged as a decision-making aspect to examine, and has since become part of the practice of the Constitutional Court. Although the function of the Constitutional Court to protect sovereignty (beyond the manifestation of popular sovereignty) rarely arises, and the external side of sovereignty does not necessarily come within the scope the Constitutional Court, in relation to the people, the nation, and their concept, it has become a task to consider global aspects beyond the specific problem.

Another novelty of the decision was the introduction of the concept of constitutional identity. By this, the decision of the Constitutional Court meant Hungary's constitutional identity, the content of which is defined on a case-by-case basis, consider together the whole of the Fundamental Law and its individual provisions, their purpose, National Avowal (the preamble of the Fundamental Law), and achievements of our historical constitution [by virtue of the National Avowal and Article R(3)<sup>34</sup>]. The resolution also contains an open list of constitutional values within this scope: freedoms, separation of powers, the republican form of government, respect for public autonomy, freedom of religion, legitimate exercise of power, parliamentarianism, equality of rights, recognition of the judiciary, and protection of the nationalities living with us. These fundamental values are not created by the Fundamental Law, only recognised by it. Therefore, they cannot be renounced by an international treaty, and can only be deprived of Hungary's sovereignty and independent statehood by the permanent loss of its sovereignty. Since sovereignty and constitutional self-identity are intertwined, their two checks must be carried out with regard to each other.<sup>35</sup> The result of the interconnection and defence of these two concepts and phenomena by the Constitutional Court shows that the meeting of European unity and national specificities is seen by the Constitutional Court as a way of ensuring that the constitutional identity of each nation cannot be dissolved in an artificially created common approach. Common values include what is common and national values include what is not. However, non-common values are also values, and European values at that, and therefore

34 | 'Article R (3). The provisions of the Fundamental Law shall be interpreted in accordance with their intended purpose, the National Avowal, and with the achievements of our historical Constitution'.

35 | Decision 22/2016 (XII.5.), Reasoning [64]–[65], [67].

also need (judicial) protection. This protection can be provided by the national constitutional courts.<sup>36</sup>

By focusing on constitutional identity, the Constitutional Court started to research the characteristics and values that are partly European but also Hungarian. The court is at the beginning of this journey, and its practice is not consistent or well developed. However, as it is linked to sovereignty issues, the study is suitable as an issue of the relationship of asylum seekers and other migrants, persons, and groups with different cultures with the majority culture. Decision 32/2021 (XII. 20.), presented later, reflected this.

This is also supported by the fact that in Decision 2/2019 (III. 5.),<sup>37</sup> which aimed to interpret the Fundamental Law, the interconnection of sovereignty, constitutional identity, and asylum emerged, but now at the Government's initiative.

The Government's petition raised questions such as whether the Fundamental Law is the source of legitimacy for all sources of law including the right of the EU under Article E of the Fundamental Law, and whether it follows from the Fundamental Law that its interpretation by the Constitutional Court cannot be undermined by the interpretation of another body. The background to the application was that the European Commission had sent a formal notice stating that according to its interpretation, Article XIV of the Fundamental Law on asylum, as amended, infringed certain articles of Directive 2011/95/EU of the European Parliament and the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

The part of the resolution concerning sovereignty control, in addition to what was already stated, stipulates that the exercise of powers through the institutions of the EU may not exceed what is necessary under an international treaty, 'may not be directed to more powers than those which Hungary otherwise has under the Fundamental Law', and emphasises the principle of reserved sovereignty.<sup>38</sup> Aligned with its previous decisions, it also stresses that the joint exercise of powers must not restrict Hungary's inalienable right to dispose of its territorial unit, population, form of government, and state structure, and that the joint exercise of powers may be limited to the extent necessary.<sup>39</sup> The resolution does not contain further elements on identity control, does not elaborate on the subject, and does not mention national specificities that need to be protected. It does, however, emphasise our European identity, but does not explain how this identity, which is part of our national identity, relates to other elements of identity that are also treated as part of our constitutional identity. The issue of sovereignty and identity surrounds the interpretation of the granting of asylum in this decision, as discussed later.

36 | Varga, 2018, pp. 22, 26–27.

37 | Constitutional Court Decision 2/2019. (III. 5.) AB [Online]. Available at: [https://api.alkotmanybirosag.hu/en/wp-content/uploads/sites/3/2019/03/2\\_2019\\_en\\_final.pdf](https://api.alkotmanybirosag.hu/en/wp-content/uploads/sites/3/2019/03/2_2019_en_final.pdf) (Accessed: 11 October 2023).

38 | Reasoning [17].

39 | Reasoning [22].

The clash between the strict approach of the Hungarian state on asylum issues and EU processes in the opposite direction has brought the issue of asylum to life in the proceedings of the Constitutional Court. Furthermore, since this is at the heart of the division of competences between the Member State and EU, these issues have become problems related to sovereignty, competence, and national values rather than an asylum issue. Consequently, no new interpretative label has been added to the issue of asylum. However, the decisions did not represent a revolutionary change in the competence issue. Although new interpretative aspects emerged, the Constitutional Court has not taken any steps that would have effectively undermined the validity of EU law or radically changed the relationship between it and national law. By relying on these decisions alone, EU decisions remain enforceable for national institutions, but can provide a reference point for the government in policy debates with the EU.

## 5. Interpretation of Article XIV of the Fundamental Law and human dignity

Following the abovementioned precedents, the Constitutional Court—surprisingly—instead of emphasising sovereignty, focused on the human dignity concerns of the host state and its population (i.e. not the asylum seekers). This solution also meant that the Constitutional Court did not push the issue of conflict of competences and sovereignty, avoiding a possible conflict with the EU.

The procedure underlying Decision 32/2021 (XII. 20.)<sup>40</sup> was based on the interpretation of the Fundamental Law and initiated by the Government. The Government requested the Constitutional Court to interpret Articles E(2) and XIV(4) of the Fundamental Law. In its application, the Government referred to the judgment of the CJEU in Case C-808/18,<sup>41</sup> according to which a foreign national illegally staying in Hungary cannot be escorted across the border, but must be subject to asylum or expulsion proceedings. The Government argues that given that the effectiveness of the EU rules on expulsion is not guaranteed, the implementation of CJEU judgment could lead to a situation where a non-Hungarian national illegally staying in Hungary, whose identity is sometimes unknown, would remain in Hungary for an indefinite period, thus becoming *de facto* part of the country's population. Therefore, until such time as effective readmission is achieved by the EU, compliance with the obligation under the judgment will change the population, which will directly affect Hungary's sovereignty as enshrined in the Fundamental Law,

40 | Decision 32/2021. (XII. 20.) AB [Online]. Available at: [https://public.mkab.hu/dev/dontesek.nsf/0/1dad915853cbc33ac1258709005bb1a1/\\$FILE/32\\_2021\\_AB\\_eng.pdf](https://public.mkab.hu/dev/dontesek.nsf/0/1dad915853cbc33ac1258709005bb1a1/$FILE/32_2021_AB_eng.pdf) (Accessed: 11 October 2023).

41 | Judgment of the Court (Grand Chamber) of 17 December 2020. *European Commission v Hungary*. ECLI:EU:C:2020:1029.

The Government's (unhidden) aim was to be exempted from the Court ruling, but the Constitutional Court's decision did not confirm this. Orbán, Szarka, and Szegedi, 2023, p. 14.

its identity based on its historical constitution, and its inalienable right to dispose of its population.

The Seventh Amendment to the Fundamental Law of 29 June 2018 incorporated the abovementioned practice of the Constitutional Court into the EU clause<sup>42</sup> and introduced the obligation to protect constitutional identity.<sup>43</sup> As mentioned, the restriction of the right of asylum was introduced in Article XIV(4). Accordingly, the issue of cultural differences eventually appeared in connection with the earlier framework of sovereignty and constitutional self-identity.

The way to do this was to unfold the content of fundamental rights control. Several options were open to the Constitutional Court. One was to wait and avoid making a decision. Here, it could have requested a preliminary ruling like the German Constitutional Court, but this had never been done before. It could also have excluded the application of the CJEU decision like the Polish example, or tried to find the balance.<sup>44</sup> The latter was achieved.

Fundamental rights control has been linked to sovereignty and identity control since Decision 22/2016 (XII. 5.), but was not the focus of previous decisions. However, for the first time, the Constitutional Court has now conducted an examination of this, meaning it has approached the issue from a fundamental rights perspective. (How does uncontrolled immigration affect culture and can it be protected through human dignity?)

In its review of fundamental rights, it concluded that the failure to exercise joint competences as provided for in Article E(2) of the Fundamental Law could result in the permanent and massive residence of foreign populations in Hungary without democratic authorisation, which could violate the right to identity and self-determination of the Hungarian people derived from their human dignity. The reason for this is that as a result of the lack of enforcement of the exercise of powers, the traditional social environment of persons living on the territory of Hungary may change without democratic authority or influence on the part of the persons concerned without State control mechanisms. This situation may lead to a process beyond the control of the State and to a forced change in the traditional social environment of the person.<sup>45</sup>

Note that the decision focused on the existence or lack of State control, not on the link between settlement and identity, and stressed that the obligation of the State should not, even exceptionally, result in any distinction between the human

42 | 'Article E) (2). In its role as a Member State of the European Union and by virtue of international treaty, Hungary may—to the extent necessary for exercising its rights and fulfilling its obligations stemming from the Founding Treaties—exercise certain competences deriving from the Fundamental Law, together with the other Member States, through the institutions of the European Union. The exercise of powers under this Paragraph must be consistent with the fundamental rights and freedoms set out in the Fundamental Law, and it must not be allowed to restrict Hungary's inalienable right of disposition relating to its territorial integrity, population, political system, and form of governance'.

43 | 'Article R (4). Each and every body of the State shall be obliged to protect the constitutional identity and the Christian culture of Hungary'.

44 | Chronowski, 2022, p. 161.

45 | Reasoning [51]–[52].

dignity of individuals or affect the State's obligation to ensure full protection of the human dignity of all persons present in its territory, including asylum seekers.<sup>46</sup>

Regarding sovereignty control, the decision clarified the previous one by referring to the Treaty on the Functioning of the European Union (TFEU): the presumption of maintained sovereignty is unquestionably applicable to all competences not considered by the TFEU to fall within the exclusive competence of the Union. This is because in these cases, both the Fundamental Law and TFEU provide that Member States are entitled to exercise a certain scope of competences even after the entry into force of the TFEU.<sup>47</sup> This focus on the Fundamental Law has been combined with some consideration of the TFEU. This decision is novel in that based on the presumption of maintained sovereignty, it also stated that the EU and its institutions do not only exercise the powers conferred on them for the purpose of their joint exercise in accordance with the objective of the founding and amending treaties of the EU if they create secondary sources of law, but that the exercise of these powers is also conditional on ensuring the effective implementation of the secondary sources of law created. It cannot be assumed that Hungary has ceded the right to exercise a given power to the institutions of the EU if these institutions disregard their obligation to exercise that power or if the joint exercise of power is carried out only ostensibly so that it manifestly does not ensure the effective application of EU law.<sup>48</sup>

For identity control, the decision stated that constitutional identity and sovereignty are not complementary, but interrelated concepts in several respects: Hungary's preservation of its constitutional identity, also as a Member State of the EU, is made possible by its sovereignty (the preservation of its sovereignty); constitutional identity is manifested primarily through a sovereign—constitution-making—act. Considering Hungary's historical struggles, the aspiration to preserve the country's sovereign decision-making powers is part of its national identity, and through its recognition in the constitution, of its constitutional identity. The main features of state sovereignty recognised in international law have been closely linked to Hungary's constitutional identity due to the historical characteristics of our country.<sup>49</sup>

The resolution reviews those aspects of our historical constitutional achievements that the Constitution has made part of the constitutional interpretation, which are the protection of the values that constitute the country's constitutional identity (including the protection of linguistic, historical, and cultural traditions, and certain steps in the struggle for its sovereignty and freedom).<sup>50</sup> Created during the historical development of the Constitution, these are legal facts that cannot be renounced by an international treaty and amendment to the Fundamental Law, since legal facts cannot be changed by legislation.<sup>51</sup>

The strengthening of fundamental rights control also has a constitutional meaning, in that the state has a constitutional obligation to act to protect human

46 | Reasoning [55].

47 | Reasoning [66].

48 | Reasoning [79].

49 | Reasoning [99].

50 | Reasoning [102]–[107].

51 | This finding Varga Zs. András appeared for the first time in two earlier parallel reasoning, Decision 22/2016 (XII. 5.), Reasoning [112]; Decision 2/2019 (III. 5.), Reasoning [70]–[72].

dignity, even against EU acts that ‘threaten’ it, albeit in exceptional cases and under specific conditions. This ultimately extends the constitutional mandate under which the state can disregard the implementation of EU law. In places, it sticks to more abstract reasoning (e.g. it does not clarify certain aspects of the lack of exercise of competence) and the criteria set out in the decision are loose.<sup>52</sup> In this case, too, the Constitutional Court has formulated principles and guidelines, but not reached a final conclusion. In cases where the question arises as to the competences of the EU and Hungary as a Member State, or the scope of EU and national law, the Hungarian Constitutional Court strives to maintain a delicate balance. Although it clearly defends the constitution and national sovereignty, it does not question the legitimacy of EU acts and does not resolve potential conflicts itself. However, and this is true for all decisions concerned, it emphasises the importance of constitutional dialogue (although it consistently does not use one of the possible means of this dialogue, namely the preliminary ruling procedure).

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## 6. Article XIV of the Fundamental Law and the constitutional protection of the right to asylum

Based on the foregoing, the Constitutional Court has had the opportunity to interpret the constitutional content of the right of asylum through the Fundamental Law, first at the initiative of the Ombudsman and then at that of the Government. While not yet done in 2016, the 2019 and 2021 decisions have already interpreted Article XIV in substance. In addition, in another case, the Constitutional Court made findings on the right of asylum in the context of the criminal offence of facilitating illegal immigration.<sup>53</sup>

The constitutional interpretations focused on the second sentence of Article XIV(4), according to which a non-Hungarian citizen who entered Hungary through a country where he or she was not subject to persecution or imminent threat of persecution is not entitled to asylum. In (the mentioned) Decision 2/2019 (III. 5.), the initiator—the Government—asked the Constitutional Court to answer the question regarding the authentic interpretation of the phrase ‘not have the right to seek asylum’. In its view, it could mean that a non-Hungarian citizen who entered Hungary through a country where he has not been subjected to persecution or the imminent threat of persecution cannot be granted the right of asylum at all. However, it could also be interpreted to mean that the applicant does not have a fundamental right to asylum and that the Hungarian State is not under a constitutional obligation to grant it, although he may be granted the right of asylum in accordance with the substantive and procedural rules laid down by Parliament.

The decision, drawing on the coherent interpretation of the Fundamental Law analogy and of international and EU law, first reviewed whether the constitutional

52 | Blutman, 2022, pp. 7, 10.

53 | See Decision 3/2019. (III. 5.) below.

text contains the same or similar phrase elsewhere. Then, drawing on the interpretation of the established churches by analogy, the Constitutional Court concluded that the phrase ‘not have the right to seek asylum’ in the second sentence of Article XIV(4) of the Fundamental Law means that the right of asylum cannot be considered a fundamental subjective right in the case of a non-Hungarian citizen who entered the territory of Hungary through a country where he has not been subjected to persecution or an imminent threat of persecution. However, this person has a fundamental right to have his/her application examined by the competent authority based on the cardinal law on the fundamental rules for the granting of the right of asylum under Article XIV(5) of the Fundamental Law. Consequent to this fundamental right, it is the duty of Parliament to set the basic rules for the granting of the right of asylum in a cardinal law.<sup>54</sup>

In so arguing, the decision has blunted the Seventh Amendment’s restriction on the right to asylum, even if deducing from the plain meaning of the text (‘not have the right to seek asylum’) that asylum seekers arriving through a quasi-safe country—or a country designated as such by the legislature—have a ‘fundamental right to have their claims examined’ under the cardinal law on asylum.<sup>55</sup>

The Constitutional Court further argued that in its view, the second sentence of Article XIV(4) should be interpreted from the internal aspect of sovereignty, since the Hungarian state independently establishes its constitutional organisation and legal system free from the sovereignty of other States, and exercises full and exclusive sovereignty over the persons living in its territory as defined by the Constitution and law.<sup>56</sup> It follows that the right to asylum is not the refugee’s own substantive right, but arises from the relevant international treaties entered into by Hungary as a limit to its external sovereignty, and that the basic rules of the international treaties are determined by the Hungarian State independently in the framework of its internal sovereignty.<sup>57</sup>

The decision then invoked the role of international and EU law in strengthening interpretation. Under the Universal Declaration of Human Rights and Geneva Refugee Convention, the principle of non-refoulement is a minimum international obligation explicitly undertaken by Hungary.<sup>58</sup> The principle is also enshrined in Article XIV (3) of the Fundamental Law, so the resolution does not contain anything new in this respect. What does, however, nuance the issue is the emphasis on the fact that the detailed establishment of the prohibition of refoulement, the rules that apply to refugees not subject to the prohibition of refoulement, in addition to those in the Fundamental Law, is not set in national law in the Fundamental Law, but referred to statutory regulation.<sup>59</sup>

54 | Reasoning [44].

55 | Chronowski, 2019, p. 73.

56 | This approach already appeared in Decision 9/2018 (VII. 9.) (Reasoning [50]).

57 | Reasoning [45].

58 | Reasoning [46].

59 | Reasoning [47] The argument also included a citation of Article 39 of Directive 2013/32/EU of the European Parliament and the Council on common procedures for granting and withdrawing international protection.

In contrast, (previously mentioned) Decision 32/2021 (XII. 20.) again avoided the actual interpretation of Article XIV(4). Although the Government has asked the Constitutional Court to interpret Article E(2) and Article XIV(4) of the Fundamental Law to determine whether it can be interpreted as meaning that Hungary can implement an EU obligation, which in the absence of effective enforcement of European legislation, could lead to a situation where an alien illegally residing in Hungary becomes *de facto* part of the country's population. However, the decision focused on the content of constitutional identity and exercise of powers as detailed above. On one hand, the last sentence of Article XIV (4) of the Fundamental Law is instrumental to the specific constitutional problem in that it defines the scope of persons not entitled to asylum. Therefore, there is no need for an independent interpretation.<sup>60</sup> On the other hand, it only stated that it is also a consequence of Article XIV and of the mutual solidarity between states that Hungary must actively and effectively contribute to the reassuring settlement of the situation of asylum seekers in its territory. This obligation is unquestionably incumbent on the institutions and bodies of the EU.<sup>61</sup>

A 'cuckoo bird' is Decision 3/2019 (III. 7.),<sup>62</sup> where the decision did not interpret the Fundamental Law, but examined a provision of the Criminal Code that sanctions the promotion and support of illegal immigration.<sup>63</sup> As such, the decision used the guarantee system of constitutional criminal law. However, this decision interpreted Article XIV(4) not in itself, but in accordance with the Asylum Act. According to this decision, Article XIV(4) of the Fundamental Law lays down the substantive—positive and negative—legal conditions for the granting of the right of asylum, which are detailed in Act LXXX of 2007 on the Right of Asylum and supplemented by procedural conditions and rules. Related with this status, the applicant for recognition as a refugee is entitled, *inter alia*, to reside in the territory of Hungary under the conditions laid down in the Asylum Act and to a permit for residing in the territory of Hungary, which is provided for in a separate act. This legislation provides the framework for a close link with Article XIV of the Fundamental Law and other provisions, *i.e.* fundamental rights protection is granted to persons who have been granted recognition (or subsidiary protection) as refugees, and to a limited extent, to those who are participants in the recognition procedure. However, fundamental rights protection does not extend to activities not covered by or not closely linked to the right of asylum, such as illegal immigration or

60 | Reasoning [22].

61 | Reasoning [49].

62 | Decision 3/2019 (III. 7.) AB [Online]. Available at: [https://public.mkab.hu/dev/dontesek.nsf/0/db659534a12560d4c12583300058b33d/\\$FILE/3\\_2019\\_AB\\_eng.pdf](https://public.mkab.hu/dev/dontesek.nsf/0/db659534a12560d4c12583300058b33d/$FILE/3_2019_AB_eng.pdf) (Accessed: 11 October 2023).

63 | The statute classifies as a misdemeanour the activity of organising illegal immigration, and defines by way of example the content of the organising activity, which may include: organising border surveillance; preparing, distributing, or commissioning information material; and building or operating a network. The indirect political background to the decision is the infringement procedure launched by the European Commission against Hungary in 2018, which found the Stop Soros law to be contrary to EU law. Békés, 2020, p. 942.

residence. Furthermore, there is no fundamental rights protection in cases where a person abuses the asylum procedure to regularise his/her stay in Hungary. Following the amendment of the Fundamental Law, protection is not extended to those who entered Hungary through a country where they have not been subject to persecution or an imminent threat of persecution.<sup>64</sup>

## 7. Right of appeal in constitutional complaint procedures

Regarding constitutional complaint procedures, the related cases have not reached the substantive stage, as the Constitutional Court considers that no problems or arguments have been put forward that would have raised the question of the unconstitutionality of the challenged judicial decision or issues of constitutional importance that would have required a substantive examination of the cases.<sup>65</sup>

There are almost no classic asylum cases under the Fundamental Law. One of these cases concerned the non-refoulement of a Syrian national, who claimed that the withdrawal of his residence card would only allow him to return to Syria, where he would be at risk of torture and inhuman treatment. The Constitutional Court, however, stated laconically that the petition only raised factual issues relating to the revocation of the residence card, but that the Constitutional Court did not have jurisdiction to assess and weigh the evidence.<sup>66</sup>

Oddly, there have also been cases where the asylum authority has lodged a constitutional complaint<sup>67</sup> against a court decision annulling its decision. In its constitutional complaint, the applicant primarily requested the Constitutional Court to rule in principle that under Article XIV(4) of the Fundamental Law, if the court annuls a decision of an asylum authority rejecting an asylum application, it may give guidance establishing the existence of conditions for the applicant's eligibility for international protection if it ascertains that the applicant arrived in Hungary directly from a country where he/she was subject to persecution or an imminent threat of persecution. It also requested a declaration that the necessary condition for granting asylum was the applicant's presence in Hungary and that the constitutional condition for the granting thereof was not fulfilled in the

64 | Reasoning [52].

65 | Act CLI of 2011 of the Constitutional Court 'Section 29. The Constitutional Court shall accept constitutional complaints if a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises paramount constitutional issues'.

66 | Order 3440/2021 (X. 25.) AB, Reasoning [25]–[26]. The residence card was revoked, because the petitioner had provided false information regarding his place of residence, and based on the information provided, posed a real, direct, and serious threat to public security in Hungary, and according to the expert opinion contained in the classified document, to national security.

67 | The right of petition of organisations exercising public authority was explicitly included in the Constitutional Court Act of 20 December 2019, but is explicitly excluded from that of 1 June 2023. Act on CC Section 27.

case of an applicant who did not cooperate with the authorities during the asylum procedure and left for an unknown destination without leaving his/her contact details behind.<sup>68</sup> In its rejection, the Constitutional Court referred to the fact that the Asylum Act contains rules on inadmissible applications, but the authority had not invoked them in its own proceedings or in those of the court. Therefore, there was no constitutional requirement to be met in that regard.<sup>69</sup>

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## 8. Summary

Hungary, as the external border of the EU, has faced a significant wave of migration since 2015, which has led to several amendments to laws and the Fundamental Law. Furthermore, the EU and the ECHR have taken action in response. However, it is an interesting contrast that despite this, asylum cases in the strict sense are almost non-existent in the practice of the Constitutional Court.

Because of the historical background, asylum issues had avoided the Constitutional Court before 2016. From 1989, Hungary adopted the international asylum system automatically without much debate. This system worked for a long time without major difficulties or controversy.

However, as a state response to the 'refugee flood' from 2014, but mostly from 2015, significant changes were introduced. Despite this, the constitutional review of the legislative amendments has not been initiated before the Constitutional Court and no constitutional complaints have been lodged in individual cases. The decisions in which the institution of asylum has been raised have been taken in constitutional interpretation proceedings. The clash between the strict approach of the Hungarian state on asylum issues and the EU processes in the opposite direction has brought the issue of asylum to life in the proceedings of the Constitutional Court. Furthermore, since this is really at the heart of the division of competences between the Member State and EU, these challenges have grown into problems pertaining to sovereignty, competence, and national values, rather than an asylum issue. Because it has arisen unilaterally as a matter of sovereignty, identity, national culture, and, most importantly, the powers of the EU, no new interpretative label has been added to the issue of asylum and the decisions did not answer everyday questions that affect the asylum scene, such as access to the territory, pushback phenomenon, provision of procedural guarantees, effectiveness of legal remedies, and conflict of all these with state sovereignty. In addition, although the Constitutional Court has raised questions pertaining to competences, sovereignty, and constitutional identity, these decisions did not represent a revolutionary change in the competence issue. Although new interpretative aspects have emerged, the Constitutional Court has not taken steps to undermine the validity of EU law or radically change the relationship between EU and national law.

68 | Ruling 3394/2022 (X. 12.), Reasoning [18]–[19].

69 | Reasoning [31].

For the future, the question of the substance of asylum as a constitutional right remains an option for the Constitutional Court. On one hand, it has an ongoing procedure in which this would be possible. On the other, it cannot be ruled out that as the EU constantly pressures Hungary to adjudicate applications from those entering its territory, such an individual case could be brought before the Constitutional Court. It already stated that fundamental rights protection does not extend to activities not covered by or not closely linked to the right of asylum, such as illegal immigration or residence, and by analogy, there is no fundamental rights protection in cases where a person abuses the asylum procedure to regularise his/her stay in Hungary. Following the amendment of the Fundamental Law, protection is not extended to those who entered Hungary through a country where they have not been subject to persecution or an imminent threat of persecution. However, these issues may change as the legality of entry and residence changes. Similarly, the scope of the safe third country definition may change. As such, it cannot be said that there is no room for manoeuvre left for the Constitutional Court.

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