

CONSTITUTIONAL COURT DECISION 2/2019. (III. 5.) AB

With regard to interpreting the Fundamental Law, the Constitutional Court has adopted the following

decision:

The Constitutional Court holds the following:

1 It follows from Article R) (1) of the Fundamental Law that the applicability of the European Union's law in Hungary shall be based on Article E) of the Fundamental Law.

2 It follows from Article 24 (1) of the Fundamental Law that the genuine interpreter of the Fundamental Law is the Constitutional Court. The interpretation provided by the Constitutional Court cannot be derogated by any interpretation provided by another organ; the Constitutional Court's interpretation has to be respected by everyone. During the interpretation of the Fundamental Law, the Constitutional Court takes into account the obligations binding Hungary on the basis of its membership in the European Union and under international treaties.

3 The Constitutional Court states that following from the second sentence of Article XIV (4), which is interpretable with regard to the international obligations undertaken by Hungary, granting asylum for a non-Hungarian citizen who arrived to the territory of Hungary through a country where he or she was not subject to persecution or imminent risk of persecution, shall not be regarded as a constitutional obligation of the Hungarian State, however the Parliament may also grant asylum to such persons according to the substantive and procedural regulations it specifies.

This decision of the Constitutional Court shall be published in the Hungarian Official Gazette.

Reasoning

I

- [1] 1 On behalf and under the authorisation of the Government, the minister of justice (hereinafter: "petitioner"), in accordance with Section 38 (1) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), submitted a petition to the Constitutional Court aimed at the interpretation of Article E) (2), Article R) (1), Article XIV (4) and Article 24 (1) of the Fundamental Law.
- [2] According to the petitioner, the particular constitutional problem addressed in the case is the relation between the Fundamental Law and the law of the European Union, more specifically the Constitutional Court's monopoly of interpreting the Fundamental Law. The background of this concrete constitutional issue is the official notice sent by the European Commission regarding the compliance with the Union law of the Act VI of 2018 on amending certain Acts relating to measures to combat illegal immigration and of the seventh amendment of the Fundamental Law. As explained by the European Commission in the notice, according to the Commission's interpretation, the amended Article XIV of the Fundamental Law on asylum violates certain Articles of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (hereinafter: "Directive"). In the context of this interpretation of the Fundamental Law, a particular constitutional issue has been raised regarding the relation between the interpretation of the Fundamental Law by an organ of the European Union and the authentic interpretation provided by the Constitutional Court.
- [3] The petitioner in particular requested the Constitutional Court to interpret the following three problems of constitutional law:
- 1 Can it be concluded from Article R) (1) of the Fundamental Law that the Fundamental Law, as the basis of Hungary's legal system, is at the same time the legitimizing source of all sources of law – including the law of the European Union according to Article E) of the Fundamental Law?
 - 2 Does it follow from Article 24 (1) of the Fundamental Law that the Constitutional Court's interpretation of the Fundamental Law shall not be derogated by any interpretation provided by another organ?
 - 3 In case of an affirmative answer to the second question, how does the Constitutional Court provide a genuine interpretation of the second sentence of Article XIV (4) of the Fundamental Law with regard to the right to asylum, by taking into account the seventh amendment of the Fundamental Law?

- [4] Regarding the first question, the petitioner explained that according to Article R) (1) of the Fundamental Law, "the Fundamental Law shall be the foundation of the legal system of Hungary." Consequently, the internal legal validity of the generally binding rules of conduct established in the framework of the competences exercised jointly with other Member States, through the institutions of the European Union (i.e. essentially the law of the European Union) follows from the Fundamental Law. To support this argumentation, the petitioner quotes, in addition to the relevant decisions of the Hungarian Constitutional Court, certain decisions of the Polish Constitutional Court and of the French Constitutional Council.
- [5] Regarding the second question, the petitioner argues that according to Article 24 (1) of the Fundamental Law, "the Constitutional Court shall be the principal organ for the protection of the Fundamental Law." The petitioner holds, on the basis of the Constitutional Court Decision 3/2017. (II. 25.) AB, that, on the basis of Article 24 (1) of the Fundamental Law quoted above, only the Constitutional Court is authorised to provide a genuine interpretation of the Fundamental Law. Consequently, the European Commission is deemed to break the Constitutional Court's monopoly of interpretation when it examines, in its own framework of interpretation, the Fundamental Law in the course of an infringement proceeding with regard to its compliance with the secondary Union law.
- [6] Regarding the third question, the petitioner explains that the interpretation of Article XIV (4) of the Fundamental Law by the Constitutional Court is indispensable for enabling the Government to meet its obligation of obeying the Fundamental Law and to protect the constitutional identity. According to the interpretation provided by the European Commission, Article XIV (4) of the Fundamental Law means that any asylum seeker who transited another country prior to arriving to Hungary, would become ineligible to be granted an asylum, unless he or she could prove that he or she was subject to persecution or to the imminent risk of it in the transit country . In contrast, according to the Government's view, the meaning of the above provision is that those who arrive from a country where they were, in the meaning of the Geneva Convention, subject to persecution or they had a well-founded fear of being persecuted shall be eligible to asylum as a fundamental right. In any other case the Parliament shall be free to decide whether to grant them asylum or a similar form of protection.

II

- [7] The provision of the Fundamental Law to be interpreted:
- "Article E) (2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to

exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure."

"Article R) (1) The Fundamental Law shall be the foundation of the legal system of Hungary."

"Article XIV Hungary shall, upon request, grant asylum to non-Hungarian nationals who are persecuted in their country or in the country of their habitual residence for reasons of race, nationality, the membership of a particular social group, religious or political beliefs, or have a well-founded reason to fear direct persecution if they do not receive protection from their country of origin, nor from any other country. A non-Hungarian national shall not be entitled to asylum if he or she arrived to the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution."

"Article 24 (1) The Constitutional Court shall be the principal organ for the protection of the Fundamental Law."

III

- [8] 1 Article 24 (2) of the Fundamental Law lists the competences of the Constitutional Court without mentioning within the items from *a)* to *h)* the competence to interpret the provisions of the Fundamental Law. However, according to item *g)* the Constitutional Court may exercise further competences laid down in a cardinal Act. Accordingly, Section 38 of the ACC regulates the competence of interpreting the Fundamental Law. The petitioner initiated the Constitutional Court's procedure on the basis of Section 38 paragraph (1) of the ACC. According to this provision, "On the petition of 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 the provisions of the Fundamental Law regarding a concrete constitutional issue, provided that the interpretation can be directly deduced from the Fundamental Law." Thus, on the basis of the text of the ACC, only certain bodies (persons) may initiate the interpretation of the Fundamental Law and they may do so only in a petition of specific content. The Constitutional Court shall examine whether the petition comes from an authorised body/person,

whether it is aimed at the interpretation of a concrete provision of the Fundamental Law, whether it is connected to a concrete constitutional issue and whether the interpretation can be directly deduced from the Fundamental Law. (Decision 8/2014. (III. 20.) AB, Reasoning [20]-[27]; most recently reinforced by the Decision 9/2018. (VII. 9.) AB, Reasoning [20]).

- [9] The Constitutional Court states that the petition had been submitted by the petitioner on behalf of the Government, thus it came from an authorised body.
- [10] The Constitutional Court also states that the petition is aimed at the interpretation of the Fundamental Law and it specifies the concrete provisions of the Fundamental Law to be interpreted.
- [11] Further conditions of interpreting the Fundamental Law – i.e. the existence of a concrete constitutional problem, and the direct deductibility of the interpretation from the Fundamental Law – were examined by the Constitutional Court with regard to the fact that it has always interpreted this competence in a restrictive sense and it considered in this case as well that without this condition the interpretations of the Fundamental Law would pose a risk that the Constitutional Court takes on the responsibility of the legislative, or indeed of the executive power. {Decision 17/2013. (VI. 26.) AB, Reasoning [10]}.
- [12] The petitioner raised three questions with relevance of constitutional law. With account to the above, the Constitutional Court proceeded with the examination independently by each question.
- [13] 2 In the first question, the Government asked whether it can be concluded from Article R) (1) of the Fundamental Law that the Fundamental Law was the legitimizing source of all sources of law – including the law of the European Union according to Article E) of the Fundamental Law.
- [14] According to Article R) (1) of the Fundamental Law, the Fundamental Law shall be the foundation of the legal system of Hungary. Article E) is part of the Fundamental Law and it contains the constitutional basis upon which Hungary participates, as a Member State, in the European Union, and which serves as a constant basis for the enforcement of the European Union's law as internal law, i.e. for its direct applicability.
- [15] The Constitutional Court recalls that Article E) (1) specifies the participation in the development of European unity as an aim of the State. This participation is not self-serving as it should serve the purpose of expanding human rights, prosperity and security. [Decision 143/2010 (VII. 14.) AB, ABH 2010, 698, 708, hereinafter: "CCDec. 1"] In line with the structural composition of the Fundamental Law, there is a correlation between paragraphs (1) and (2) of Article E) of the Fundamental Law: Hungary participates in the European Union as a Member State in the interest of developing the European unity, for the purpose of expanding the freedom, prosperity and security of European nations.

- [16] 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 it is expressed in our National Avowal of the Fundamental Law: we are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago. It is also a part of our national values that our nation has over the centuries defended Europe in a series of struggles and enriched Europe's common values with its talent and diligence, and we also "believe that our national culture is a rich contribution to the diversity of European unity." 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.
- [17] In line with the above, the reasoning of the Fundamental Law sets out the following: "Hungary shall contribute to the development of European unity serving the purpose of expanding the freedom, prosperity and security of the nations of Europe, and it also mentions the European Union as the most important institutionalized forum of developing the European unity. The European Union has its own legal system based on international treaties, according to which the Union law is directly applicable in the territory of the Member States and it may also directly create rights and obligations for the subjects of law. As the participation in the European Union has a significant impact on the order and the framework of exercising public authority in Hungary, and as the Union law determines to a great extent the rights and obligations of Hungarian subjects of law, it is necessary to have an explicit authorisation in the Fundamental Law – among the structural principles that have an overall effect throughout the whole Fundamental Law – for the exercising of competences within the framework of the European Union. Article E) of the Fundamental Law allows Hungary to exercise some of its competences, as a Member State of the European Union, through the institutions of the European Union. The affected concrete competences shall be determined in an international treaty; the exercising of powers through the institutions of the European Union shall not exceed the extent necessary that results from the international treaty and it shall not be aimed at more competence than Hungary otherwise possesses on the basis of the Fundamental Law. Due to its prominent importance, the binding effect of the international treaty that serves as the basis of exercising powers through the institutions of the European Union shall be acknowledged if authorised to do so by the National Assembly with the two thirds majority of the Members of Parliament."
- [18] With regard to the competences of the Constitutional Court, the international treaties according to Article E) (2) and (4) of the Fundamental Law shall become, after the entry into force, parts of the Union law, nevertheless they shall retain their origin as international treaties. As referred to in the wording of Article E) (2) of the

Fundamental Law, the founding treaties are considered as international undertakings made by Hungary. There is also a decision of the Constitutional Court that made a reference to this origin of international law. [see Decision 61/2008 (IV. 29.) AB, ABH 2008, 546, 550]

- [19] However, the *sui generis* character of Union law as internal law differentiated from international law is demonstrated by the fact that it is subject to Article E) of the Fundamental Law, which is a *lex specialis* compared to Article Q) applicable to international law. It has been reinforced in the Decision 9/2018. (VII. 9.) AB, according to which the sovereignty transfer under Article E) (2) of the Fundamental Law is separated from international law and it requires distinct handling due to the *sui generis* nature of Union law. (Cp. Reasoning [31])
- [20] However, the Union law as internal law does not fit into the hierarchy of the domestic sources of law: it is a set of laws to be applied mandatorily on the basis of the constitutional order incorporated in the Fundamental Law. This approach is also supported by the fact that the Constitutional Court has no competence to annul the Union law as the Constitutional Court may only apply such legal consequence, according to Article 24 of the Fundamental Law, to the legal regulations listed in Article T) (2) of the Fundamental Law, while the Union law provides for obligatory rules of conduct on the basis of Article E) (3). Accordingly, the Constitutional Court's lack of competence to annul Union law results from the fact that, in a systematic sense, the Union law is not part of the system of the sources of law according to Article T) of the Fundamental Law, and there is a separate constitutional provision that makes Union law, as a mandatorily applicable law, part of the legal system.
- [21] The transfer of competence on the basis of Article E) (2) of the Fundamental Law is based on the international treaties signed by the Member States – and handled in the case law of the Constitutional Court as internal law due to the peculiar features of such treaties – the ratification of which requires a majority required for the adoption of a constitution under Article E) (4) of the Fundamental Law. In this context the Constitutional Court reiterated in the Decision 22/2012. (V. 11.) AB that "for any treaty resulting in the further transfer of Hungary's powers specified in the Fundamental Law through exercising certain competences jointly with the institutions of the European Union shall require an authorisation granted by the votes of two-thirds of all Members of Parliament. Accordingly, Article E) paragraphs (2) and (4) shall be applicable not only to the Treaty of Accession and to the founding treaties or their amendments, but also to all treaties in the drafting of which – in the reform of the European Union – Hungary participates as a Member State. [...] It should be established case-by-case on the basis of the treaty's subjects and its subject matter, as well as the rights and obligations deriving from the treaty, which treaties shall fall in the above category" (Reasoning [50]–[51]). Thus it is an essential content of Article E) (2) and (4) of the Fundamental Law that they contain guarantees for the case of

allocating competences to the institutions of the Union. In the opinion of the Constitutional Court, the requirement of a majority required for the adoption of a constitution specified in Article E) (4) results in the obligation of a cooperative interpretation of the law. Based on the above, the Union law shall enjoy a primacy of application in contrast with the internal law created by the domestic legislator, since – as pointed out by the Federal Constitutional Court of Germany – "the uniform enforcement of the European law in the Member States is of central importance concerning the success of the European Union" (Cp. BVerfGE 73, 339, 368). The legal community of the current 28 members could not survive without the uniform enforcement and effect of European law in the Member States. (Cp. BVerfGE – 2 BvR 2735/14, 37).

[22] However, some restrictions can also be identified in Article E) of the Fundamental Law. On the one hand, according to the seventh amendment of the Fundamental Law, the joint exercise of competences "shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure." The wording "some of its" competences originating from the Fundamental Law as referred to in Article E) (2) may mean concrete competences. The joint exercising of competences may take place "to the extent necessary". As recalled by the Constitutional Court, it had examined the new founding treaties at the time of the entry into force of the Treaty of Lisbon and it stated that the procedures of the treaty guarantee that "the Parliament shall play a proactive role in controlling the "extent necessary" for exercising the rights and performing the obligations originating from the founding treaties." CCDec. 1, 708-709) The subsidiarity check and the proportionality test offer preliminary control, while with regard to adopted acts of legislation there is the annulment procedure which may be initiated at the Court of Justice of the European Union.

[23] Additionally, in accordance with the "principle of maintained sovereignty", the Union membership shall mean the joint exercising of competences in an international community rather than surrender of sovereignty. "The maintenance of Hungary's sovereignty should be presumed when judging upon the joint exercising of further competences in addition to the rights and obligations provided in the Founding Treaties of the European Union." (Decision 22/2016. (XII. 5.), Reasoning [60], hereinafter: CCDec2.) The joint exercising of competences is allowed by the Fundamental Law through the constitutional self-restraint of Hungary's sovereignty. As a consequence, the limitations set by the Fundamental Law shall also be respected in the case of the jointly exercised competences, in particular the protection of fundamental rights, which is "the primary obligation of the State" under Article I (1) of the Fundamental Law as well as the inalienable elements of sovereignty in accordance with the last sentence of Article E) (2) of the Fundamental Law. This requirement is represented in the control mechanisms laid down in the holdings of CCDec 2.

- [24] The Constitutional Court recalls, however, that it has already pointed out in CCDec 2 that "The Constitutional Court is aware of the fact that from the point of view of the Court of Justice of the European Union the Union law is defined as an independent and autonomous legal order (Cp. 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." (Reasoning [32]) The Member States are masters of these treaties and their acts on the national enforcement of these treaties and ultimately the frameworks set by the Member States' constitutions shall determine the extent of primacy enjoyed by Union law in the given Member State over the State's own law. Based on the above, by paying respect to the application primacy of Union law over Member States' law, the answer to the petitioner's question is as follows: on the basis of Article R) (1) of the Fundamental Law, the foundation of the applicability of Union law in Hungary is Article E) of the Fundamental Law.
- [25] 3 The second question of the Government addressed the issue whether it follows from Article 24 (1) of the Fundamental Law – according to which the Constitutional Court shall be the principal organ for the protection of the Fundamental Law – that the Constitutional Court's interpretation of the Fundamental Law shall not be derogated by any interpretation provided by another organ.
- [26] 3.1 The Constitutional Court first recalls that it has laid down in the Decision 12/2013. (V. 24.) AB on the fourth amendment of the Fundamental Law, in connection with Article 24 (1) of the Fundamental Law (of Hungary), that "in the course of assessing the concrete constitutional question – proceeding in line with the applicable rules – the Court will also take into consideration the obligations Hungary has undertaken in its international treaties, that come from Union membership, and also the generally acknowledged rules of international law, and the basic principles and values reflected in them. Indeed, these rules – with regard in particular to their values embedded in the Fundamental Law as well – constitute a unified system of values which are not to be disregarded in the course of framing the constitution or legislation or in the course of constitutional review provided by the Constitutional Court" (Reasoning [48]).
- [27] From among the generally acknowledged rules of international law, the international obligations shall always be performed in accordance with the principle of *pacta sunt servanda* that arranges the international cooperation of States. Accordingly, Section 27 of the Decree-Law No. 12 of 1987 on the promulgation of the Vienna Convention on the Law of Treaties of 23 May 1969 provides that the violation of obligations under international law shall not be justified by referring to the provisions of

domestic law. This was the reason for which the European Court of Human Rights held that Hungary violated the Convention, because of the provision found in Article 70 (5) of the former Constitution that excluded – without weighing the individual circumstances – persons under guardianship from exercising the right to vote. [Kiss Alajos vs. Hungary (38832/06) 20 May 2010]

- [28] 3.2 As the petition of the Government has been submitted with account to the interpretation provided in the framework of the infringement proceeding launched by the European Commission, the Constitutional Court emphasizes the following.
- [29] The Constitution and the Fundamental Law has been amended several times because of Hungary's membership in the European Union. First the Act LXI of 2002 amended the Act XX of 1949 on the Constitution of the Republic of Hungary, when Article 2/A was introduced in the interest of Hungary's accession to the European Union. In the reasoning of the amendment, the constitutional legislator laid down that "the accession of the Republic of Hungary to the European Union requires the amendment of the Constitution as the treaty of accession can only be ratified and promulgated if the treaty is in line with the provisions of the Constitution."
- [30] Then in the Decision 32/2008. (III. 12.) AB on the European arrest warrant the Constitutional Court stated that Section 3 (2) and Section 3 (3) of the Agreement contained in Section 3 of the Act adopted on the session of the Parliament of the 11th of June, 2007 on the promulgation of the "Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway", as well as Section 4 of the Act in the part establishing the declaration made in Section 3 (4) of the Agreement are unconstitutional." As a consequence, the Act CLXVII of 2007 amended again Article 57 (4) of the former Constitution. As emphasized in the reasoning of the amendment: "the law of the European Union is not a set of rules enforced unconditionally and independently from the Member States" decision, as the basis of the validity of Union law is the decision based on free determination in line with the national constitution of the Member State on the intention to join the European Union and to ratify the amendment of the founding treaties. However, if a State has made a decision on accession or on ratification, it has also undertaken to adopt all general and individual measures in accordance with Article 10, currently in force, of the Treaty establishing the European Community for the performance of the obligations resulting from the founding treaties."
- [31] Finally, the fifth amendment of the Fundamental Law was also adopted due to our membership in the European Union. According to the reasoning attached to Article 7 (1) of the amendment, the relevant Article "shall annul the provision of the Fundamental Law that provides for the right of the president of the National Office for the Judiciary to designate the proceeding court in specific case-groups. As a

reaction to the request made by the European Commission, the Government terminates the possibility of case transfer between courts."

- [32] These decisions of the constitutional legislator are also in line with the French practice referred to by the petitioner, according to which "in the interest of avoiding a collision between the primary Union law and the French Constitution, the opinion of the Constitutional Council of France shall be requested prior to the adoption of primary Union law, and if it is found to be in conflict with the Constitution of France, the relevant Union law may only be accepted by France after its amendment.
- [33] The Hungarian Constitutional Court took a similar approach in CCDec 1 when it rejected the petition aimed at finding the entire Act CLXVIII of 2007 on the promulgation of the Lisbon Treaty on the amendment of the Treaty on the European Union and the Treaty establishing the European Community unconstitutional and annulling it. The Constitutional Court also laid down before commencing the review that "in the case, however, if the Constitutional Court established the unconstitutionality of an Act promulgating a treaty like that – i.e. one that amends the founding and amending treaties of the European Union –, the Constitutional Court's decision finding the unconstitutionality shall not influence the undertakings of the Republic of Hungary resulting from its membership in the European Union. By virtue of the decision of the Constitutional Court, the legislator shall be bound to create a situation where the Republic of Hungary may perform all of its obligations within the European Union without an infringement of the Constitution." (CCDec1, ABH 2010, 698, 703) This is in accordance with the international undertaking aspect of the founding treaties of the European Union that may provide ground for the State's responsibility in the case of a failure to perform the obligations, and with the principle of sincere cooperation found in Article 4 (3) of the Treaty on the European Union.
- [34] 3.3 In most cases the parallel systems of Union law and the domestic norms do not cause any constitutional dilemma as the two normative systems are based on a common set of values. However, due to the different standards, the Constitutional Court and the Court of Justice of the European Union may reach different results regarding the conformity of the national norms. Nevertheless, as Article Q) of the Fundamental Law and its special Article E) on the Union law both require, as a constitutional obligation, compliance with the international law and with the Union law, the resolving of any collision is possible by paying respect to constitutional dialogue. In this regard, the CCDec 1 recognised that "the genuine interpretation of the founding and amending treaties of the European Union and of the so-called secondary or derivative law, regulations, directives and other norms of Union law based on these [...] fall under the competence of the European Court of Justice." It does not mean of course that only the Court of Justice of the European Union may interpret the Union law as it needs to be interpreted for example by the Member

States' courts that must enforce the Union law as well as by other subjects of the procedures. Similarly it follows from Article 24 (1) of the Fundamental Law that the Constitutional Court is the genuine interpreter of the Fundamental Law, and following from this it is the duty of the Constitutional Court to determine the interpretation of the constitutional order of Hungary, including the genuine interpretation of its fundamental constitutional system. It does not prevent, however, other domestic and international organs, courts or institutions from interpreting the Fundamental Law or the laws of Hungary in the course of their own procedures. For example, according to Article 28 of the Fundamental Law, all courts shall provide an interpretation in conformity with the Fundamental Law, but this interpretation may not deter from the genuine interpretation practice of the Constitutional Court.

[35] The Constitutional Court's interpretation of the Fundamental Law – just as the interpretations of the constitutions by other constitutional courts in the Member States – is of *erga omnes* character, and all organs or institutions shall respect it in their own procedures as the authentic meaning.

[36] Additionally, in international and EU context, the Constitutional Court recalls that in CCDec 2 the Constitutional Court committed itself to the requirement of constitutional dialogue. (C.p. CCDec 2, Reasoning [33]) In line with the above, by the Decisions 3198/2018. (VI. 21.) AB, 3199/2018. (VI. 21.) AB, 3200/2018. (VI. 21.) AB and 3220/2018. (VII. 2.) AB the Constitutional Court suspended several procedures "in view of the potential enforcement of European law". It is required for the realisation of the condition of "cooperation based on the principles of equality and collegiality, with mutual respect to each other" (CCDec 2, Reasoning [63]) as laid down in CCDec 2, and consequently the proceeding courts shall take into account each others' authentic interpretations. Indeed, it can be presumed that both the Union law and the national legal system based on the Fundamental Law aim to carry out the objectives specified in Article E) (1). With regard to the above, "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.

[37] 3.4 Based on the above, the reply to the petitioner's question is as follows: according to Article 24 (1) of the Fundamental Law, the Constitutional Court is the genuine interpreter of the Fundamental Law, and its interpretation shall not be derogated by any interpretation provided by another organ; the Constitutional Court's interpretation shall be respected by everyone. In the course of interpreting the Fundamental Law, the Constitutional Court shall take into account the obligations

binding Hungary on the basis of its membership in the European Union and under international treaties.

- [38] 4 Finally, the petitioner essentially requested the Constitutional Court to provide a genuine interpretation of the wording "shall not be entitled" in the second sentence of Article XIV (4) of the Fundamental Law. According to the petitioner, the exact meaning of this phrase is doubtful. On the one hand, it could mean that a non-Hungarian national shall not be able to receive asylum if he or she arrived to the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution, but on the other hand it could also be interpreted in a way that although the affected applicant does not enjoy a fundamental right to get asylum and therefore the Hungarian State is not obliged to grant that, the Parliament may provide for substantive and procedural regulations on granting asylum to such persons as well.
- [39] In the course of interpreting the phrase in question, the Constitutional Court followed the principle of coherent constitutional interpretation. Accordingly, the Constitutional Court "in the exercise of its powers (e.g. preliminary and posterior norm control procedure, examination of constitutional complaints, interpreting the Fundamental Law), as the principal organ for the protection of the Fundamental Law [Article 24 (1) of the Fundamental Law] shall continue to interpret and apply the Fundamental Law – in accordance with its aims – as a coherent system and will consider and measure against one another, every provision of the Fundamental Law relevant to the decision of the given matter." {Decision 12/2013. (V. 24.) AB, Reasoning [48]}.
- [40] Consequently the Constitutional Court shall review in what sense are the phrases "entitled" / "have right to" and "not entitled" / "have no right to" used in the Fundamental Law's part entitled Freedom and Responsibility. According to Article IV (4) of the Fundamental Law, "everyone whose liberty has been restricted without a well-founded reason or unlawfully shall have the right to compensation." As laid down in Article VII (4) of the Fundamental Law, "the State shall provide specific privileges to established churches with regard to their participation in the fulfilment of tasks that serve to achieve community goals." In line with Article IX (5) of the Fundamental Law, the persons belonging to the Hungarian nation or of any national, ethnic, racial or religious community "shall be entitled to enforce their claims in court against the expression of an opinion which violates their community, invoking the violation of their human dignity, as provided for by an Act." According to Article X (2) of the Fundamental Law, "the State shall have no right to decide on questions of scientific truth; only scientists shall have the right to evaluate scientific research." As laid down in Article XIX (1) of the Fundamental Law, "every Hungarian citizen shall be entitled to assistance in the event of maternity, illness, invalidity, disability, widowhood, orphanage and unemployment for reasons outside of his or her control, as provided for by an Act." Paragraph (4) of the same Article provides

that "an Act may lay down the conditions for entitlement to state pension also with regard to the requirement for stronger protection for women".

- [41] In order to provide for the enforcement of the principle of coherent constitutional interpretation with the tools of analogy in the present case, the Constitutional Court determined the abstract features of the regulatory environment of the phrase used in Article XIV (2) as follows. On the one hand, the relation between the State and the natural person is based on an application, and on the other hand, granting the application depends on conditions regulated in a cardinal Act.
- [42] The phrase "not entitled" or "have no right" is only used once in the Fundamental Law, in addition to the provision to be interpreted, where it excludes the right of the State to decide in the question of scientific truth. As this Article regulates the lack of entitlement of the State and not of a natural person, it cannot be used *ad analogiam* for the purpose of successfully interpreting the addressed phrase contained in Article XIV (2). Therefore only the constitutional regulatory environment applicable to established churches complies with the three conjunctive conditions specified above. Interpreting the regulatory environment of Article VII (4) of the Fundamental Law, the Decision 36/2017. (XII. 29.) AB explained that "the National Assembly shall decide, on the basis of the religious community's application, on the cooperation between the State and the religious community in the interest of achieving community goals, and the conditions of such cooperation shall be determined in a cardinal Act. As the Fundamental Law sets conditions for becoming an »established church«, it is not considered as a fundamental subjective right of the religious community. Adopting the decision on the cooperation is not only within the National Assembly's scope of competence, it is also the duty of the National Assembly on the basis of the religious community's application. Consequently the religious community has a claim protected as a fundamental right to have its application ruled upon by the National Assembly on the basis of an Act." (Reasoning [59] Due to the very different content of the affected provisions of the Fundamental Law, it is clear that only those elements of the explanation may be used by way of analogy that are linked to the triple abstract condition common in the two regulations and that are abstract enough to bear a meaningful content with regard to both provisions of the Fundamental Law.
- [43] Taking the above into account, the Constitutional Court established that the wording "not entitled to" used in the second sentence of Article XIV (4) means that the right to asylum shall not be regarded as a fundamental individual subjective right in the case of a non-Hungarian citizen who arrived to the territory of Hungary through a country where he or she was not subject to persecution or the imminent danger of persecution. Nevertheless such persons do have a claim protected as a fundamental right to have their application decided by the competent authority on the basis of a cardinal Act on the fundamental rules on granting asylum, according to Article XIV (5) of the Fundamental Law. Due to this claim protected as a fundamental right, it is the

duty of the National Assembly to lay down in a cardinal Act the fundamental rules on granting asylum.

- [44] This systematic interpretation is supported by the fact that the first sentence of Article XIV (2) of the Fundamental Law regulates the binding of Hungary's international undertaking on the basis of the State's own decision as a question related to the external side of sovereignty {c.p. Decision 9/2018. (VII. 9.) AB (hereinafter: CCDec 3), Reasoning [50]}. Therefore we have due grounds to suppose that the second sentence restricting the first one should be interpreted from the internal side of sovereignty. It means that the Hungarian "State shall develop its constitutional system and its legal system without any interference by the supreme power of other State(s), and that it shall exercise complete and exclusive supreme power, in the manner regulated by the constitution and the legal regulations, over the persons living in the territory of the State." (See CCDec 3, Reasoning [50]). As a consequence, with regard to the meaning of the term "not entitled to" in the second sentence of Article XIV (2) of the Fundamental Law, the right to asylum is not the refugee's own individual subjective right as it stems from relevant international treaties undertaken by Hungary as an external restriction of its sovereignty, and its fundamental regulations may be formed independently by the Hungarian State – due to its internal sovereignty – within the limits of the international treaties.
- [45] The Constitutional Court also pointed out in the context of the interpretation of Article XIV (4) that according to Article 14 of the Universal Declaration of Human Rights, "everyone has the right to seek and to enjoy in other countries asylum from persecution" and in accordance with Article 33.1 of the "no Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion ." On the basis of the foregoing, the Constitutional Court points out that paying full respect to the principle of non-refoulement is one of the minimum obligations explicitly undertaken by Hungary as an international undertaking.
- [46] The Constitutional Court also notes that according to Article 39 (1) of the Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, "Member States may provide that no, or no full, examination of the application for international protection and of the safety of the applicant in his or her particular circumstances [...] shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph (2)." As regulated in paragraph (4) of the same Article, "the Member States concerned shall lay down in national law the modalities for implementing the provisions of paragraph (1) and the consequences of decisions pursuant to those provisions in accordance with the principle of non-refoulement,

including providing for exceptions from the application of this Article for humanitarian or political reasons or for reasons of public international law."

- [47] This way, in the light of the above constitutional interpretation and with account to the international undertakings applicable to Hungary, the last sentence of Article XIV (4) of the Fundamental Law is actually setting out in the Fundamental Law the fact that in Article XIV (3) Hungary provides constitutional protection for the principle of non-refoulement, however, it refers to regulating in its national law at the level of an Act of Parliament, rather than in the Fundamental Law, to state what rules are applicable to those refugees who are not subject to the principle of non-refoulement.
- [48] The Constitutional Court points out that in the course of the above interpretation it has taken into account the principle of constitutional dialogue within the European Union {C.p. Decision 22/2016. (XII. 5.) AB, Reasoning [33]}], as well as its commitment to the accomplishment of European unity (*Europafreundlichkeit*), which originates in Article E (1) of the Fundamental Law. With regard to the above, the Constitutional Court interpreted the second sentence of Article XIV (4) of the Fundamental Law on the one hand for the purpose of reaching a conclusion, which is in line with the overall spirit of the Fundamental Law and on the other hand to take into account the compatibility with the relevant provisions of the Directive interpreted in the light of the Charter of Fundamental Rights, in the spirit of contributing to the development of European unity in the interest of the constitutional dialogue and of expanding the freedom, prosperity and security of the nations of Europe.
- [49] 5 According to the first sentence of Section 44 (1) of the ACC, this decision shall be published in the Hungarian Official Gazette.

Budapest, 25 February 2019

Dr. Tamás Sulyok
President of the Constitutional Court
Rapporteur Justice

Dr. István Balsai
Justice of the Constitutional Court

Dr. Ágnes Czine
Justice of the Constitutional Court

Dr. Egon Dienes-Oehm
Justice of the Constitutional Court

Dr. Attila Horváth
Justice of the Constitutional Court

Dr. Ildikó Hörcherné dr. Marosi
Justice of the Constitutional Court

Dr. Imre Juhász
Justice of the Constitutional Court

Dr. Béla Pokol
Justice of the Constitutional Court

Dr. László Salamon
Justice of the Constitutional Court

Dr. Balázs Schanda
Justice of the Constitutional Court

Dr. István Stumpf
Justice of the Constitutional Court

Dr. Marcel Szabó
Justice of the Constitutional Court

Dr. Péter Szalay
Justice of the Constitutional Court

Dr. Mária Szívós
Justice of the Constitutional Court

Dr. András Varga Zs.
Justice of the Constitutional Court

Concurring reasoning by Justice *Dr. Egon Dienes-Oehm*

- [50] The sole purpose of this concurring reasoning is to amend and this way reinforce my full agreement with the majority decision, taking into consideration the completely or partly different positions taken in the dissenting opinions and concurring reasonings made regarding the case concerned.
- [51] 1 With regard to point 2 of the decision, I fully agree with the arguments made under point 3 of the concurring reasoning by Justice Dr. András Varga Zs. I also presented this standpoint during the adoption of the decision.
- [52] 2 I hold it important to stress concerning point 3 of the decision that with regard to granting asylum, the second sentence of Article XIV (4) of the Fundamental Law cannot be constitutionally interpreted in any way to convey a meaning that extending it would be prohibited. If the circumstances change (*clausula rebus sic stantibus*) – regarding either the international context or the autonomous interests of our country – it may become necessary that Hungary should be able to offer a chance for the positive assessment of the asylum claims, according to the conditions specified in a cardinal Act, of those non-Hungarian citizens who may have arrived to the territory of Hungary through a country where they were not subject to persecution or the imminent danger of persecution.

Budapest, 25 February 2019

Dr. Egon Dienes-Oehm
Justice of the Constitutional Court

[53] I second to point 2 of the concurring reasoning.

Budapest, 25 February 2019

Dr. András Varga Zs.
Justice of the Constitutional Court

Concurring reasoning by Justice *Dr. István Stumpf*

- [54] I essentially agree with the majority interpretation of the Fundamental Law, however, I see differently the meaning of certain arguments contained in the adopted decision and I also put emphasis on different parts of the decision's reasoning.
- [55] In the petition aimed at interpreting the Fundamental Law, the Government asked the Constitutional Court to answer three questions of constitutional law.
- [56] The first question was aimed at finding out whether, with regard to to Article R) (1), the Fundamental Law was also a source of legitimacy of "the law of the European Union according to Article E) of the Fundamental Law". Article E) of the Fundamental Law explicitly allows the joint exercising – on the basis of an international treaty – of certain competences originating from the Fundamental Law through the institutions of the European Union and in the framework of it, the institutions of the European Union may establish, with the participation of the Member States, generally binding rules of conduct – similarly to the organs with legislative competences as specified in the Fundamental Law. With account to the above, I agree with the reply provided in our decision that on the basis of Article R) (1), the Fundamental Law is the basis of Hungary's legal system and at the same time, on the basis of Article E) of the Fundamental Law, Union law is a part of our legal system as a generally binding rule of conduct. The validity of the law of the European Union does not depend on the constitutions of the Member States, however the Fundamental Law ensures the applicability of the secondary law by the Hungarian state organs. As pointed out in the majority reasoning: "Union law is not part of the system of the sources of law according to Article T) of the Fundamental Law, and there is a separate constitutional provision that makes Union law, as a mandatorily applicable law, part of the legal system".
- [57] An affirmative answer should also be given to the core of the second question: the Constitutional Court's interpretation of the Fundamental Law shall not be derogated by any interpretation provided by another organ. The holdings of the decision adopted in the present case adds further statements.
- [58] On the one hand, it stated that the Constitutional Court's interpretation of the Fundamental Law "shall be respected by everyone". This statement may be misleading in the context that the Government's petition has been submitted with regard to the interpretation made in the framework of the infringement proceeding

launched by the European Commission. The Constitutional Court may not establish any interpretation of the Fundamental Law binding upon the European Commission. It is not because of not considering the Constitutional Court as the authentic interpreter of the Fundamental Law. It is simply because of the fact that the Fundamental Law and the laws are binding upon the subjects of law under the jurisdiction of Hungary, therefore the *erga omnes* rule laid down in Article 39 (1) of the ACC – as the cardinal law specified in Article 24 (9) of the Fundamental Law – is to be interpreted in this scope of subjects as well. However, it is reasonably expectable from the Commission to accept as authentic an interpretation provided by the constitutional court of a Member State (as it is done by the European Court of Justice, as referred to in the petition). In the case of any debate connected to the interpretation of the Fundamental Law – as follows from the rule of the ACC – the Hungarian state organs should follow the interpretation given by the Constitutional Court: this interpretation shall be the actually enforced normative content of the Fundamental Law. Thus, if any institution of the European Union expressly attributed a different (own) interpretation to a provision of the Fundamental Law, then, in the case concerned, it would criticise not the Fundamental Law, but a mirage.

[59] On the other hand, although it is not closely related to addressing the question, it is right that "in the course of interpreting the Fundamental Law, the Constitutional Court shall take into account the obligations binding Hungary on the basis of its membership in the European Union and under international treaties", in particular as Article Q) and Article E) of the Fundamental Law contain such aims and undertakings. Nevertheless, these external obligations shall not overwrite the normative content of the Fundamental Law; in the competences aimed at interpreting and protecting the Fundamental Law, the Constitutional Court should primarily and finally enforce the Fundamental Law itself.

[60] In the third question the petitioner asked the interpretation of the second sentence of Article XIV (4) of the Fundamental Law with regard to the right to asylum, by taking into account the Seventh Amendment of the Fundamental Law. The jurisdiction of the Constitutional Court may not be excluded with regard to a request to interpret the newly adopted provision of the Fundamental Law, although such a claim could also be considered as a legislative problem as well. Also with regard to the present question, the submitting party's reasoning of the proposed Seventh Amendment had a determining role in the Constitutional Court's decision. Although Article 28 of the Fundamental Law lays down by addressing the courts and with regard to laws that in the course of ascertaining their purpose, consideration shall be given primarily to the preamble and their reasoning of the proposal for or for amending the law, but the method of interpretation specified here may also be applied in the case of interpreting the Fundamental Law by the Constitutional Court, even more so as Article R) (3) requires purpose-bound interpretation in this respect as well, without

providing for further detailed rules. According to the submitter's reasoning of the proposal for the Seventh Amendment, the proposal "makes it clear in the Fundamental Law [...] that only those who arrive to Hungary from a territory where they were subject to persecution according to the Geneva Convention or where they feared such persecution on due grounds shall be eligible to asylum as a fundamental right. In the case of all the other persons (i.e. concerning those who arrive to the territory of Hungary through a country where they were not subject to persecution or the direct danger of persecution according to the Geneva Convention), the Parliament shall be free to decide whether to provide them asylum or a similar form of protection, and if it does, under what conditions of substantive law and of procedural regulations". This way the answer provided in the holdings of our decision to the questions is plainly in harmony with the submitting party's reasoning. At the same time, it is surprising that in the course of answering the question, the majority decision [point III. 4], by following the guideline of the "principle of coherent constitutional interpretation", in my opinion, wandered to by-paths – decorated with diverse analogies, systematic interpretation, international law and directives – that are rather far from the central question of constitutional law. However, virtually the reasoning of the Seventh Amendment is the only basis upon which the conclusion adopted by the majority decision may be reached, i.e. that the meaning of the term "not entitled" is that a person arriving to Hungary through a safe third country shall not be entitled to asylum as a fundamental right granted in the Fundamental Law, but the Parliament may provide asylum to such persons as well under the substantive and procedural regulations specified by it.

Budapest, 22 February 2019

Dr. István Stumpf
Justice of the Constitutional Court

Concurring reasoning by Justice *Dr. Mária Szívós*

- [61] I agree with the decision, however, in line with the arguments detailed below, in accordance with my powers granted in Section 66 (3) of ACC, I hold it necessary to attach the following concurring reasoning to point 2 of the holdings of the decision.
- [62] I agree with the statement made in point 2 that it follows from Article 24 (1) of the Fundamental Law that the genuine interpreter of the Fundamental Law is the Constitutional Court.. This follows with compelling force from the wording of the above provision, i.e. from stating that the Constitutional Court is the principal organ for the protection of the Fundamental Law, therefore I also voted for the decision.
- [63] At the same time, I have concerns about the statement made in the third sentence, according to which during the interpretation of the Fundamental Law, the

Constitutional Court takes into account the obligations binding Hungary on the basis of its membership in the European Union and under international treaties.

- [64] Article 24 of the Fundamental Law does not provide for the competence of the Constitutional Court related to interpreting the Fundamental Law; nevertheless, according to paragraph (2) *g*) of this Article, the Constitutional Court shall exercise further functions and powers as laid down in the Fundamental Law and in a cardinal Act. This provision is the legal basis of the Constitutional Court's competence, regulated in Section 38 of the ACC, on interpreting the Fundamental Law. According to Section 38 (1) of the ACC, "on the petition of the National Assembly or its standing committee, the President of the Republic or the Government, the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a certain constitutional issue, provided that the interpretation is *deductible directly from the Fundamental Law*."
- [65] On the basis of the text of Section 38 of the ACC, the Constitutional Court established its practice regarding the petitions aimed at the interpretation of specific provisions of the Fundamental Law: in accordance with the above normative text, the interpretation of the Fundamental Law can only be initiated by certain organisations (persons), in petitions of certain content, under the conditions laid down in the ACC. Therefore, in the case of such a petition, the Constitutional Court should – in line with its standing practice – examine in each case whether the petition comes from an organisation or person specified in Section 38 (1) of the ACC; whether it is related to the interpretation of a concrete provision of the Fundamental Law; whether it is connected to a concrete constitutional problem; and finally whether the interpretation is deductible directly from the Fundamental Law {see for the first time in Decision 22/2012. (V. 11.) AB, Reasoning [18]-[25], later on in Decision 8/2014. (III. 20.) AB, Reasoning [22]-[27] etc.}.
- [66] In line with the above, in my view, neither the Fundamental Law, the ACC, nor the Constitutional Court's standing practice on interpreting the Fundamental Law makes a reference to any expectation or obligation to take into account – in an undifferentiated and unlimited way as presented in the decision – the obligations that bind Hungary on the basis of its membership in the European Union and under international treaties.

[67] Budapest, 25 February 2019

Dr. Mária Szívós
Justice of the Constitutional Court

Concurring reasoning by Justice *Dr. András Varga Zs.*

- [68] I fully agree with the holdings of the decision and with its reasoning. However, with regard to the colliding standpoints reflected in the concurring reasonings and dissenting opinions, I hold it necessary to go into details about why I supported the decision.
- [69] 1 According to our Fundamental Law, the protection of our identity rooted in Hungary's historic constitution is a fundamental obligation of the State that applies to all institutions, in particular to the Constitutional Court as the principal body for the protection of the Fundamental Law [National Avowal, Article R) (4), Article 24 (1)]. The Constitutional Court has already established about the constitutional identity of Hungary that it is "not a list of static and closed values", at the same time it 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. Therefore the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State." (Decision 22/2016 (XII. 5.) AB, Reasoning [65], [67])
- [70] According to my own supplementing standpoint, "constitutional self-identity is not a universal legal value, it is a feature of specific States and of their communities, of the nation, that does not apply (the same way) to other nations. In the case of Hungary, national identity is especially inseparable from constitutional identity. The constitutional government of the country has been one of the core values the nation has always stuck to, and that has been a living value even at the times when the whole or the majority of the country was occupied by foreign powers. This legal value has been manifested and presented in legal regulations: freedoms and the limitation of power (the Golden Bull), respect for autonomies under public law (Tripartitum), freedom of religion (the Laws of Torda), lawful exercising of power (Pragmatica Sanctio), parliamentarism, equal rights (Laws of April 1848), separation of powers, acknowledging judicial power, protection of minorities (Laws of the Reconciliation of 1867). These are the achievements of our historical constitution, the Fundamental Law and thus the whole Hungarian legal system is based upon. Since the values that make up the self-identity have come into existence on the basis of historical constitutional development, they are legal facts that can be waived neither by way of an international treaty nor with the amendment of the Fundamental Law, because legal facts cannot be changed through legislation." {Decision 22/2016. (XII. 5.) AB, Reasoning [112]}. This situation of legal facts, the constitutional state-continuity of Hungary and the unity of the nation is embodied in the Holy Crown as acknowledged by the National Avowal.
- [71] Both the decision of the Constitutional Court and my supplementing standpoint follow the National Avowal, according to which the Fundamental Law shall be a

binding legal rule, it shall be the foundation of our legal order, but it shall also be more than that, "it shall be an alliance among Hungarians of the past, present and future. It is a living framework which expresses the nation's will and the form in which we want to live".

- [72] 2 Thus the constitutional identity of Hungary is a legal fact but it is neither static nor closed. It is a *legal fact*, i.e. it is not a theoretical framework to be freely filled as it is based on laws, namely on the ineffective but valid rules of our historical constitution and on the Fundamental Law. It is a legal *fact*, which cannot be changed retroactively: everything incorporated into it shall remain there as a part of it. At the same time, it is *not a static or closed* catalogue of values, i.e. with a sovereign decision its content may be modified *for the future*. These modifications shall be added to our identity and they themselves shall become legal facts that cannot be modified retroactively. This is what makes the Fundamental Law a *living framework*.
- [73] For example, the refusal of Ottoman occupation and the fight for the restitution of the constitutional independence of the country torn to three parts are such subsequently unmodifiable elements of our constitutional identity. Also our common constitutional statehood with Austria, enjoyed in its last phase as a part of the Austro-Hungarian Monarchy, is such a subsequently unmodifiable element of our constitutional identity. And also the fact that Hungary has been, since 1 May 2004, the member of the European Union is such a subsequently unmodifiable element of our constitutional identity. The fact that at different times Hungary has been subject to various rights and obligations based on different international treaties is such a subsequently unmodifiable element of our constitutional identity.
- [74] 3 When the Constitutional Court exercises its competences, e.g. interprets the Fundamental Law as in the present case, it has to take into account the Fundamental Law as a whole, including Articles E) and Q). As it can do nothing else, it has to take into account the obligations binding Hungary on the basis of its membership in the European Union and under international treaties. However, the term "take into account" may not – because should not – mean that the Constitutional Court could accept these obligations as more powerful ones than the Fundamental Law. These are parts of our constitutional identity, but not exclusive parts. As they have become parts of our constitutional identity through the sovereign decision of Hungary, they can never result in the full and final surrender of sovereignty.
- [75] Therefore the Constitutional Court should take into account the obligations of Hungary that originate from its membership in the European Union and from other international treaties, but it should always interpret them restrictively. This is what is meant by the *presumption of maintained sovereignty* {Decision 22/2016. (XII. 5.) AB, Reasoning [60]} The decision adopted in the present case provides for the obligatory interpretation of the Fundamental Law by making explicit reference to the

presumption of maintained sovereignty (point III.2) and by safeguarding our constitutional identity, this is why I could support it without reservations.

Budapest, 25 February 2019

Dr. András Varga Zs.
Justice of the Constitutional Court

[76] I second to point 3 of the concurring reasoning.

Budapest, 25 February 2019

Dr. Egon Dienes-Oehm
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Ágnes Czine*

[77] I agree with points 1 and 2 of the holdings, but I do not agree with point 3 of the holdings due to the following reasons.

[78] 1 With regard to the constitutional problem raised by the petitioner, I hold it important to underline the following.

[79] The Court of Justice of the European Union (CJEU) has stressed already in the early phase of the integration that the founding treaties had created a peculiar "new legal order". "For the benefit of which the States have limited their sovereign rights, albeit within limited fields" [*Van Gend en Loos* case, C-26/62, EU:C:1963:1]. In another decision the CJEU stated that "by contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply." The CJEU also pointed out that "by creating a community of unlimited duration, having [...] real powers [...], the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves ." [*Costa v. ENEL*, C-6/64, EU:C:1964:66].

[80] According to these decisions that fundamentally determined the subsequent case law of the Court, the Member States, by signing the founding treaties, have created an autonomous legal order with the principle of the primacy of Union law as its basic feature.

[81] In its subsequent case law, the CJEU has reinforced the principle of primacy in several decisions both in respect of the legal regulations [e.g. *Simmenthal* (II) case, C-106/77, EU:C:1978:49, point 22] and the constitutional provisions of the Member States. The court established that "the law stemming from the Treaty, an independent source of

law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the Community itself being called in question". Therefore, according to the CJEU, "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure." [Internationale Handelsgesellschaft case, C-11/70, EU:C:1970:114] The CJEU then has reinforced in several decisions the primacy of Community (Union) law in contrast with the constitutional rules of the Member States [see in *Dow Chemical Ibérica and others v Commission, joined cases C-97/87, 98/87, 99/87*, EU:C:1989:380, point 38; *Commission v Luxembourg*, case C-473/93, EU:C:1996:263, point 38].

- [82] In addition to the above, at the same time, Article 4 (2) of TEU undoubtedly clarifies that "the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional [...]."
- [83] In the light of the above, I hold that the relation between the legal order of the Union and of the Member States should be described by using the position elaborated in the legal doctrine, stating that they are autonomous, equal and coexisting legal orders. Thus the principle of primacy shall mean a tool for resolving conflicts between the laws at the points of contact of the legal orders, rather than any hierarchical relation. (see in details in László Blutman: *Az Európai Unió joga a gyakorlatban*, HVG-ORAC, Budapest, 2013. p 370-371] In addition, it is important to stress, however, that by signing the founding treaties the Member States undertake an obligation of sincere cooperation, including that: "the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives" [Article 3 (3) third sentence of TEU].
- [84] Accordingly, based on the above, both the European Union and the Member States should mutually pay respect to each other's legal order. With regard to that, I agree with the interpretation laid down in points 1 and 2 of the holdings.
- [85] At the same time, however, on the basis of the principle of sincere cooperation, the constitution-setting powers of the Member States must make efforts to make all the provisions of the Member States' constitutions – as the basis of the Member State's legal order – comply with the principles of the Union's legal order, which is based upon the founding treaties.
- [86] 2 In the particular case, the petitioner asked the interpretation of the new provision of Article XIV (4) of the Fundamental Law, introduced by the Seventh Amendment thereof.

- [87] The provisions of Article XIV of the Fundamental Law affected by the interpretation set out the constitutional rules on asylum. In this respect, the constitution-setting power has underlined already in the reasoning attached to the original normative text of the Fundamental Law that "in accordance with its obligations under international law, Hungary shall grant asylum to non-Hungarian citizens in need of it". Also the reasoning attached to the Seventh Amendment of the Fundamental Law emphasizes that "Hungary grants asylum among fundamental rights in line with its obligations under international law on the basis of Article XIV (3) [earlier] in force of the Fundamental Law." In this context, it is not useless to provide an overview about the content of asylum according to the provisions of international law.
- [88] Asylum as a human right was introduced in the Universal Declaration of Human Rights. According to it, "everyone has the right to seek and to enjoy in other countries asylum from persecution" [Article 14 (1)]. The universal documents regulating the legal status of refugees [the 1951 Convention relating to the Status of Refugees and the 1967 Protocol (together: Geneva Convention)] were adopted in the framework of the United Nations. This international legal regulation applies to those persons who qualify as refugees according to the provisions of the regulation. It is the duty of the State where the applicant of the status stays to determine whether or not someone is a refugee according to the Geneva Convention.
- [89] The Office of the United Nations High Commissioner for Refugees summarised the experience gained in the application of the law based on the international rules (Handbook and guidelines on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees). According to this analysis, "Recognition of his refugee status does not therefore make him a refugee but declares him to be one. The decision of the authority merely recognizes the person's refugee status".
- [90] It should be noted, however, that the granting of asylum is not the subjective right of the affected person: it is an act closely related to the sovereignty of the respective State and it is based on obligations under international law. This is why Article 14 of the UDHR recognizes as a human right the "right to seek asylum" and not the "right to asylum". Consequently, the person concerned has the right to apply for recognition as a refugee.
- [91] The European Union's regulation on refugees is also closely linked to the international regulations. According to the Charter of Fundamental Rights of the European Union, "the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on the operation of the European Union" (Article 18).
- [92] In addition to Article 18 of the Charter of Fundamental Rights, the preamble of the Directive 2011/95/EU 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 also lays down that "the Geneva Convention and the Protocol provide the cornerstone of the international legal regime for the protection of refugees". Therefore the Directive defines the refugee status on the basis of the provisions of the Geneva Convention (see Article 2 (d) of the Directive).

[93] At the same time, the Directive added to the definition used in the Geneva Convention further aspects that help the application of the law and it also laid down concrete detailed rules. However, as the provisions of the Directive do not solve all problems of interpretation connected to the concept of refugees, it is indispensable to explore the aspects of interpretation manifested in the case law of the CJEU, too. For example, the decision passed in the case C-71/11, where the CJEU underlined that: "in the system provided for by the Directive, when assessing whether, in accordance with Article 2(c) thereof, an applicant has a well-founded fear of being persecuted, the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution. That assessment of the extent of the risk, which must, in all cases, be carried out with vigilance and care [...], will be based solely on a specific evaluation of the facts and circumstances, in accordance with the rules laid down in particular by Article 4 of the Directive". [*Bundesrepublik Deutschland v Y and Z, Joined Cases C-71/11 and C-91/11, EU:C:2012:518, points 76 and 77*]

[94] 3 Based on the above arguments, in my opinion, the content of asylum – as a fundamental right – is that the person concerned should apply with the State authority for recognition as a refugee. However, the status is not generated by virtue of the recognition. Therefore also the preamble of the Directive 2011/95/EU underlines that "the recognition of refugee status is a declarative act".

[95] With the Seventh Amendment of the Fundamental Law, the following condition was added to the former Article XIV (3) of the Fundamental Law: "a non-Hungarian national shall not be entitled to asylum if he or she arrived to the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution".

[96] Thus it is plain from this provision – on the basis of simple and common grammatical interpretation – that in the case of a non-Hungarian national who arrived to the territory of Hungary through a country where he or she was not persecuted or directly threatened with persecution, the refugee status cannot be recognized.

[97] In point 3 of the holdings of the decision, the Constitutional Court made exactly the following statement: The Constitutional Court states that following from the second sentence of Article XIV (4), which is interpretable with regard to the international obligations undertaken by Hungary, granting asylum for a non-Hungarian citizen who

arrived to the territory of Hungary through a country where he or she was not subject to persecution or imminent risk of persecution, shall not be regarded as a constitutional obligation of the Hungarian State, however the Parliament may also grant asylum to such persons according to the substantive and procedural regulations it specifies.

[98] I disagree with the above statements made by the Constitutional Court.

[99] In the relevant case, the Constitutional Court had to take a stand in the question about the authentic content of the second sentence of Article XIV (4) of the Fundamental Law.

[100] The constitution-setting power clearly expressed by the plain wording of the second sentence of Article XIV (4) of the Fundamental Law ("A non-Hungarian national *shall not be entitled to asylum* if he or she arrived to the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution"), as well as in the relevant reasoning that "only those who arrive to Hungary from a territory where they were subject to persecution according to the Geneva Convention or where they feared such persecution on due grounds shall be eligible to asylum *as a fundamental right*".

[101] In my view, the interpretation provided by the Constitutional Court in respect of the second sentence of Article XIV (4) of the Fundamental Law is in conflict with the plain text of the provision and with the intention of the constitution-setting power.

Budapest, 25 February 2019

Dr. Ágnes Czine
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Imre Juhász*

[102] I do not agree with the third sentence of point 2 and with point 3 of the holdings of the decision, and neither do I with several pillars of the reasoning attached to the above, therefore I could not support the decision as a whole with my vote.

[103] 1 According to the provisions in force of the Fundamental Law, in line with Article R) (3), the provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution.

[104] The provisions of the Fundamental Law are binding upon the Constitutional Court, too. The Constitutional Court has no competence to create or amend – by dragging the privilege of the constitution-setting authority – the Fundamental Law in the framework of interpreting the Fundamental Law.

- [105] I hold it important to make a firm and exact distinction between the Constitutional Court interpreting the Fundamental Law or applying the provisions of the Fundamental Law to an individual problem with respect to a concrete decision or a provision of the law. The former one – interpreting the Fundamental Law – is a special competence whereby the Constitutional Court should apply the most precise and mature argumentation and use clear definitions to mark the road upon which the legal system shall be based in the future, by paying constant attention to Article R) (1), which states that: "The Fundamental Law shall be the foundation of the legal system of Hungary."
- [106] 2 The third sentence of point 2 of the majority decision ("During the interpretation of the Fundamental Law, the Constitutional Court takes into account the obligations binding Hungary on the basis of its membership in the European Union and under international treaties.") is incompatible on the one hand with
- the provisions of Article R) (3) of the Fundamental Law as referred to above,
 - and on the other hand with the requirement – applicable to all decisions – of firmness and having clear definitions
- [107] To support my standpoint, I underline that the term "*takes into account*" is not unambiguous and it may convey different meanings, therefore it should not be used in a text intended to serve as the solid basis of interpreting the Fundamental Law.
- [108] 3 The primary reason of my refusal to support point 3 of the holdings is because I cannot accept – due to the reasons I laid down with regard to point 2 of the holdings – the statement made in this point that Article XIV (4) should be interpreted with regard to the international obligations undertaken by Hungary.
- [109] Secondly, the statement made in point 3 that the Parliament may also grant asylum to such persons according to the substantive and procedural regulations it specifies fails to take into account the most elementary rules of Hungarian grammar. The second sentence of Article XIV (4) states clearly that a non-Hungarian national shall not be entitled to asylum if he or she arrived to the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution. There is no way for the Constitutional Court to turn it around to mean that "the Parliament may also grant asylum to such persons according to the substantive and procedural regulations it specifies". The Constitutional Court is not authorised to do that neither by virtue of the *Europafreundlichkeit* referred to – with a wrong reference – on the last page of the reasoning, nor by the constitutional dialogue, nor by the directive taken into account "in the light of the Charter of Fundamental Rights". Thus the majority decision fails to take into account the clear text promulgated by the constitution-setting power in the Seventh Amendment of the Fundamental Law.
- [110] I wish to note that the majority decision applies a highly questionable method when it misrepresents the original meaning of Article E) (1) of the Fundamental Law

("Hungary shall take an active part in establishing a European unity in order to achieve freedom, well-being and security for the peoples of Europe.") by claiming that the commitment to the accomplishment of European unity could be deducted from this Article as a criteria of interpretation with regard to any of the Fundamental Law's provisions (as in the present case for Article XIV (4) of the Fundamental Law).

[111] To sum up: I am convinced that, according to the relevant provisions, only the constitution-setting power (the Parliament) may amend the Fundamental Law. Furthermore, the Parliament as legislative authority may not adopt Acts that are in conflict with the text and the spirit of the Fundamental Law. Although – in my view – laying down the latter statement in a decision of the Constitutional Court concerning any concrete case would not be necessary, still it needs to be emphasized because of the majority decision's statements that I reject to support.

[112] Finally it should be stressed that the legislative power is not prevented from amending or – as necessary – adopting the Acts of Parliament that grant protection for the physical integrity of persons with regard to humanitarian concerns.

Budapest, 25 February 2019

Dr. Imre Juhász
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Béla Pokol*

[113] I agree neither with point 3 of the holdings of the decision, nor with the reasoning of it. Our procedure was started upon the petition submitted by the minister of justice acting on behalf of the Government, who had turned to the Constitutional Court for an abstract interpretation of the constitution in the framework of providing a reply to the infringement proceeding started by the Commission of the European Union. The provision of the Fundamental Law challenged by the Commission is the second sentence of Article XIV (4) prohibiting the granting of asylum to immigrants who arrive via safe countries. Point 3 of the majority decision's holdings contains its interpretation, thus my rejection of this point means opposing the majority decision concerning the essence of the case.

[114] The core of my opposition is that I cannot accept the statement made in the point concerned, according to which although Article XIV (4) of the Fundamental Law prohibits the granting of asylum to those immigrants who arrived through safe countries, still it is considered to allow the legislating Parliament to do this: "however, the Parliament may provide asylum to such persons as well under the substantive and procedural regulations specified by it."

- [115] Similarly, I cannot accept the related reasoning, which states that the wording "not entitled to" means that the right to asylum shall not be regarded as a fundamental subjective right in the case of a non-Hungarian citizen who arrived to the territory of Hungary via a country where he or she was not subject to persecution or the imminent danger of persecution. Nevertheless such persons do have a claim protected as a fundamental right to have their application ruled upon by the competent authority on the basis of a cardinal Act on the fundamental rules on granting asylum, according to Article XIV (5) of the Fundamental Law". (Reasoning, part III point 4). In the debate of the court I stuck to my opinion that the Hungarian language does not allow to interpret the term "not entitled to" in a way to read it as a "claim protected as a fundamental right" and thus to attribute the meaning "shall not be regarded as a fundamental subjective right" to the prohibition laid down in the term "not entitled to".
- [116] In order to make it at least possible to discuss such a meaning, the majority decision should have examined the reasoning attached to the provision of the Fundamental Law challenged in the infringement proceeding – as it had actually been requested in the petition of the minister (see page 10 of the petition). However, the reasoning of the majority decision failed to address it. Let us see, therefore, what dilemmas would have been raised as a result of including it.
- [117] After examining it we shall find that while the Seventh Amendment of the Fundamental Law introduced the prohibition of granting asylum to the relevant scope of immigrants ("not entitled to..."), still the attached reasoning provided an explanation stating that, despite of the prohibition, the Parliament may provide a statutory regulation that nevertheless grants asylum to such persons: "the Parliament shall be free to decide whether to provide them asylum or a similar form of protection, and if it does, under what conditions of substantive law and of procedural regulations." However, this reasoning is clearly in conflict with the relevant text of the Fundamental Law it intended to support. If, by any chance, we tried to resolve the contradiction by assuming that the text of the Fundamental Law only provided for prohibiting the granting of asylum on constitutional level and not preventing the Parliament from granting asylum on simple statutory level, then actually the remaining content of the text of the Fundamental Law would be to prohibit the legislative Parliament to grant a right on the level of the Fundamental Law to the relevant scope of immigrants without prohibiting granting them a simple statutory right. However, as the legislative Parliament as such is not entitled at all to grant a right on the level of the Fundamental Law as it could only do this as a constitution-setting power – with the special procedure required and with its qualified majority –, such a prohibition would be nonsense and such an interpretation would lead to a nonsense result under constitutional law.

[118] Accordingly, we need to arrive to the conclusion that the second sentence of Article XIV (4) of the Fundamental Law is in an irresolvable conflict with its reasoning and it raises the question of how the Constitutional Court is bound in the interpretation of the Fundamental Law by the reasoning having an enhanced potential for legal interpretation and also introduced by the Seventh Amendment of the Fundamental Law. Does it bind us, Justices of the Constitutional Court, or does it only bind the judges or ordinary courts who apply the law?

[119] To answer this question, let us first examine how the reasoning – of enhanced potential due to the Seventh Amendment of the Fundamental Law – is inserted in the text of Article 28 for the purpose of the interpretation: "In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and to the reasoning of the proposal of the law or the reasoning of amending the law." Although literally this rule only applies to the judges of ordinary courts who apply the laws and not to the Justices of the Constitutional Court who interpret and apply the Fundamental Law, as the Fundamental Law is not a law, but it stands above laws as the foundation of the legal order, we might also apply a broad interpretation to assume that this order of the Fundamental Law is also applicable to the Justices of the Constitutional Court who interpret the Fundamental Law. At first sight, an evident argument to support this approach would be to raise the question: how could the ordinary judges be held accountable under this order if the Justices of the Constitutional Court hold that this is not applicable on themselves with regard to the Fundamental Law and its reasoning? However, after thorough considerations, I hold that the correct standpoint is that the order under Article 28 should only be applicable to interpreting the law by the ordinary judges and its application should be excluded concerning the Justices of the Constitutional Court. In addition to the text of the Fundamental Law, this rule should not be extended to its reasoning. My reasons to support this argument are as follows: while ordinary judges interpret the provisions of the Acts and other laws that regulate a certain niche of life, where the inclusion of *ad hoc* legislative intent and political motivation through the reasoning is permissible to a greater extent, in the case of the Fundamental Law that regulates in a unified way the whole life of the State and of the law, the protection of coherent systemic reason should not allow to bind the judges to the reasonings that provide ground for *ad hoc* motivations.

[120] In the present case it means that in my opinion the reasoning contradicting the provision of the Fundamental Law under review may be set aside. As a logical consequence, I hold that there is a prohibition in the Fundamental Law for the legislative Parliament to grant asylum to those immigrants who arrive to the territory of Hungary through a safe country. This is why I could not have supported point 3 of the holdings – neither with an argumentation following the minister's petition –, however, a debate on it would have offered at least a chance to elaborate important

standpoints in the significant questions of constitutional dogmatics raised in connection with the case. In my dissenting opinion, I undertook the duty of substituting this.

Budapest, 25 February 2019

Dr. Béla Pokol
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. László Salamon*

[121] I do not agree with the reference made in points 2 and 3 of the holdings of the decision, which stated that in the course of interpreting the Fundamental Law the Constitutional Court should take into account other than the Fundamental Law. Neither do I agree with the related part of the reasoning.

[122] In my opinion, interpreting the Fundamental Law is an activity of interpreting the law aimed at exploring the content and at explaining the given provision of the Fundamental Law in line with the requirement of clarity. The sole and exclusive reference point of this activity is the Fundamental Law and the methods of interpretation are the grammatical, historical, systematic and logical analysis of the text of the Fundamental Law. Our membership in the European Union and the obligations binding Hungary on the basis of an international treaty are factors outside this framework.

[123] The interpreting of the Fundamental Law as an operation of interpreting the law should be distinguished from other acts of the State. Undoubtedly, EU membership and international treaties impose on Hungary – the Hungarian State – specific obligations that are binding upon the State of Hungary as the subject of international law and as the member of the European Union and that shall be taken into account by the Hungarian state organs having duties or competences related to the specific cases. This system of relations is regulated at the highest level by the Fundamental Law of Hungary as well as by other Acts of Parliament, fundamentally providing for the possibility of resolving any collision that may arise. However, in my view, the sole function of interpreting the Fundamental Law is to enlighten the content of the Fundamental Law that can only be conceptually based on nothing else but the Fundamental Law itself.

Budapest, 25 February 2019

Dr. László Salamon
Justice of the Constitutional Court