4 The EU Migrant Quota Referendum in Hungary

The Legal Aspects of a Primarily Political Device

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"Le Président de la République est responsable devant le Peuple français, auquel il a toujours le droit de faire appel."
Constitution du 14 Janvier 1852, Art. 5.[1]

4.1 Introduction

On 2 October 2016 Hungarian voters cast their votes to decide the following question: "Do you want the European Union to be able to prescribe the compulsory settlement of non-Hungarian citizens in Hungary even without the approval of the Parliament?" The referendum was invalid, because the required turnout quorum, the valid votes of more than 50% of the total electorate, was not reached. Nevertheless, the referendum was one of the most important political events of 2016 in Hungary and the problem of migration dominated the Hungarian political agenda also in the first half of 2017.

The following paper opens with a summary of the historic and political background of the referendum, touching upon the measures of the EU and the Hungarian Government. This is followed by an analysis of the Curia's (Supreme Court of Hungary) decision,[2] which gave the green light to the referendum. The most important conclusion is that the legal conditions for national referendums in Hungary (in particular, that the subject matter of the referendum lie within the competence of the Parliament and that the question be unambiguous) cannot be interpreted outside the EU law context. The refusal of the Curia to directly apply and interpret EU law in connection with referendum initiatives is, therefore, untenable. It is also worth reconsidering the long-held view that Article 8(3) (d) of the Fundamental Law, which bans referendums that would affect obligations arising from international treaties, is inapplicable to referendums in contravention of EU law.

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1 L. Duguit & H. Monnier & R. Bonnard (Eds.), *Les constitutions et les principales lois politiques de la France depuis 1789*, 7th edn (par G. Berlia), Librairie générale de droit et de jurisprudence, Paris, 1952, p. 250.

2 Decision Knk.IV.37.222/2016/9. of the Curia.

4.2 Background

4.2.1 European Union

4.2.1.1 The Increasing Inflow of Migrants and Asylum Seekers

While EU member states detected 107,365 illegal border-crossings in 2013, this number drastically increased to 282,962 in 2014 and to 1,822,337 in 2015.[3] According to a modest estimate, based on the assumption that all migrants first detected in Greece continued their journey through the Balkans and tried to re-enter the EU a second time, about 1,000,000 illegal migrants may be presumed to have entered the EU in 2015.[4] Most migrants tried to enter the EU in Greece, Hungary and Italy. Approximately half of them came from Syria, Afghanistan and Iraq. Meanwhile, asylum applications showed a similarly significant increase: while in 2014 the number of first time applicants amounted to 562,680 in the EU, in 2015 an increase of +123% could be discerned (1,255,640). In this respect, the most important target countries were Germany, Hungary and Sweden (2015: 441,800, 174,435, and 156,110 asylum seekers, respectively). The number of applicants per million inhabitants was the highest in Hungary (17,699).[5]

4.2.1.2 Proposed Measures and Council Decision (EU) 2015/1601

On 13 May 2015 the European Commission presented a European Agenda on Migration[6] with detailed short-, medium- and long-term political guidelines to manage the crisis. The four pillars of the Agenda included reducing incentives for irregular migration, border management reforms, a common asylum policy, and a new policy on legal migration. As a short-term solution, the Commission proposed end of May 2015 to relocate 40,000 Syrian and Eritrean nationals from Italy and Greece to other EU member states,[7] and adopted a recommendation to resettle further 20,000 people in need of international

3 Frontex Risk Analysis for 2016. <http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf>, Annex Table 1. p. 63.

4 Id. p. 6.

5 Asylum in the EU Member States, Eurostat newsrelease, 44/2016 (4 March 2016), <http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6>, pp. 1-2. In 2016 the migratory flow to the EU has been reduced: the number of asylum applications showed a decrease of 9% compared to 2015 and the amount of irregular border crossings has dropped significantly (to 511,371 in 2016). See EASO: Latest Asylum Trends – 2016 Overview, <https://www.easo.europa.eu/sites/default/files/Latest%20Asylum%20Trends%20Overview%202016%20final.pdf> and Frontex: FRAN Quarterly, Quarter 1, January–March 2017 <http://frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q1_2017.pdf>, Table 1 on p. 6.

6 Commission Communication of 15 May 2015, COM(2015) 240 final.

7 Commission Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece of 27 May 2015, COM(2015) 286 final. The Council adopted it three and a half months later: Council Decision (EU) 2015/1523 of 14 September 2015, OJ 2015 L 239/146.

protection in EU member states.[8] Both proposed measures were to apply for a period of two years and entailed financial support to those member states who receive migrants in the framework of these policies.

The most important proposal,[9] however, was an emergency measure issued in September 2015 to relocate 120,000 people from Italy (15,600), Greece (50,400), and Hungary (54,000). This was to be in addition to the 40,000 Syrians and Eritreans mentioned above and was based on a mandatory distribution key, which took into account the population, GDP, average number of past asylum applicants, and unemployment rate of the EU member states. The Commission's proposal included the prospect of financial support amounting to €6,000 per relocated person and €500 for refunding travel costs. For the case of exceptional circumstances the Commission foresaw the possibility for member states to abstain for a period of up to 12 months in exchange for a financial contribution of 0.002% of its GDP. The essence of this proposed measure was that, instead of Italy, Greece or Hungary, that member state should deal with the asylum application to which a particular asylum seeker is relocated. Should the right to asylum be granted, the asylum seeker would be compelled to stay in the member state concerned. In case of secondary movements, he or she could be returned to the receiving member state. This is contrary to the so-called Dublin system, which requires, if priority rules regarding unaccompanied children, family reunification and asylum seekers having a visa or residence permit[10] are not applicable, that asylum applications be decided by the first country of entry,[11] and in case of secondary movements it is the first country of entry to which the asylum applicant shall be returned.[12] It must be noted that the Commission planned for this solution to be the basis of a permanent relocation mechanism which could be triggered any time a similar crisis situation occurs.[13]

After consulting the European Parliament, the Council adopted the proposed measures in Council Decision (EU) 2015/1601 of 22 September 2015.[14] The legal basis for the

8 Commission Recommendation of 8 June 2015 on a European resettlement scheme, C(2015) 3560 final.

9 Commission Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary of 9 September 2015, COM(2015) 451 final.

10 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013, OJ 2013 L 180/31, Art. 7-12.

11 Id. Art. 13. The Dublin regulation is, however, not applicable to recognised refugees and to persons who were granted subsidiary protection.

12 Cf. European Commission: Fact Sheet on Refugee Crisis – Q&A on Emergency Relocation, 22 September 2015 (MEMO/15/5698), <http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm?locale=en>.

13 Cf. European Commission: Press Release on Refugee Crisis: European Commission takes decisive action, 9 September 2015 (IP/15/5596), <http://europa.eu/rapid/press-release_IP-15-5596_en.htm>, see further Proposal for a Regulation of the European Parliament and of the Council "establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person", 9 September 2015, COM(2015) 450 final, 2015/0208(COD).

14 OJ L 248/80.

decision is Article 78(3) of the Treaty on the Functioning of the European Union (TFEU).[15] According to this provision, "[i]n the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament". Article 78 forms part of Title V on the "Area of Freedom, Security and Justice" and Chapter 2 on "Policies on Border Checks, Asylum and Immigration". Pursuant to Article 4(2), the "area of freedom, security and justice" belongs to the shared competence of the Union and the member states.

4.2.2 Hungary

4.2.2.1 Political Background and Communication Campaign

After the victory of the coalition of Fidesz–Hungarian Civic Alliance and Christian Democratic People's Party (Fidesz-KDNP) in the 2014 parliamentary election resulting in a nearly 2/3 majority in the Parliament, the governing coalition was faced with a palpable loss of popularity at the turn of 2014 and 2015. While according to five Hungarian public-opinion research institutes in May 2014 Fidesz-KDNP had the political support of 33-39 percent of the total electorate, in December of the same year the surveys only suggested a support of 25 to 29 percent with no significant shift until August 2015.[16] Although opposition parties could not spectacularly benefit from the weakening of the governing coalition, the Government was, from a political point of view, in desperate need of an issue that could help regain its declining popularity. The appearance of large numbers of migrant on the southern border of Hungary, their march through the country in the direction of Austria, and the EU's plans to handle the situation were factors, which presented themselves as a golden opportunity for the Government to leap into action and determine the political agenda.

In April 2015 'national consultations' were held on questions relating to immigration and terrorism. The questionnaire, 8 million copies of which were sent to households and made available on the internet as well,[17] included twelve questions, which suggested a connection between the growing number of terror attacks, immigration and the policies

15 OJ C 326/47.

16 <http://kozvelemenykutatok.hu/partpreferencia/>, party-preferences in the total electorate. From September 2015 a significant increase could by observed. One year later, in September 2016 the data ranged from 26 to 37%.

17 MTI (Hungarian News Agency): National Consultation on Immigration to Begin (24 April 2015), <www.kormany.hu/en/prime-minister-s-office/news/national-consultation-on-immigration-to-begin>. See further the summary of the press conference held by the Government spokesman on 31 May 2015, <www.kormany.hu/hu/a-kormanyszovivo/hirek/nemzeti-konzultacio-a-bevandorlasrol>.

of 'Brussels' (the EU).[18] In addition, in June 2015 large posters were placed on billboards all over the country, addressed to migrants, reading "If you come to Hungary you can not take the jobs of Hungarians", "…you have to observe our laws" and "…you must respect our culture". In fact, since the posters were written in Hungarian, they were primarily intended for Hungarian citizens.

4.2.2.2 Physical Barriers

Besides the communication campaign, in June 2015 the Government decided to build a fence on the southern border of Hungary in order to direct migrants, who entered Hungary over the 'green zone' *en masse*, to the official border crossing points. The first fence, which was completed at the end of August, ran 175 kilometers long between Hungary and Serbia. It was followed in September and October by a second section of 41 kilometers on the Hungarian-Croatian border. In July the Parliament passed Act CXXVII of 2015[19] on the Temporary Closure of Borders and Amendment of Migration Related Acts to speed-up asylum-procedures. In September it adopted Act CXL of 2015[20] on the Amendment of Certain Acts Related to the Management of Mass Migration, which, among others, criminalized the crossing and damaging of the border fence, and the hindering of construction works. While in September the number of captured illegal migrants peaked at 138,396, in October this value decreased to 99,497 and in November to 315.[21]

4.2.2.3 The Action for Annulment and the Ombudsman's Motion

In parallel with the communication campaign and the building of a physical barrier to keep illegal migrants out of Hungary, a third thread of events may also be discerned, which has a legal character. Hungary had voted – along with the Czech Republic, Romania and Slovakia – "no" on Council Decision (EU) 2015/1601 and refused to receive the 1,294 asylum seekers – 306 from Italy and 988 from Greece – assigned to Hungary according to the quota. In November 2015 the Hungarian Parliament adopted Act CLXXV of 2015[22] on Countering the Compulsory Relocation Quota System in Defense of Hungary and Europe. The law called upon the Government to initiate an action for annulment against the Council Decision before the EU Court of Justice. The Government

18 The questionnaire is available at <www.kormany.hu/download/7/e2/50000/nemzeti_konzultacio_bevandorlas_2015.pdf> (in Hungarian). The English translation can be downloaded from <www.kormany.hu/download/9/a3/50000/Nemzetikonzultacio_mmkorrnel.docx>. The results of the consultation are available here: <www.kormany.hu/download/4/d3/c0000/Bev%20konzult%C3%A1ci%C3%B3%20eredm%C3%A9nyei.pdf> (in Hungarian).

19 Magyar Közlöny (Official Gazette) No. 102 of 2015, pp. 17524-17537.

20 Magyar Közlöny (Official Gazette) No. 124 of 2015, pp. 19196-19208.

21 The numbers are based on the Hungarian Police's daily statements: <https://en.wikipedia.org/wiki/Hungarian_border_barrier#cite_ref-30>.

22 Magyar Közlöny (Official Gazette) No. 182 of 2015, p. 20800.

lodged its action on 3 December 2015.[23] The action brought forth ten arguments against the Council Decision. The main argument was that Article 78(3) TFEU did not provide an appropriate legal basis for the measures taken by the Council, which are legislative by nature (since they deviate from Regulation No. 604/2013), and their temporal effect of 24 and 36 months goes beyond the provisional character foreseen by the TFEU. Accordingly, the provisions taken would have required the unanimous vote of the Council.[24]

On this exact same day, on 3 December 2015, László Székely, Commissioner (Ombudsman) for Fundamental Rights turned to the Hungarian Constitutional Court and requested an interpretation of Articles XIV(1) and E(2) of the Fundamental Law of Hungary.[25] The Commissioner, in his motion,[26] alleged that Council Decision (EU) 2015/1601 was contrary to fundamental provisions of international and EU law, in particular it infringed the ban on collective expulsion and the right of refugees to remain in the territory of the country in which they filed their application for asylum during the examination of their application. The core of the Commissioner's question was whether Hungarian authorities are obliged to execute EU measures which are contrary to fundamental rights enshrined in the Fundamental Law of Hungary, and if they are not, which Hungarian authority may establish that the conditions of non-execution are present. The Court's response came only in December 2016[27] and the Government had no reason to wait for it before launching a referendum initiative on the EU relocation quota. Notwithstanding, the initiative had still to go through some institutional filters before getting on the ballot.

4.3 The Decision of the Curia on the Admissibility of the Initiative

4.3.1 The Legal Framework of Direct Democracy in Hungary in General

Detailed rules concerning direct democracy were present in the Hungarian constitutional system since 1989. Act XVII of 1989 provided the legal basis both for citizen-initiated

23 Case C-647/15, *Hungary v. Council of the European Union* (2016/C 038/56).

24 A similar action was brought by Slovakia (Case C-643/15) on 2 December 2015.

25 Article XIV(1) stipulates that "…[f]oreigners legally staying in the territory of Hungary shall only be expelled on the basis of a lawful decision. Group expulsion shall be forbidden." Translation cited from L. Csink & B. Schanda & A. Zs. Varga (Eds.), *The Basic Law of Hungary. A First Commentary*, Clarus Press, Dublin, 2012. Annex. This translation will be used henceforth.Article E(2) is the so-called "Europe-clause". The whole Article can be read below in Section 4.3.2.1.

26 The motion of the Commissioner is available here: <http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/$FILE/X_3327_0_2015_inditvany.002.pdf/X_3327_0_2015_inditvany.pdf>.

27 Decision 22/2016. (XII. 5.) of the Constitutional Court. An English translation can be found here: <http://hunconcourt.hu/letoltesek/en_22_2016.pdf>. The Court didn't give a concrete answer to all questions of the Commissioner, e.g. to the question of whether Hungarian authorities may, due to their obligations arising from EU law, assist to the collective expulsion carried out by other EU member states against persons residing lawfully in their territory.

referendums and referendums initiated by authorities. The possibility of both 'top-down' and 'bottom-up' instruments has, despite significant amendments, remained unchanged ever since. In practice, out of the 13 referendums, submitted to the electorate since 1989, 10 were initiated by citizens. According to existing regulations, if 200,000 voters request, their proposed question must be submitted to referendum provided that the question meets legal requirements. In this case, the Parliament is obliged to order the referendum. If the initiative stems from the President of the Republic, the Government, or less than 200,000, but at least 100,000 enfranchised voters, the Parliament may decide at its own discretion whether it wishes to order the referendum or not. However, in Hungary with its parliamentary system of government in which the Government normally has a majority in Parliament, referendum initiatives coming from the Government may count with certainty on approval by the Parliament. Nonetheless, the legal criteria for referendum initiatives must be fulfilled also in case of Government-initiated referendums.

These criteria are laid down partly in the Fundamental Law of Hungary and partly in Act CCXXXVIII of 2013 on Referendum Initiatives, the European Citizens' Initiative and the Referendum Procedure. The initiative must be handed in to the National Election Commission (NEC), which examines it both from a formal and from a substantive point of view. As regards the substantive requirements, the NEC shall check whether the initiative 1) constitutes an abuse of the right of initiative; 2) is related to a question in respect of which an initiative is already underway; 3) pertains to an issue which does not lie in the competence of the Parliament; 4) concerns a matter which is excluded according to Article 8(3) of the Fundamental Law of Hungary or 5) is ambiguous. Should any of these circumstances be established, the NEC shall reject validating the initiative and the referendum cannot be held. An appeal can be lodged against the decision of the NEC with the Curia (Supreme Court) of Hungary. The Curia decides on the admissibility of the initiative in the second instance. It may come to a review, exceptionally, in the third instance by the Constitutional Court.[28] The Constitutional Court may only admit complaints against the decision of the Curia if the plaintiff alleges infringement of his or her fundamental rights, there is no other remedy available, and the unconstitutionality substantially affected the decision of the Curia or the case concerns a fundamental question of constitutionality.

It is important to note, that once a valid national referendum is held, the decision made by referendum will not automatically become part of the Hungarian Legal System. It is the Parliament who is obliged to implement the result of the vote by adopting the appropriate legislation.

28 Between 1997 and 2011 it was the Constitutional Court which reviewed the decision of NEC in the second instance.

4.3.2 The Decision of the Curia on the Government's Referendum Initiative

In the present case, the Government handed in the initiative on 24 February 2016 to the NEC, which rendered a positive decision on admissibility on 29 February.[29] The NEC didn't go into details regarding the above mentioned criteria, it simply established that the initiative met the legal requirements. The NEC's decision was challenged by four petitioners and their petitions were decided by the Curia on 3 May 2016.[30] The Curia was also positive about the admissibility of the referendum, therefore the Parliament ordered the vote on 10 May.[31] Complaints were lodged against the decision of the Curia as well as against the resolution of the Parliament before the Constitutional Court, but neither did the Court established the infringement of any fundamental rights of the plaintiffs[32] nor did it declare the Parliament's resolution unconstitutional.[33] Thus, the decision of the Curia on the admissibility of the referendum remained effective. The main arguments of the Curia's decision shall be analysed in the following.

4.3.2.1 The Ban on Referendums Which Would Affect International Obligations

All petitioners, who turned to the Curia countering the NEC's decision, voiced their concern that the initiative of the Government is contrary to EU law and affects, in this respect, Hungary's international obligations. The normative basis of this reference may be found in Article 8(3) of the Fundamental Law, which enumerates the issues that are excluded from a referendum. Among other things no referendum may be held "on obligations arising from international treaties".

In order to assess the persuasive power of this argument, the status of EU law in the Hungarian constitutional system must be briefly discussed. Article E) of the Fundamental Law, more precisely its Section (2) is often referred to as 'Europe-clause' and stipulates the following:

1. Hungary shall contribute to achieve European unity in order to realise the liberty, the well-being and the security of the European peoples.
2. In order to participate in the European Union as a Member State, Hungary – to the extent that is necessary to exercise the rights and to perform the obligations arising from the Founding Treaties – may exercise certain competences arising from the Fundamental Law in conjunction with other member states through the institutions of the European Union based upon international treaty.

29 Decision 14/2016. of the NEC.
30 Decision Knk.IV.37.222/2016/9. of the Curia.
31 Resolution 8/2016. (V. 10.) of the Parliament.
32 Rulings 3130/2016. (VI. 29.) and 3151/2016. (VII. 22.) of the Constitutional Court.
33 Decision 12/2016. (VI. 22.) of the Constitutional Court.

3. The law of the European Union may stipulate a generally binding rule of conduct subject to the conditions set out in paragraph (2).
4. The establishment of consent to be bound by an international agreement referred to in paragraph (2) shall require a two-thirds majority of the votes of the Members of Parliament.

The wording is essentially identical with the provisions of Article 2/A. and 6(4) of Act XX of 1949, the previous Constitution of Hungary.[34] The clause does not resolve the paradox, with which most member states are faced with: on the one hand the constitution enables the country to join an international organisation, the norms of which require absolute primacy even vis-à-vis the constitution itself, on the other hand the constitution shall be considered the highest norm in the member states from which the validity of all other rules of the domestic legal system derive.[35] Furthermore, the formulation of Section (2) is incomplete and ambiguous. It only refers to the joint exercise of competences with other member states but is silent on the acceptance of the EU law that had been in force when Hungary joined the EU.[36] Nor does it offer clear criteria for identifying "the extent that is necessary to exercise the rights and to perform the obligations arising from the Founding Treaties". The aim of the transfer of powers to EU institutions is namely not to realize the proper exercise of the rights and the performance of the obligations of the member states but to enable the EU to achieve its goals.[37]

Until December 2016,[38] when the EU 'Migrant Quota' Referendum had already been held, the Constitutional Court showed much restraint in the interpretation of the Europe-clause. In 2010, when a complaint asserted the unconstitutionality of the law implementing the Treaty of Lisbon because the Treaty allegedly undermined Hungary's sovereignty, the Court only referred to the fundamental requirements in Article 2(1) of the Constitution for Hungary to be "an independent, democratic constitutional state" and to the principle of popular sovereignty in Article 2(2). The Court added further that the application of the Europe-clause may not extinguish the requirements and the principle mentioned previously.[39] The Court listed several provisions of the Treaty of Lisbon which represented constraints on the competences of the EU and came to the conclusion that the Treaty was not unconstitutional. A more exact test for the protection of sovereignty

34 A. Jakab, *Az új Alaptörvény keletkezése és gyakorlati következményei [The Formation of the New Basic Law and Its Practical Consequences]*, HVG-ORAC, Budapest, 2011, p. 188.

35 L. Blutman – N. Chronowski, 'Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában [The Constitutional Court and EU Law: in the Trap of a Constitutional Paradox]', Part I, *Európai jog*, Vol. 7, No. 2, 2007, pp. 3-16, chapter 1.

36 Id. subchapter 4.4.2.

37 L. Blutman, 'A magyar Lisszabon-határozat: befejezetlen szimfónia luxemburgi hangnemben [The Hungarian Lisbon-decision: Unfinished Symphony in Luxemburg Mode]', 2010/2 *Alkotmánybírósági Szemle*, p. 96.

38 Decision 12/2016. (VI. 22.) of the Constitutional Court.

39 Decision 143/2010. (VII. 14.) of the Constitutional Court, IV.2.3.2.

against EU legislation and for the assessment of the constitutionality of future transfers of sovereignty was, however, not elaborated.[40]

As regards the formal requirements of such sovereignty transfers, the Court stated in accordance with Article 2/A. of the Constitution, that this can only take place by means of an international treaty, which shall be approved by a majority vote of two-thirds in Parliament. This requirement was repeated by the Constitutional Court in 2012 when the Government asked the Court for an interpretation of the new Europe-clause of the Fundamental Law in relation to the planned signing of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ('Fiscal Compact').[41]

There is, however, another trend in the Constitutional Court's rulings, which served as a basis for the decision of the Curia regarding the admissibility of the Government's referendum initiative. Namely, the Constitutional Court did not perceive of the founding treaties, their amendments and secondary EU law acts as international treaties from the aspect of the Court's own competences. These legal norms form part of the acquis communautaire and are consequently also components of Hungarian domestic law. The origins of this approach go back to 2006.[42] In 2007 the Court applied this principle also to Hungary's treaty of accession when it rejected a complaint which asserted that a particular popular referendum initiative would impose, in case of approval by the electorate, the obligation on the Parliament to adopt a law which would violate the treaty of accession.[43]

The Curia held itself strictly to this interpretation and used it – in this context – as a central argument in the reasoning.[44] According to the latter, the question, whether Council Decision (EU) 2015/1601 has modified the division of competences between the EU and the member states, shall not be dealt with by the Curia but by the European Court of Justice in Case C-647/15. The Curia declared, therefore, that neither the direct application of EU law nor its interpretation is necessary to make a judgement on the admissibility of the initiative. The subject-matter of the present case is, according to the Curia,

40 Blutman 2010, pp. 96-97.

41 Decision 22/2012. (V. 11.) of the Constitutional Court.

42 Decisions 1053/E/2005 and 72/2006. (XII. 15.) of the Constitutional Court.

43 Decision 12/2007. (III. 9.) of the Constitutional Court. (The treaty of accession was already in force when the question arose.) The Curia, however, regarded the treaty of accession as an international treaty in case of a popular referendum initiative, which was intended to modify the treaty's provisions on the acquisition of agricultural land and denied therefore to validate the initiative – cf. decision Knk.IV.37.446/2014/3. of the Curia, see further Zs. Balogh, A Kúria szerepe és gyakorlata az országos népszavazási kezdeményezések kérdéseinek hitelesítésében [Role and Practice of the Curia (Supreme Court) in the Certification of Questions Asked at National Referendum Initiatives], *in* K. Gáva & A. Téglási (Eds.), *A népszavazás szabályozása és gyakorlata Európában és Magyarországon [The Legal Framework and Practice of Referendums in Europe and Hungary]*, NKE Szolgáltató Nonprofit Kft., Budapest, 2016, pp. 107-108. Initiatives aimed at the exit from international organisations or the EU were also declared inadmissible with reference to the ban on referendums that affect obligations arising from international treaties – cf. Decisions Knk.37.184/2012/2., Knk.37.185/2012/2., Knk.37.186/2012/2. of the Curia.

44 Sections [29]-[35].

the referendum initiative of the Government. This initiative is related to the introduction of a measure, which was taken by a legal act of secondary EU law. The ban on referendums affecting international obligations arising from international treaties may not be applied to secondary EU law. The prohibition may only apply to international treaties concluded according to Article Q) of the Fundamental Law, which generally prescribes fostering international co-operation to establish and maintain peace and security, to achieve sustainable development, and obliges Hungary to ensure the conformity between international law and domestic law, and to fulfil Hungary's international obligations. International treaties mentioned in Article E) as bases for the joint exercise of state competences with other EU member states are beyond the scope of the referendum ban set forth in Article 8(3) (d).

4.3.2.2 The Subject-Matter of the Referendum Shall Fall within the Parliament's Competences

Every petitioner expressed the argument that the subject-matter of the Government's initiative does not lie within the powers of the Parliament, the question may, therefore, not be submitted to the voters. The legal basis of this argument is Article 8(2) of the Fundamental Law, which provides that "[q]estions falling within the competence of the Parliament may be subjects of national referendums". This requirement was a constant in Hungarian legislation since 1989.

In the present casethis provision should have been examined from two angles: firstly from the aspect of the division of powers between the Parliament and the Government, and secondly from the aspect of the division of competences between the EU (and its institutions) and the Parliament. As regards the first aspect the question shall be answered whether the competence of the Parliament may be established if it is the Government who represents Hungary in the Council, and who's competence it is to carry out or omit the measures prescribed by Council Decision (EU) 2015/1601. The Curia referred to the long-held view of the Constitutional Court that the Government does not have regulatory competences of which it cannot be lawfully deprived by the Parliament. The legislative powers of the latter are open in respect of all social issues. In case the Parliament passes a law on a certain issue, this defines the framework in which the Government may adopt detailed rules, and the law shall prevail over Government decrees in conflict with it.[45]

Although the Curia, referring to the amended provisions of the Fundamental Law, deviated from this approach in a later decision concerning a popular referendum initiative aimed at prohibiting the building of a football stadium in Felcsút at public expense and regarded the issue as not lying within the Parliament's powers,[46] in the present case it

45 Decisions 53/2001. (XI. 29.) and 46/2006. (X. 5.) of the Constitutional Court.
46 Decision Knk.37.807/2012/2. of the Curia.

seems to have returned to the erstwhile view of the Constitutional Court. The Curia also brought forward the argument that the present matter is connected with Act LXXX of 2007 on Asylum (Asylum Act), which explicitly refers to Regulation (EU) No 604/2013 of the European Parliament and of the Council, and includes provisions in order to implement this EU legislation into Hungarian law. Since Council Decision (EU) 2015/1601 departs from the rules of Regulation (EU) No 604/2013, the initiative, which is aimed against the application of the Council Decision, necessarily relates to problems regulated by the Asylum Act. Therefore, the Parliament's competence cannot be denied. The Curia referred further to the fundamental rights aspects of the asylum procedure and to the term 'relocation', which was new from the perspective of the Parliament's power, and, therefore, required a definition. In the reasoning of the Curia both factors are brought forward as arguments for regarding the issue as part of the Parliament's competence.[47]

The second aspect, namely that of the division of competences between the EU (and its institutions) and the Parliament, was not analysed by the Curia in depth. Nevertheless, the existence or absence of the Parliament's competence cannot be established without taking into consideration the TFEU's provisions on the exclusive and shared competences of the EU. Namely, abstaining from an analysis of EU law and making a mere reference to the case underway before the Court of Justice of the EU cannot lead to a well-founded decision, since provisions of Hungarian domestic law cannot be interpreted in isolation from their EU law context. Once the Curia accepts, in line with the practice of the Constitutional Court, that EU law is a component of Hungary's domestic legal system – and in fact it did, at least implicitly, when it used the statements of Decision 143/2010. (VII. 14.) of the Constitutional Court as the basis for its own reasoning[48] –, then taking into account and interpreting both legal systems is inevitable. As regards the concrete case it would have sufficed to establish that the area of freedom, security and justice, and more concretely policies on border checks, asylum and immigration belong to the competences shared between the EU and the member states.[49] Once the Council takes measures in this field – and this was acknowledged by the Curia as well with reference to Council Decision (EU) 2015/1601[50] – then pursuant to Article 2(2) TFEU the member states may not exercise their competence to the extent that the Union has exercised its competence. This also applies to the Hungarian Parliament's legislative competence.[51] Accordingly, the conclusion may be drawn that the Government's referendum initiative does not lie within the current competences of the Parliament, because the exercise of this part of its competence is dormant. (It is worth mentioning: the exercise of this right of

47 Sections [37]-[39].

48 Section [31].

49 TFEU Art. 4(2) (j) and Title V, Chapter 2.

50 Section [30].

51 Cf. B. Tárnok, 'A kötelezo menekültkvóták szabályozása az Európai Unióban a szubszidiaritás elvének érvényesülése tükrében [The Regulation of Refugee Quotas in the European Union in the Light of the Principle of Subsidiarity]', 2016/2 Pázmány Law Working Papers, pp. 4-5.

pre-emption[52] by the EU may convert shared competences into de facto exclusive competences of the EU in the long run.[53])

The reluctance of the Curia from taking into account the competence provisions of the TFEU is all the more remarkable, since it applied them in another case in September 2016.[54] In that case a popular referendum initiative was intended to prohibit non-Hungarian citizens from acquiring agricultural land in Hungary. The Curia first established that internal market issues belong to the competences shared between the EU and the member states. Next, it examined whether the EU had taken such measures in connection with the subject-matter of the initiative, which would exclude the exercise of the member states' competence. The Curia came to the conclusion that the provisions of the TFEU on non-discrimination, the freedom of establishment and the free movement of capital can be regarded as measures, which exclude the Hungarian Parliament from limiting the acquisition of agricultural land by the citizens of other EU member states. Accordingly, it concluded that the subject-matter of the initiative does not lie within the competence of the Parliament.

The inconsistency of the Curia's reasoning in the 'Migrant Quota' Referendum decision is also apparent from the fact that while it recognizes the competence of the Court of Justice of the EU to decide on the issue of competence, it nevertheless establishes the Hungarian Parliament's competence without waiting for that decision. The collision is even more obvious since the Court of Justice of the EU has adopted its judgement of 6 September 2017 on the actions brought by Hungary and Slovakia against Council Decision (EU) 2015/1601.[55] The Court of Justice arrived at the conclusion that the council decision cannot be classified as 'legislative act' and, therefore, the rules relating to ordinary or special legislative procedures are not applicable either. Furthermore, the provisional measures taken by the Council didn't exceed the legal basis provided by Art. 78(3) of the TFEU. These findings mean, in an implicit way, that, since the council decision did not violate the competence provisions of the TFEU, the freedom of the member states to adopt different measures in their domestic law could no longer be asserted.

52 On the concept of pre-emption in American and EU law seeT. Molnár: "Amerikából jöttem, mesterségem címere: pre-emption" ["I Came from America, My Signboard Is Pre-emption"], *in* P. Takács (Ed.), *Est quadam prodire tenus. Tudományos Diákköri Dolgozatok 2003*, Budapest, ELTE ÁJK, 2004, pp. 223-246.

53 Cf. Opinion of Advocate General Sharpston delivered on 21 December 2016 in opinion procedure 2/15 initiated following a request made by the European Commission ('Request for an Opinion pursuant to Article 218(11) TFEU – conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore – Allocation of competences between the European Union and the Member States', ECLI: EU:C:2016: 992, para. 59.

54 Decision Knk.VII.37.543/2016/2. of the Curia.

55 Judgement of 6 September 2017 on the Joint Cases C-643/15 and C-647/15, ECLI:EU:C:2017:631, paras. 57-84.

4.3.2.3 The Requirement of Unambiguity

Each petitioner asserted that the formulation of the initiative fails to fulfil the requirement of unambiguity. Among other things they referred to the uncertain meaning of the notion *settlement* ("betelepítés") and to the uncertain position of the Parliament on how to implement the popular decision since the issue does not lie within its competence.

The requirement of the unambiguity of the questions to be put to referendum has been a constant element of the law since 1989. A detailed test was elaborated in this respect by the Constitutional Court[56] which was later developed by the Curia.[57] The main feature of the test is that it examines the question from two perspectives: from the aspect of the voter and from the point of view of the Parliament.

From the aspect of the voter general intelligibility is required. The question may not be misleading, it must be clear, open only to one interpretation and the voter must be able to answer it with "yes" or "no". The Constitutional Court took the latter so seriously that it denied the validation of complex initiatives involving more than one substantive element, the relationship of which was unclear, or which did not follow from one another.[58] This makes the submission of elaborated drafts to referendum practically impossible. Only generally formulated questions narrowed down into one single sentence have a chance of passing the validation procedure. Another important requirement worth noting is that the voter must know the possible consequences of his or her choice. The popular initiative, for example, which sought to make beer free of charge in restaurants, was stopped by the Court with the reasoning that voters would not know who would bear the costs of the beer.[59]

From the point of view of the Parliament it is required that the legislator know whether it is obliged to adopt new norms to implement the result of the referendum and if so, what the content of such legislation shall be. The decision made by referendum should be neither infeasible, nor its consequences unpredictable.[60]

These two aspects may stand in conflict. Most social phenomena, which are regulated by the legislator, are covered with complex, detailed regulations. Where the question submitted to referendum is formulated so generally that it fulfils the requirement of clarity and simplicity from the perspective of the voter, the Parliament has several options in how to achieve the general purpose of the decision in detail. How narrow the path is to achieve a phrasing that corresponds to both requirements is clearly shown by the fact, that failure to meet the requirement of unambiguity is the most common reason invoked by the authorities for rejecting referendum initiatives. The reasoning behind 61.66% of

56 First in 2001, see decisions 51/2001. (XI. 29.) and 52/2001. (XI. 29.) of the Constitutional Court.
57 Balogh 2016, pp. 96-99.
58 Decision 52/2001. (XI. 29.) of the Constitutional Court.
59 Decision 26/2007. (IV. 25.) of the Constitutional Court, III. 2.
60 Id. III. 3.

the initiatives rejected by National Election Commission between 2012 and 2015 was that the formulation of the initiative was not unambiguous.[61]

In the present case the Curia focused, from the aspect of the voters, on the term *settlement* ("betelepítés") and established that the expression is understandable as a word rooted in standard language, voters will thus be able to grasp the meaning of the question. From the point of view of the legislator, the Curia declared that the initiative, if approved by the electorate, would not necessarily impose the obligation on the Parliament to leave the EU. It further added that implementing the result of the vote would not necessarily have to take the form of legislation but could also be implemented by means of other "legal instruments of state administration" set forth under Article 23 of Act CXXX of 2010 on Legislation. In practice, this would mean normative decisions or normative orders, which are of organisational or operational nature and are not generally binding but bind only the institution issuing these acts or the particular addressees (subordinated bodies and persons). However, the Curia did not go into further detail in this respect, it is therefore unclear what exactly was meant by this reference.[62]

In addition to these considerations there are further points in connection to which the unambiguity of the initiative may be called into question based on the above mentioned criteria. The question – "Do you want the European Union to be able to prescribe the compulsory settlement of non-Hungarian citizens in Hungary even without the approval of the Parliament?" – implies that a negative decision made by the Hungarian voters will prevent the "European Union" from prescribing the compulsory settlement. In fact, the European Union or any of its institutions can not be hindered from adopting acts of secondary EU law by way of a referendum held in a member state, and the Council had already adopted Decision (EU) 2015/1601, which prescribed the "settlement" (relocation) of non-Hungarians in Hungary. The Curia also acknowledges that in reality the initiative relates to the application of this decision in Hungary.[63] The addressee of the decision to be made by the Hungarian voters is therefore not the European Union but the Hungarian authorities. The wording of the question is, in this respect, misleading.

But even if we assume that Hungarian voters were aware of this distinction and wished to impose an obligation on the Parliament, as the primary addressee of referendums according to Article 8(2) of the Fundamental Law, it would still be doubtful as to how the Parliament could lawfully implement the decision made by the referendum. It may enact the appropriate amendments to domestic Hungarian law (for example to the Asylum Act) but this would be contrary to EU law. It may invite the Government to enter

61 B. Farkas, *Direkte Demokratie in Ungarn. Warum scheitern Volksinitiativen?* (Master Thesis), Andrássy Universität, Budapest, 2016, pp. 25, 110.

62 Z. Pozsár-Szentmiklósy, 'A Kúria végzése a betelepítési kvótáról szóló népszavazási kérdésrol. Országgyulési hatáskör az európai jog homályában [The Decision of the Curia on the Relocation Quota Initiative. The Parliament's Competence in the Obscurity of EU Law]', *Jogesetek Magyarázata*, Vol. VII, No. 1-2, 2016, p. 84.

63 Section [30].

into negotiations with EU authorities and other member states to achieve derogation from the obligation of receiving migrants under Council Decision (EU) 2015/1601. However, the success of such efforts would be uncertain. The Parliament may also call upon the Government to start the withdrawal procedure but according to the interpretation of the Curia a referendum may not be aimed at leaving the EU (see footnote 34 above).[64] The vague idea[65] formulated by the Curia to issue a "legal instrument of state administration" does not offer more promising options either. According to Article 23 of Act CXXX of 2010 on Legislation the Parliament may regulate its own organisation, operation, activity, and programme by means of a normative resolution. In addition to this, the head of the Parliament's Office may issue a normative order which is only binding upon persons who are on the payroll of the Office. It's hardly perceivable how the result of the referendum could be implemented through any of these devices. The unambiguity of the question may, therefore, be called into question also from the perspective of the Parliament.

Finally, the consequences of any possible action of the Parliament that would violate EU law also remain unclear. Whether the Commission would abandon the plan of a constant relocation system as a result of the Hungarian quota referendum is, to say the least, doubtful. The possible results of an infringement procedure,[66] or whether the Commission shall proceed for a lump sum fine or penalty payment to be imposed by the Court of Justice pursuant to Article 260 TFEU, are also not exactly foreseeable. In this respect both the electorate and the Parliament are faced with a situation where important consequences of their decisions are unpredictable. Accordingly, based on the above mentioned criteria the initiative could have been deemed ambiguous.

4.4. The Referendum and Its Aftermath

4.4.1 An Overwhelming Majority, But an Invalid Vote

After the Curia had given green light to the initiative on 3 May 2016, the Parliament ordered the referendum on 10 May and the President of the Republic set its date for 2 October. In addition to Fidesz-KDNP also the right-wing party Jobbik called its adherents to vote with "no" on the initiative; most left-wing parties invited citizens to boycott

64 Pozsár-Szentmiklósy 2016, pp. 82-83.

65 Cf. Pozsár-Szentmiklósy 2016, p. 84.

66 Infringement procedures were launched by the Commission against Hungary, Poland and the Czech Republic in connection with the non-fulfilment of their duties under Council Decision (EU) 2015/1601 in June 2017.Infringement number: 20172093. See the infringement decisions' database at <http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/> and the Commission's related press releases at <http://europa.eu/rapid/press-release_IP-17-1607_EN.htm> and <http://europa.eu/rapid/press-release_IP-17-2103_EN.htm>.

the referendum. Only the Hungarian Liberal Party encouraged the "yes" vote; the satirical political party MKKP promoted casting an invalid vote. The poster-campaign of the Government sought to communicate the connection between immigration, relocation quotas, terrorism and other imminent dangers that threaten the Hungarian people.[67] According to the Government Publicity Service the net cost of the campaign amounted to HUF 6.775 billion (ca. HUF 8.6 billion gross),[68] the watchdog NGO Atlatszo.hu calculated, however, a total of HUF 17 billion (gross) for governmental campaign spending[69] including the costs of the "national consultations" conducted in April-July 2015 and the posters of the post-referendum campaign.

Despite the vast spending the result of the referendum was ambivalent. The majority of "no" votes was overwhelming: 98,36% against the 1,64% proportion of "yes" votes. The referendum was, however, legally invalid: instead of the required 4,136,313 (50% of the electorate + 1) only 3,418,387 valid votes were cast, which correspond to 41.32% of the total electorate. The turnout was a bit higher: 44.07%, but in addition to the 3,418,387 valid votes 224,668 invalid votes were also cast (6.17% of all votes cast).[70] It is ironic that Fidesz-KDNP failed on the turnout quorum of 50%, which was reintroduced in 2012 by the very same governing coalition.[71]

4.4.2 A Failed Constitutional Amendment

Although the invalid referendum didn't impose the duty of legislation upon the Parliament, the Government tried to pass an amendment to the Fundamental Law[72] in order to invest the unanimous will of 98% of those casting a valid vote with the force of constitutional law.[73] It is worth noting that according to Article 8(3) (a) of the Fundamental Law no national referendums may be held on questions pertaining to amendments to the

67 R. Tóth, 'Itt vannak a kormány új plakátjai a menekültellenes népszavazáshoz [Here Are the New Posters of the Government for the Anti-Refugee Referendum]', *24.hu*, 20 July 2016, <http://24.hu/kozelet/2016/07/20/itt-vannak-a-kormany-uj-plakatjai-a-menekultellenes-nepszavazashoz/>.

68 Sz. Dull, 'Elárulta végre a kormány, mennyibe került a kvótakampány [The Government Has Finally Revealed the Costs of the Quota Campaign]', *Index.hu*, 4 October 2016, <http://index.hu/belfold/2016/10/04/elarulta_vegre_a_kormany_mennyibe_kerult_a_kvotakampany/>.

69 T. Sepsi & K. Erdélyi, 'Kiszámoltuk a kvótakampány teljes állami költségét: 17 milliárd forintot vertünk el [We Figured Up the Total Costs of State Spending on the Quota Campaign: 17 Billions Were Squandered]', *Atlatszo.hu*, 15 November 2016, <https://atlatszo.hu/2016/11/15/kiszamoltuk-a-kvotakampany-teljes-allami-koltseget-17-milliard-forintot-vertunk-el/>.

70 National Election Office: <www.valasztas.hu/hu/ref2016/1154/1154_0_index.html>.

71 Between 1997 and 2011 an approval quorum of 25% was applicable to national referendums. Art. 8(4) of theFundamental Law of 2011 replaced it with a turnout quorum of 50%.

72 Bill No. T/12458, <www.parlament.hu/irom40/12458/12458.pdf>.

73 As the general explanation pointed out: "The unanimous will of this 98 percent binds us and it is the task of the National Assembly to give it the force of public law." See the full English translation of the proposed amendment and its explanation at <http://abouthungary.hu/news-in-brief/proposed-seventh-amendment-to-the-fundamental-law-full-text-in-english/>.

Fundamental Law. Nevertheless, the Parliament is not barred from introducing a decision adopted by way of referendum, which does not necessarily require a constitutional amendment, into the Fundamental Law. The bill was submitted by Prime Minister Viktor Orbán on 10 October 2016 and involved provisions on the protection of Hungary's constitutional identity, the amendment of the Europe-clause with constraints on the joint exercise of state competences with EU institutions. It further included a ban on the settlement of foreign population in Hungary and laid down the basic conditions of asylum and expulsion. The proposed amendment finally failed because the required two-thirds majority was not reached in the Parliament. The right-wing oppositional party Jobbik originally pledged support for the amendment but about a week later it attached as a condition to the "yes" votes that the Government suspend the Hungarian Residency Bond Program, which is, in Jobbik's view, also an undue settlement of foreigners in Hungary.[74] Since the Government was not willing to give up the program, Jobbik abstained from the vote.[75]

4.4.3 The Constitutional Court on the Control of Sovereignty and Constitutional Identity

On 5 December 2016, the Constitutional Court answered the questions raised one year earlier by the Commissioner (Ombudsman) for Fundamental Rights regarding the applicability of Council Decision (EU) 2015/1601 in Hungary.[76] Although this decision had no legal impact on the referendum process, it is worth discussing its merit because it may be relevant in future cases.

The Court presented – similar to the request submitted by the ombudsman – an in-depth analysis of the judicial practice of EU member states regarding the constitutional limits of EU competences.[77] It came to the conclusion that the Constitutional Court may examine whether the joint exercise of powers under Article E(2) of the Fundamental Law

74 In the framework of the program non-EU citizens could get residence in Hungary in exchange for investing EUR 360,000 in 5-year maturity government residency bonds, out of which 300,000 were to be refunded after a period of 5 years. The Government ceased to accept any further application on 31 March 2017. 6,621 bonds were sold altogether by the Hungarian Debt Management Agency until the suspension of the program. Cf. <www.residency-bond.eu/residency-bond-program.html>. See further M. Ligeti, J.P. Martin & B. Nagy, *In Whose Interest? Shadows over the Hungarian Residency Bond Program*, Investment Migration Council & Transparency International Hungary, Geneva, 2016. Available at <https://transparency.hu/wp-content/uploads/2017/01/In-Whose-Interest_Shadows-over-the-Hungarian-Residency-Bond-Program.pdf>.

75 A. Kovács, 'Nem szavazták meg az alaptörvény módosítását [The Seventh Amendment to the Basic Law Was Not Passed]', *Origo.hu*, 8 November 2016, <www.origo.hu/itthon/20161108-szavazott-az-orszaggyules-az-alaptorveny.html>.

76 Decision 22/2016. (XII. 5.) of the Constitutional Court. A full English translation is available here: <http://hunconcourt.hu/letoltesek/en_22_2016.pdf>. This translation will be referred to henceforth; occasionally with modifications.

77 Sections [34]-[44].

"would violate human dignity, another fundamental right, the sovereignty of Hungary or its identity based on the country's historical constitution". This can only take place "on the basis of a relevant petition, in exceptional cases and as a resort of *ultima ratio*, i.e. with due consideration to the constitutional dialogue between the Member states".[78] The Court also added that "[r]especting and safeguarding the sovereignty of Hungary and its constitutional identity is mandatory for everybody (including the Parliament contributing to the European Union's decision-making mechanism and the Government directly participating in that mechanism)", but "the principal organ for the protection is the Constitutional Court". The Court emphasized further that "the direct subject of sovereignty- and identity control is not the legal act of the Union or its interpretation, therefore the Court shall not comment on the validity, invalidity or the primacy of application of such Union acts".[79]

In connection with sovereignty control the Court pointed out that

> "[s]ince by joining the European Union, Hungary has not surrendered its sovereignty, it rather allowed for the joint exercise of certain competences, retaining Hungary's sovereignty should be presumed when assessing the joint exercise of further competences in addition to rights and obligations provided under the Founding Treaties of the European Union (the presumption of retained sovereignty). […] Therefore, the joint exercise of competences shall not result in depriving the people of the possibility of possessing the ultimate opportunity to control the joint or individual (Member State) exercise of public power".[80]

Not only did the Court refer to the consent of the Parliament indispensable for concluding international treaties on the basis of which the joint exercise of state competences with other member states through EU institutions may take place,[81] but it also invoked the right to referendum.[82]

As far as identity control is concerned, the Constitutional Court declared that "the constitutional self-identity of Hungary is a fundamental value not established by the Fundamental Law – but merely recognized by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty…". The Court "unfolds the substance of this concept from case to case", but it also enumerated some of its elements without giving an exhaustive list: "freedoms, the separation of powers, the republican form of government, respect for autonomies under public law, the freedom of

78 Section [46].
79 Sections [55]-[56].
80 Section [60].
81 See Article E(2) and (4) of the Basic Law.
82 As regulated in Article XXIII(7) of the Basic Law.

religion, the lawful exercise of state power, parliamentarism, the equality of rights, the acknowledgment of judicial power and the protection of nationalities living among us". The Court also added that "[t]he protection of constitutional self-identity may be raised in the cases that have an influence on the living conditions of individuals, in particular their privacy protected by fundamental rights, on their personal and social security, on their decision-making responsibility, and when Hungary's linguistic, historical and cultural traditions are affected".[83]

Concerning the concrete question relating to the relocation of third country citizens to Hungary, the Court pronounced that "[i]n case the violation of human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution may be presumed as a result of exercising competences based on Article E) (2) of the Fundamental Law, in the course of exercising its competences the Constitutional Court may examine the existence of the alleged violation on the basis of a relevant petition".[84] Thus, the Court didn't deny to examine eventual violations of human dignity and fundamental rights upon a concrete petition in connection with the relocation of asylum seekers from other EU member states to Hungary, but it didn't make clear what would happen if a violation was established.[85]

4.5 Conclusion

Referendums initiated and imposed top-down by authorities are often denoted with the term "plebiscite",[86] traditions of direct democracy, in which such popular votes are predominant, may be termed "plebiscitary" traditions. The use of this kind of popular vote first became widespread in France during the reign of Napoleon Bonaparte and his nephew, Louis-Napoleon Bonaparte.[87] In the Napoleonic practice plebiscites were instruments of power by means of which the head of state could reinforce his political position. The formula was simple: finding a popular issue, which he reckons will enjoy the support of the masses, wording the question in a way that only one reasonable answer can be given, and submitting it to the vote in due time. From the aspect of the political effectiveness it does not make any difference whether the issue was already decided by the authorities or whether this decision had already been enforced by the military. What is impor-

83 Sections [64]-[67].

84 Section [69].

85 T. Drinóczi, 'A 22/2016. (XII. 5.) AB határozat: mit (nem) tartalmaz, és mi következik belole? (…) [Decision 22/2016. (XII. 5.) of the Constitutional Court: What Does It Involve, What Doesn't, and What Is Implied in It? (…)]', 2017/1 *MTA Law Working Papers*, pp. 11-12, <http://jog.tk.mta.hu/uploads/files/2017_01_Drinoczi.pdf>.

86 Cf. Th. Schiller, *Direkte Demokratie. Eine Einführung*, Campus, Frankfurt & New York, 2002, p. 14.

87 Ch. Frei, *Direkte Demokratie in Frankreich: Wegmarken einer schwierigen Tradition*, Verlag der Liechtensteinischen Akademischen Gesellschaft, Vaduz, 1995, pp. 12-19.

tant from a political point of view is that the vote does not only relate to the factual issue printed on the ballot but also to the head of state who proposed the solution. Thus, the vote is more an acclamation than a real decision for a political question. The ideology of this occasional political meeting between the head of state and the citizens was laid down in a euphemistic formulation in the 1852 French Constitution, already cited in the motto of this paper: "The President of the Republic is responsible before the French people to whom he can always make appeal." (Art. 5.)

The Hungarian EU 'Migrant Quota' Referendum shows traits of such a plebiscitary practice. The vote was ordered by the Government; the citizens were carefully prepared for the issue by a campaign conducted at public expense; and the merits of the question were, from the perspective of domestic politics, already decided by the authorities (the Government voted with "no" in the Council, filed an action before the Court of Justice of the EU and had the clear support of the Hungarian Parliament). The referendum had an acclamative – i.e. political – function in terms of garnering popular support for the Government in its conflict with EU authorities, rather than legal significance since it was not relevant before the Court of Justice, where the legality or illegality of the contested act was ultimately decided.

It also depends on the Hungarian authorities – the National Election Commission, the Curia and the Constitutional Court – whether they lend a helping hand to such practices. In the present case, the Curia would have had weighty arguments for stopping the initiative, even without the need of deviating from its own standards and from the criteria that were formerly elaborated and applied by the Constitutional Court. It could have easily established that the question did not lie within the Parliament's competence and serious reasons could have been brought forward to declare the question ambiguous, both from the aspect of the electors and from perspective of the Parliament.

For the purposes of any possible future referendum initiatives affecting EU law the following would be worth considering:

1. The decision on the admissibility of initiatives which may affect EU regulations makes it necessary for authorities to interpret and apply these rules. EU law has become part of the domestic legal order and the norms of the same as well as their proper meaning cannot be understood in isolation of their EU law context.[88] This may also be the case when authorities must establish whether the subject-matter of the initiative lies within the competence of the Hungarian Parliament and when the unambiguity of a question is assessed in relation to existing (EU or domestic) rules.[89]

88 Regarding the interpretation of the founding treaties by the Constitutional Court similarly Blutman 2010, p. 95. Further articles in English on the practice of the Hungarian Constitutional Court in matters having an EU law context: L. Blutman & N. Chronowski, Hungarian Constitutional Court: Keeping Aloof from European Union Law, *Vienna Journal on International Constitutional Law*, Vol. 5, No. 3, 2011, pp. 329-348; F. Gárdos-Orosz, Preliminary Reference and the Hungarian Constitutional Court: A Context of Non-Reference, *German Law Journal*, Vol. 16, No. 6, 2015, pp. 1570-1589.

89 Cf. Pozsár-Szentmiklósy 2016, p. 81.

2. Initiatives which affect EU law may also be declared inadmissible with the reasoning that they affect obligations arising from international treaties, thereby violating Article 8(3) (d) of the Fundamental Law. This would mean a deviation from the practice followed hitherto. The reasoning behind it, however, is very simple: although the treaties of accession, the founding treaties and their amendments (sources of primary law) have special character, they are still essentially international treaties. If their provisions are directly affected by a referendum initiative, the prohibition laid down in Article 8(3) of the Fundamental Law shall be applicable. The sources of primary law involve rules on decision-making processes by means of which acts of secondary EU law shall be adopted or may be challenged. Admitting a referendum initiative which affects secondary EU law would therefore also indirectly contravene sources of primary law. Since the affected sources of primary law are international treaties, such an initiative would also be inadmissible by reason of Article 8(3) (d) of the Fundamental Law.
3. Were we to acknowledge that the sovereignty and constitutional identity of the member states shall have special safeguards also in the member states, we must also accept that Constitutional Courts or similar judicial authorities are the institutions that function as control institutions in this regard. But even if sovereignty were to mean, as stated by the Constitutional Court,[90] that the people shall have the ultimate opportunity to control the exercise of public power, the question, whether a certain issue belongs to the competence of the EU or lies within the powers of a member state instead, shall be decided, in the first place, by interpreting the relevant provisions of domestic and EU law. A referendum, by means of which citizens may decide to transfer or not to transfer the exercise of sovereignty in a particular field to the EU, may only happen after the relevant judicial authority, the Constitutional Court or the Curia of Hungary had established the lack of EU competence in that particular field.[91]

90 Decision 22/2016. (XII. 5.) of the Constitutional Court, Section [60].

91 Cf. the concurring opinion of István Stumpf to Decision 22/2016. (XII. 5.) of the Constitutional Court: the sovereignty control exercised by the people "could hardly mean that in individual cases the voters could review the measures by the bodies of the European Union with regard to the question of the joint exercising of Union powers undertaken in the accession treaty confirmed by two-thirds of the members of Parliament and concretely incorporated in the Basic Law" (Section [106]). See further the concerns of Drinóczi 2016, p. 13.