

## The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts

By *Kriszta Kovács*\*

### Abstract

The recent trend in East Central European jurisprudence is that courts apply an ethnocultural understanding of identity, thereby putting European integration in peril. Although the EU is clearly committed to shared values and principles, Article 4(2) of the Treaty on European Union emphasizes that “the Union shall respect the national identities of the Member States.” Due to the recent migration flow in Europe, the Member States are currently attempting to (re)define themselves and offer a legal definition of identity. East Central European Member States, by labelling ethnocultural national identity as constitutional identity, apply Article 4(2) as a means of derogating from some of their obligations under EU law. Despite the vast literature available on national identity and its role in EU law, little attention has been paid to the recently emerging trend of judicial reinvention of identity in East Central Europe. This is what this Article offers. It focuses on the Visegrád Group, which consists of the Czech Republic, Hungary, Poland, and Slovakia. The Visegrád countries (V4) are united in their views on rejecting migrant relocation quotas in the EU and define their exclusionary constitutional identities accordingly. The main subject of the Article is the relevant case law of the V4 constitutional courts. These courts have the authoritative role in enforcing nation-state policies based upon ethnocultural considerations. The Article provides a comparative-analytical description of the judicial interpretations of constitutional identity in these countries based on which we can better understand the recent East Central European trend of disintegration.

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## A. Introduction

The concept of sovereignty has long framed the discourse on the allocation of competencies within the EU and on the structure and function of the EU. After the entering into force of the Lisbon Treaty, the relevance of the concept of sovereignty weakened and the concept of national identity became more relevant, because Article 4(2) of the Treaty on European Union (TEU) obliges the EU to respect the national identity of Member States. The EU Member States use this concept to offer a legal definition of their identity. And although the TEU explicitly uses the notion of national identity, Article 4(2) by focusing on state structures, suggests that national identity has a constitutional bearing.<sup>1</sup> Thereby national identity taken in a socio-constitutional sense became a legal concept of EU law.<sup>2</sup>

Recently in East Central Europe, forceful political claims have been made in the name of national identity, and such claims have induced various kinds of constitutional transformation in East Central Europe.<sup>3</sup> It is worth examining and analyzing how V4<sup>4</sup> apply the concept of identity. The reason for choosing them is that they all voted against the quota scheme introduced by EU Council Decision 2015/1601.<sup>5</sup> Hungary and Slovakia filed two separate actions for annulment against the Decision to the Court of Justice of the European Union (CJEU).<sup>6</sup> V4 declared that setting quotas with negative consequences is not a policy that the V4 supports<sup>7</sup> and they (re)define their constitutional identities along these lines.

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<sup>1</sup> Roberto Toniatti, *Sovereignty Lost: Constitutional Identity Regained*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 64 (Alejandro Saiz Arnaiz & Carina Alcobarro LLivina eds., 2013).

<sup>2</sup> Leonard Besselink, *National and Constitutional Identity Before and after Lisbon*, 6 UTRECHT L. REV. 37 (2010).

<sup>3</sup> See the papers included in the 2016 Symposium of the Journal of Common Market Studies coedited by Dmitry Kochenov, Amichai Magen, and Laurent Pech. See Jan-Werner Müller, *Should the EU Protect Democracy and the Rule of Law in Its Member States?*, 21 EUR. L.J. (2015).

<sup>4</sup> V4 consists of countries with different historical/cultural/linguistic background, it is "not an all round alliance, but a practical ad hoc cooperation platform." Daniel Hegedús, *From Front-runners' "EU"phoria to Backmarkers' "Pragmatic Adhocism"*, DGAPanalyse, No. 7 (May 2014), at 13.

<sup>5</sup> *Joint Declaration by the Prime Ministers of V4 Countries on Migration*, VISEGRAD (July 19, 2017), <http://www.visegradgroup.eu/documents/official-statements>.

<sup>6</sup> ECJ, C-643/15, *Slovak Republic and Hungary v. Council of the European Union*, ECLI:EU:C:2017:631, Judgment of 6 September 2017.

<sup>7</sup> As of 18 August 2017, the Czech Republic launched 50 pledges and relocated 12 people, Slovakia pledged 60 places and relocated 16, Poland pledged 100 but did not relocate anyone. <http://europeanstudies.macmillan.yale.edu/news/visegrad-group-factor-stability-central-and-eastern-europe>. Hungary refused to pledge any number. See *Member States' Support to Emergency Relocation Mechanism*, European Union (Oct. 19, 2017), [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_relocation\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf).

The Article focuses on the judicial interpretation, since law is an interpretive concept<sup>8</sup> influencing the everyday life of members of a society. Hence, constitutional law is a practice of that society. Constitutional courts are the authoritative interpreters of constitutions in that practice. During the democratic transition V4 constitutional courts played a vital role in the revision of the legal system inherited from the Soviet era to meet new constitutional-democratic standards.<sup>9</sup> The part played by these courts during the recent anti-democratic changes has remained integral and crucial. What is of great significance for the article is to establish the nature of that role, and how homogenous is it across the countries of the region.

Seemingly, the German Federal Constitutional Court (FCC) served as a role model for V4 courts to empower themselves to exercise identity review. In reality, the identity reviews exercised by those courts are not identical; the essence, the scope and the aim of the identity control are different. The article takes the 2016 decision of the Hungarian constitutional court on constitutional identity as a reference point for developing a critique of the corresponding interpretation of identity among the V4 apex courts.

## **B. National and Constitutional Identities**

Identity is the characteristics determining what a given thing is. But how can a community's political identity, which extends across generations, be defined? In a political community, political agents usually exercise the identity-constituting power. Their aim is to make the identity of the community distinguishable and worthy of protection. It can be conceived as a belonging to a collective self.<sup>10</sup> Belonging is the condition of being understood, and "to be understood is to share a common past, common feelings and language, common assumptions, possibility of intimate communications—in short, to share common forms of life."<sup>11</sup>

One way to define this belonging is to apply the concept of national identity. National identity can be connected to the "state-nation" concept, where the membership is based upon political criteria, for example, citizenship. Or, alternatively, to the "ethnocultural-nation" concept, where the members should have "their roots in the generations that have lived in the nation's territory and share its customs and culture (e.g., language, religion) since

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<sup>8</sup> RONALD DWORKIN, *LAW'S EMPIRE* 410–13 (Hart, 1998).

<sup>9</sup> See Gábor Attila Tóth, *From Uneasy Compromises to Democratic Partnership: The Prospects of Central European Constitutionalism*, 13 *EUR. J. L. REFORM* 1 (2011).

<sup>10</sup> See Michel Rosenfeld, *Constitutional Identity*, in *The Oxford Handbook of Comparative Constitutional Law*, Oxford UP, 2012, 757.

<sup>11</sup> ISAIAH BERLIN, *PERSONAL IMPRESSIONS* 258 (Pimlico, 1998).

childhood.”<sup>12</sup> Applying the metaphorical concept of Ceruti, a mirror-identity can be formed which creates a “we” but does not create an “other,” in other cases a wall-identity may emerge, which separates the group from other groups.<sup>13</sup> While there is always a comparison with other groups, this comparison with “the Others” can be relatively benign, whereby the national identity can remain open to everyone who shares the same constitutional values. When a comparison with “the incomprehensible Alien”<sup>14</sup> is present, exclusionary identity may emerge. Today in the V4 countries the concept of national identity is taken in a linguistic, ethnic, religious sense and depends upon the distinctive ethnocultural traditions of a given society. The imagined<sup>15</sup> common ethnicity of the people of a given society serves as the core of the collective identity. It is imagined because “ethnic identity is not natural and inborn, nor the product of ancient tradition: instead, it is socially constructed.”<sup>16</sup> Hence, it is more a wall-identity than a mirror-identity. The origins of such projects where ethnicity arises as a category of identity based upon the idea of distinctiveness can be found in romantic nationalism.<sup>17</sup>

Constitutional identity is also a contested and inarticulate concept, and there are different views on the exact meaning of the phrase. The identitarian or communitarian approach sees constitutions as reflections of national identity or the identity of the people. This Article builds on the thought which emphasizes that constitutional identity is located within the constitution.<sup>18</sup> But how this identity can be identified? First, the whole set of constitutional values, principles and rules should be recollected in order to receive information on the constitutional identity.<sup>19</sup> Second, the constitutional amendment procedures could be used as sources from which we are able to determine a given state’s constitutional identity.<sup>20</sup>

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<sup>12</sup> Max Haller & Regina Ressler, *National and European Identity: A Study of Their Meanings and Interrelationships*, 47 *REVUE FRANÇAISE DE SOCIOLOGIE* 822 (2006).

<sup>13</sup> FURIO CERRUTI, *POLITICAL IDENTITY AND CONFLICT: A COMPARISON OF DEFINITIONS* (Palgrave, 2001).

<sup>14</sup> European Commission, *The Development of European Identity/Identities: Unfinished Business* (2012), at 22.

<sup>15</sup> See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (Verso, 1991).

<sup>16</sup> Lawrence M. Friedman, *Introduction: Nationalism, Identity, and Law*, 28 *IND. L. REV.* 503 (1995).

<sup>17</sup> Isaiah Berlin, *European Unity and its Vicissitudes*, in *CROOKED TIMBER* 191–92 (1990).

<sup>18</sup> See Michel Troper, *Behind the Constitution?*, in *CONSTITUTIONAL TOPOGRAPHY: VALUES AND CONSTITUTIONS* 201–03 (András Sajó & Renáta Uitz eds., 2010).

<sup>19</sup> See José Luis Martí, *Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People*, in *NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION* 24 (Alejandro Saiz Arnaiz & Carina Alcoberto Llivina eds., 2013).

<sup>20</sup> See Constance Grewe, *Methods of Identification of National Constitutional Identity*, in *NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION* 40 (Alejandro Saiz Arnaiz & Carina Alcoberto Llivina eds., 2013).

The notion of constitutional identity may be connected to the “state-nation” concept, the roots of which go back to Aristotle’s *Politics*.<sup>21</sup> In this case constitutional identity refers to the fact that it is not the physical characteristics of the community, or the ethnocultural form of life of the given community that matter, but the constitution<sup>22</sup> itself.<sup>23</sup> Therefore, the identity of the people and the identity of the constitution are two different things, and the identity of the political community may be different from the identity of the constitution which gives rules to the given community.<sup>24</sup>

In other words, constitutional identity may refer to the “constitutional essentials”<sup>25</sup> of a given constitutional order,<sup>26</sup> which can be identified by the sets of norms—including the underlying principles, the system of constitutional organs and the basic liberties—providing information on the fundamental structure of the given state, that, when touched by constitutional change, would result in a modified constitutional identity.

Constitutional texts themselves have only limited potential for giving information on constitutional identity. Therefore, the words of the constitution need to be interpreted, and socially embedded institutions, by interpreting and applying these words, could actually foster the constitutional identity. Hence, constitutional identity depends upon the constitutional principles embedded in the political culture.<sup>27</sup> Some empirical demonstration that the text of the constitution is mainly consistent with constitutional experience is thus required.<sup>28</sup> Constitutions acquire identity by experience, and constitutional courts are the institutions which have the authority to give *erga omnes* interpretation of the constitutional provisions.

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<sup>21</sup> THE POLITICS OF ARISTOTLE 98 (Ernst Baker ed. & trans., Oxford University Press, 1962).

<sup>22</sup> Since the Age of Enlightenment, we have been differentiating between constitutions and constitutionalism. When not otherwise indicated, this article applies the concept of a normative constitution which complies with the requirement of constitutionalism. See Wil Waluchow, *Constitutionalism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2014), <http://plato.stanford.edu/archives/spr2014/entries/constitutionalism/>.

<sup>23</sup> See Gary Jeffrey Jacobsohn, *Constitutional Identity*, 68 R. POL. 361, 364 (2006).

<sup>24</sup> See Martí, *supra* note 19, at 19.

<sup>25</sup> John Rawls’ well-known expression refers to the principles that structure the government and the basic rights and liberties, not including political issues that are the matters of ordinary legislation. See JOHN RAWLS, *POLITICAL LIBERALISM* 214, 227–29 (1993).

<sup>26</sup> Martí, *supra* note 19, at 20.

<sup>27</sup> See Jürgen Habermas: *Citizenship and National Identity*, in GLOBALIZATION: GLOBAL MEMBERSHIP AND PARTICIPATION 172 (2003). Constitutional patriotism means an attachment not only to abstract constitutional values. It is also crucial how they were discussed and established in the given democratic context.

<sup>28</sup> Gary J. Jacobsohn, *The Formation of Constitutional Identities*, in COMPARATIVE CONSTITUTIONAL LAW 131 (Tom Ginsburg & Rosalind Dixon eds., 2011).

### C. Regional Dynamics: The Emerging Ethnocultural Understanding of Identity

#### I. Convergence Toward a Common European Constitutional Identity

The year 1989 is frequently taken as a marker of qualitative change regarding the constitutional identities of the V4. It is a turning point in a sense that in the early 1990s these states, by departing from the Socialist values and aspiring to the constitutional values of the European Convention on Human Rights as well as the EU, were converging towards a common European constitutional identity that everybody aspired to.<sup>29</sup> Breaking with the Socialist past, and openness towards European integration played an important role in their identity formation, and it looked as if unique national events were not that decisive in the constitution-making process. Hence, the Visegrád countries ended up with more or less similar constitutional narratives at the level of constitutional principles<sup>30</sup>—democracy, rule of law, equality, and respect of human rights—regardless what political events brought them to the point of constructing a democratic constitution.

The newly adopted domestic constitutions of the region contained the principles of rule of law, democracy and the most basic human rights, including, for instance, the right to human dignity and a free speech clause. Certainly, the domestic judicial interpretations of these constitutional principles differed strikingly. For instance, the Polish Constitutional Tribunal recognized the constitutional right to life of an unborn *vis-à-vis* the mother's claim to self-determination.<sup>31</sup> While the Hungarian Constitutional Court, after the legislature did not deem the embryo a legal subject, weighed the mother's right to control her body against the state's duty to protect human life—instead of the right to life of an unborn.<sup>32</sup> Other differences in judicial interpretation of the principles might also be detected. V4 courts interpreted the constitutional free speech clauses differently. For example, the Czech Constitutional Court<sup>33</sup> and the Polish Tribunal<sup>34</sup> argued that the constitutional right to free

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<sup>29</sup> See Jirí Pribán, *Reconstituting Paradise Lost: Temporality, Civility, and Ethnicity in Post-Communist Constitution-Making*, 48 L. & SOC. REV. 408 (2004).

<sup>30</sup> The article uses this term in the Dworkinian sense. See Ronald Dworkin, *The Model of Rules*, 35 UNIV. CHI. L. REV. 14 (1967).

<sup>31</sup> See Constitutional Tribunal [CT], 16 November 2011, K 45/09 (Pol.).

<sup>32</sup> See Alkotmánybíróság (AB) 48/1998. (XI. 23.) AB határozat (Hung.).

<sup>33</sup> See Czech Constitutional Court Pl. ÚS 5/92, Decision 2943/08 of January 2009 (Cz.).

<sup>34</sup> See Constitutional Tribunal [CT], 7 June 1994, K 17/93 (Pol.).

speech did not encompass the right to hate speech. Contrary to this, under the early Hungarian constitutional jurisprudence the political right to free speech included hate speech so long as the speech does not incite others to criminal acts.<sup>35</sup> Hence, the early Hungarian free speech jurisprudence was more in line with the US tradition, while the other V4 courts were ready to restrict speech in the interests of social peace.<sup>36</sup>

These are only a few examples of how these constitutional courts were to play a central role in forming the identity of the newly adopted constitutional-democratic constitutions. The judicial interpretations of the constitutional principles formed the constitutional identity of the respective country and the constitutional identities were to be guarded by constitutional courts as authoritative interpreters of the constitutions.<sup>37</sup> The courts tended to interpret the identity of the political community by emphasizing its connection to the values of the domestic constitutional setting, and to European constitutionalism. For instance, in 2010 the Polish Constitutional Tribunal connected the constitutional identity to the values of the political system of the state, such as the protection of human dignity and constitutional rights, the principles of democracy, the rule of law, social justice, and subsidiarity.<sup>38</sup>

## *II. Divergence of the Interpretations of Constitutional Identity*

The convergence toward a common European constitutional identity based upon the rule of law, democracy and human rights, however, seems now to have been only temporary, and to be drifting into divergence. What we are witnessing in the V4 region is a far-reaching questioning of these core principles and an increase in national constitutional projects aiming at making national identity as locally valid and unique as possible. One of the reasons for this new trend might be that constitutions adopted after the 1989 democratic transitions are perceived by many political actors and their supporters not as something “organically grown,” but something imposed by external forces, such as the international community.<sup>39</sup> For these political agents the concept of national identity represents the view that nation-states are faithful to their own system of political and ethnocultural priorities, and their aim

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<sup>35</sup> See Alkotmánybíróság (AB) 30/1992. (V. 26.) AB határozat (Hung.).

<sup>36</sup> *But see* WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 233 (2d ed. 2014).

<sup>37</sup> For an account on how constitutional identity are guarded by constitutional courts by means of reviewing constitutional amendments, see Kriszta Kovács, *Changing Constitutional Identity via Amendment*, in CONSTITUTIONAL ACCELERATION WITHIN THE EUROPEAN UNION AND BEYOND 199–216 (Paul Blokker ed., 2017).

<sup>38</sup> Constitutional Tribunal [CT], 24 November 2010, K 32/09, 2.1 (Pol.) [hereinafter the *Lisbon decision of the CT*].

<sup>39</sup> The phrase “fight for independence” against external influence is often used by Viktor Orbán <https://visegradpost.com/en/2017/07/24/full-speech-of-v-orban-will-europe-belong-to-europeans/>, and Jaroslaw Kaczynski <https://www.bloomberg.com/news/articles/2016-11-11/poland-ready-to-fight-its-allies-for-sovereignty-kaczynski-says>.

first and foremost is to protect particular interests. National identity is understood as the sum of the distinctive ethnocultural traditions and culture of a given society. It is the physical characteristics of the given community that matter, which should be in accord with the constitution. These contemporary identity-maker political agents stress the need for a religious and ethnocultural background for the concept of national identity by referring to the culturally, religiously and linguistically homogeneous community.<sup>40</sup>

In Hungary and Poland these political actors, after becoming leading forces, are playing a crucial role in the process of creating new, exclusionary national identities. For instance, the current Hungarian constitutional transformation was substantiated by the argument that the identity expressed by the 1989 constitutional revision failed to comply with the Hungarian national identity, and for this reason Hungary needed a new constitution which was able to provide a “foundation for the spiritual and intellectual renewal of Hungary.”<sup>41</sup> Similarly, the President of Poland called for constitutional referendum saying that “it is time for a serious debate on the constitution among the Polish people,” because “Poles and Poland have earned a new constitution.”<sup>42</sup>

The new systems of government<sup>43</sup> in these countries have affected the independence and the competences of the constitutional courts.<sup>44</sup> Today both the Tribunal and the Hungarian Constitutional Court are dominated by justices elected by the ruling majority, hence the “constitutional captures”<sup>45</sup> neutralized the courts as checks on government.

Consequently, these courts are more often than not deferential to the government’s understanding of national identity. They reflect the ruling majority’s conception of what a “nation” is. Moreover, the existing case law in East Central Europe lends them a helping hand. In the early 2010s the Slovak and Czech Constitutional Courts already proclaimed their

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<sup>40</sup> In the case of national identity the Slovak political discussion is dominated by Robert Fico’s Smer party, the Hungarian discussion by Viktor Orbán’s Fidesz party, the Polish discussion by Jaroslaw Kaczysky’s PiS party, the Czech discussion by Pavel Belobrádek’s KDU and Petr Fiala’s ODS parties. National Identities in CEE — country case studies, available at <http://www.cceidentity.eu/news/national-0> and <http://www.cceidentity.eu/blog/ten-years-after-0>

<sup>41</sup> Tibor Navracsics, ‘A New Constitution for Hungary: Locking in the Values of 1989–1990 Transition, At Last’ (2011) *The Wall Street Journal* April 19.

<sup>42</sup> <http://www.dw.com/en/polands-president-calls-for-constitutional-referendum/a-38725200>

<sup>43</sup> The second (2010-2014) and third (2014-) Orbán-government and the (2015-) Szydło-government.

<sup>44</sup> See Venice Commission Opinion on the Act CL of 2011 on the Constitutional Court of Hungary, CDL-AD(2012)009-e, 19 June 2012; Venice Commission Opinion on the Act on the Constitutional Tribunal, CDL-AD(2016)026-e, 14 October 2016.

<sup>45</sup> Jan-Werner Müller, *Rising to the Challenge of Constitutional Capture*, EUROZINE (Mar. 21, 2014), <http://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/> (last visited Oct. 25, 2017).

capacity to conduct identity review, that is, to decide whether the EU respects the national identity of the Member States and the limits of their conferred competences.<sup>46</sup>

In 2010, the Slovak Constitutional Court held, without giving lengthy justifications, that the constitutional court has the power to review EU law if this is indispensable to protect the constitutional identity of the country.<sup>47</sup> Likewise, the Czech Constitutional Court in a Slovak pension case referred to the concept of identity. The so-called *Landtová* case was about the financial situation of retired employees who worked in the Czech part of Czechoslovakia while their employer's residence was in the Slovak part of the country. Their pensions were to be covered by the Slovak state. According to the calculation based on a bilateral Treaty concluded by the Czech and Slovak Republic, however, the pensions of these workers were significantly lower than pensions in the Czech Republic. The Czech Constitutional Court concluded that this violated the principle of equality and the right to social security, and therefore some benefits to compensate the difference should be paid. This interpretation was contested by the Czech Supreme Administrative Court, which posed a preliminary question to the CJEU. The CJEU considered that payment of a supplement to old age benefit solely to individuals of Czech nationality, residing in the territory of the Czech Republic, constituted discrimination and was in contradiction to the principle of free movement of workers.<sup>48</sup> The Czech Supreme Administrative Court decided the case by holding it illegal and rejecting the discriminatory pension supplement.<sup>49</sup>

The Czech Constitutional Court, on the next opportunity given to it, did not follow the argumentation of the CJEU and did not accept the argument that the pension supplement was discriminatory.<sup>50</sup> Instead, it held that the CJEU in the case of *Landtová* had acted *ultra vires*, because in the given case the foreign element was lacking; the employment happened in the formerly united Czechoslovakia, hence EU law could not have been applicable. The court argued that the CJEU had not respected Czech constitutional identity. According to the Czech Constitutional Court, Czech constitutional identity draws on a common constitutional tradition with the Slovak Republic that stems from the over seventy years of the common

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<sup>46</sup> This article uses the notions identity review and identity control interchangeably.

<sup>47</sup> See Decision II. ÚS 501/2010 of the Slovak Constitutional Court.

<sup>48</sup> See ECJ, C-399/09, Marie Landtová v. Česká správa sociálního zabezpečení, ECLI:EU:C:2011:415, Judgment of 22 June 2011.

<sup>49</sup> See Decision 3 Ads 130/2008-204 of the Czech Supreme Administrative Court. The CJEU decision did not require such an outcome. For more on the legal background, see Georgios Anagnostaras, *Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court*, 14 GERMAN L.J. 959 (2013).

<sup>50</sup> See Decision Pl. ÚS 5/12 31 January 2012 of the Czech Constitutional Court <http://www.usoud.cz/en/decisions/20120131-pl-us-512-slovak-pensions/> [hereinafter *Slovak pension decision*].

state and its peaceful dissolution. It is a “completely idiosyncratic and historically created situation that has no parallel in Europe.”<sup>51</sup>

#### D. The Hungarian Decision on Constitutional Identity

##### I. *The Precursors and the Context*

The recent decision of the Hungarian Constitutional Court (HCC) on constitutional identity<sup>52</sup> fits into a general trend in the East Central European jurisprudence. Following the relevant Slovak, Czech, and the already mentioned Polish decisions, the Hungarian judges introduced the notion of “constitutional identity” to the Hungarian legal system.<sup>53</sup> What is particular to Hungary is that the 2011 Fundamental Law (FL) has already declared a change in the identity of the political community by characterizing the nation as an ethnic and Christian community, which opposes the republican ethos.<sup>54</sup> Since the adoption of the FL, the concept of identity has been further clarified under the pretext of “the danger caused by mass migration.” In 2015 the biggest wave of migrants ever reached the country. The number of asylum claims submitted in Hungary multiplied a hundredfold;<sup>55</sup> however, these claims were largely abandoned, as the applicants left the country within a few days. Nonetheless, in 2015 Hungarian state officials began labelling asylum seekers as “illegal migrants;”<sup>56</sup> and the government used “mass migration” as a justification for introducing “emergency measures”<sup>57</sup> to protect the sovereignty and cultural identity of the Hungarian nation.

The EU refugee relocation system was believed by the Hungarian government to impose the model of multicultural society the government opposes; hence, the parliamentary majority

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<sup>51</sup> *Id.*

<sup>52</sup> Alkotmánybíróság (AB) 22/2016. (XII. 5.) AB határozat (Hung.), [http://hunconcourt.hu/letoltesek/en\\_22\\_2016.pdf](http://hunconcourt.hu/letoltesek/en_22_2016.pdf) [hereinafter *Identity decision*].

<sup>53</sup> The court decision is embedded in a wider national political context, but this article does not go into the details, since the contributions of Balázs Majtényi and Zsolt Körtvélyesi present and analyze the relevant Hungarian political events.

<sup>54</sup> See the legally binding National Avowal of the Fundamental Law. See *Opinion on the Fundamental Law of Hungary*, in CONSTITUTION FOR A DISUNITED NATION 460–62 (Andrew Arato, Gábor Halmai, János Kis & Tóth GA eds., 2012).

<sup>55</sup> Boldizsár Nagy, *Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation*, GERMAN L.J. 1035 (2016).

<sup>56</sup> *Id.* at 1045.

<sup>57</sup> Act CXLII of 2015 on the amendment of the Act LXXX of 2007 on Asylum was adopted to enact the “state of crisis caused by mass migration” and to make it possible to renew the state of crisis indefinitely at six-month intervals. The government declared and prolonged the state of crisis in the following decrees 269/2015, 270/2015, 41/2016, 272/2016, 36/2017, and 247/2017.

adopted an Act<sup>58</sup> calling on the government to initiate an action for annulment against the Council Decision before the CJEU. Accordingly, Hungary challenged the Council Decision. Soon afterwards the European Commission opened an infringement procedure against Hungary<sup>59</sup> concerning its recently-adopted legislation.

In response to this, the Hungarian ombudsman turned to the HCC, asking the Court to interpret two constitutional provisions of the FL over the issue of the EU relocation scheme. One of these articles prohibits collective expulsion, stating that foreigners staying in the territory of Hungary may only be expelled on the basis of a lawful decision, Article XIV(1). The second is the so-called “EU clause,” which makes a limited transfer of the constitutional competences to the EU possible by virtue of the constitution and on the basis of international treaties, Article E(2). The ombudsman explained this move by saying that he sought to clear up legal concerns around the issue of the mandatory transfer of asylum seekers to Hungarian territory. Although the ombudsman did not explicitly challenge the constitutionality of the Council Decision, the petition questions its lawfulness. Seemingly the ombudsman protected the rights of the asylum-seekers by arguing that the FL secures the fundamental rights of the asylum seekers more than the EU law. But in fact, the ombudsman questioned the constitutionality of the EU Council Decision by saying that the HCC should be competent to declare secondary EU legislation inapplicable in the Hungarian legal order, if and to the extent that it conflicts with national identity.

Simultaneously, the government called for a referendum allowing the electorate to vote on the following question: “Do you want the European Union, without the consent of Parliament, to order the compulsory settlement of non-Hungarian citizens in Hungary?” The political aim of the referendum was to gain the approval of the people to protect “Hungary’s and Europe’s ethnic, cultural and religious identity.”<sup>60</sup> Although the Prime Minister claimed a victory, and nearly 98 per cent of those who took part supported the government’s call, the referendum was invalid because of the low turnout.<sup>61</sup>

Shortly afterwards, the Prime Minister proposed a constitutional amendment to put the wished-for results of the referendum into the FL, to define the “core element of the

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<sup>58</sup> See Act CLXXV of 2015 on Acting Against the Compulsory Settlement Quota System in Defense of Hungary and Europe.

<sup>59</sup> European Commission Press Release, Commission Opens Infringement Procedure Against Hungary Concerning Its Asylum Law (Dec. 10, 2015), [http://europa.eu/rapid/press-release\\_IP-15-6228\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6228_en.htm). The Commission has found the Hungarian legislation to be partly incompatible with EU law.

<sup>60</sup> Orbán: Népszavazás lesz a betelepítési kvótáról, MAGYAR NEMZET (Feb. 24, 2016), <https://mno.hu/belfold/orban-nepszavazas-lesz-a-betelepitesi-kvotarol-1330246> (last visited Oct. 25, 2017) (author translation).

<sup>61</sup> 41,32 % of the Hungarian electorate participated in the referendum, less than the 50% threshold needed to validate the referendum.

constitution, which is also a kind of check and limit to EU law.”<sup>62</sup> The Seventh Amendment leaned on “constitutional self-identity<sup>63</sup>” to gain exemption from EU law in the area of immigration. The Seventh Amendment would add to the FL the following sentence: “We hold that the defense our constitutional self-identity, which is rooted in our historical constitution, is the fundamental responsibility of the state.” Furthermore, the EU clause would have been amended to emphasize that the exercise of the powers granted by the EU founding treaties “must be in harmony with the fundamental rights and freedoms established in the Fundamental Law and must not curtail Hungary’s inalienable right to determine its territory, population, or form of government.” The Seventh Amendment would declare that it is the responsibility of every state institution to defend Hungary’s constitutional identity. And, last but not least, the refurbished Article XIV would prohibit the settlement of foreign population in Hungary and regulated how foreign citizens, not including EEA citizens, might live in the territory of Hungary in accordance with the procedures established by the national Parliament, based upon their documentation individually evaluated by Hungarian authorities.

The governing majority no longer has its two-thirds majority in Parliament to amend the FL, and political attempts to obtain extra votes have been proved unsuccessful, including the attempt to pass the constitutional amendment. The decision of the HCC, however, achieved the required result.

## *II. Ethnocultural Constitutional Identity Approved*

The decision<sup>64</sup> expressed that the common identity of the Hungarian people is equivalent to the constitutional identity of Hungary that has not been created but only recognized by the FL and, therefore, cannot be renounced by an international treaty.<sup>65</sup> The content of constitutional identity is to be determined on a case-by-case basis by the HCC. When the Court decides so, it should base its decision on the FL. The FL requires the judges to interpret the constitutional provisions in the light of the Preamble called the “National Avowal”, and the “achievements of the historical constitution,” Article R(3).<sup>66</sup>

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<sup>62</sup> Ministry of Justice, *Non-Hungarians Cannot Be Relocated to Hungary’s Territory*, HUNGARIAN GOVERNMENT (Oct. 11, 2016, 12:58PM), <http://www.kormany.hu/en/ministry-of-justice/news/non-hungarians-cannot-be-relocated-to-hungary-s-territory> (last visited Oct. 25, 2017).

<sup>63</sup> The Seventh Amendment and the HCC’s decision use the phrase “constitutional self-identity,” but this paper continues to apply the notion of constitutional identity.

<sup>64</sup> Although the ombudsman’s petition contained several points, the Court dealt only with the issue of interpreting the EU clause and left the EU refugee relocation issue to another decision. See *Identity decision*, *supra* note 52, para. 29.

<sup>65</sup> See *id.* para. 67.

<sup>66</sup> See *id.* para. 64.

The concept of the historical constitution dates back to 1896, when Hungary—at that time part of the Austrian-Hungarian Empire—celebrated the millennial anniversary of the conquest of the territory of Hungary. At that time a claim appeared that Hungary was the only nation in Central Europe to possess a thousand-year-old statehood built upon the “Millennial historical constitution.”<sup>67</sup> The concept of the historical constitution is coupled with the Holy Crown doctrine, according to which the Holy Crown—allegedly the crown of St Stephen, the first Hungarian king—is seen as an ancient source of authority, a literal marker of collective Hungarian identity. In the last century this concept has been used for various purposes. Its core prefers “a ‘mystic membership’ to constitutional patriotism, the ancient territory of the Hungarian Kingdom to the current borders of the State, and noble privileges to the republican traditions of 1946 and 1989.”<sup>68</sup> Today the historical constitution and the Holy Crown features prominently in the National Avowal. The HCC is deferential to the claim of the ruling majority engraved into the FL, that the constitutional identity of Hungary is distinctively rooted in the historical constitution.

Even though the Court held that the constitutional identity of Hungary does not mean a list of exhaustively enumerated values, it nevertheless mentioned some of them without further clarifying their meanings: “freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, equality of rights, acknowledging judicial power, the protection of nationalities that are living with us.”<sup>69</sup> In addition, the decision declared without further explanation that the protection of constitutional identity may also emerge in connection with areas that shape citizens’ living conditions, in particular the private sphere of their responsibility, personal and social security, protected by fundamental rights, as well as in cases where the linguistic, historical and cultural traditions of Hungary are affected.<sup>70</sup> The sentence has been taken word for word from the *Lisbon decision* of the FCC, in which the FCC held that when achieving European unification, sufficient space should be left for the Member States to outline economic, cultural and social living conditions.<sup>71</sup> This applies especially to areas which “shape the citizens’ living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical

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<sup>67</sup> János M. Bak & Anna Gara-Bak, *The Ideology of a “Millennial Constitution” of Hungary*, 15 E. EUR. Q. 307 (1981).

<sup>68</sup> Gábor Attila Tóth, *Hungary*, in CONSTITUTIONAL LAW IN THE EU MEMBERS 791 (Besselink et. al. eds., 2014).

<sup>69</sup> Identity decision, *supra* note 52, para. 65.

<sup>70</sup> *See id.* para. 66.

<sup>71</sup> *See* Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], 30 June 2009, [2 BvE 2/08].

and linguistic perceptions.”<sup>72</sup> This sentence became part of the decision without any argument justifying its presence in the text.

The decision emphasized that since the principal organ for protection of the FL is the HCC, it is the task of the Court to defend Hungary’s constitutional identity.<sup>73</sup> For this purpose the HCC developed the fundamental rights-reservation review and the ultra vires review—composed of a sovereignty review and an identity review—to decide whether the EU respects the national identity of Hungary and the limits of their conferred competences. The Court based the fundamental rights-reservation review on the EU clause and Article I(1) of the FL on the state duty to protect fundamental rights. It argued that as the state is bound by fundamental rights, this binding force of the rights is applicable also to cases where public power is exercised together with EU institutions or other Member States.

Concerning the ultra vires review, the Court stressed without going into detail that there are two main limits for conferred or jointly exercised competencies: they cannot infringe either the sovereignty of Hungary—sovereignty review—or Hungarian constitutional identity—identity review.<sup>74</sup> According to the judicial reasoning, there are many overlaps between sovereignty and constitutional identity; the two reviews need to be employed considering one another. In the Court’s view, the concept of “state sovereignty”—supreme power, territory, and population—follows from Article B of the FL, and the EU clause should not empty Article B, nor the exercise of powers (within the EU) result in the loss of the ultimate oversight possibility of the people over the public power. Therefore, the Court empowered itself to examine whether the joint exercise of competences with the EU infringes human dignity, other fundamental rights, the sovereignty of Hungary, or Hungary’s identity based on its historical constitution.

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

#### **E. The V4 approach: Deviation from the German Role Model**

By now all V4 constitutional courts have considered themselves competent to define constitutional identity and exercise identity review. Several commonalities in their approach can be identified. First, V4 courts tend to interpret the concept of constitutional identity as a national identity based upon ethnocultural attributes: the relevant case-law very often

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<sup>72</sup> *Id.* para. 4.

<sup>73</sup> See *Identity decision*, *supra* note 52, para. 55.

<sup>74</sup> See *id.* para. 54.

refers to the assumed common and homogenous ethnocultural tradition of a given community rooted in distinctive historical events. For instance, both the Czech and the Hungarian decisions mention the “unique historical events” as the basis upon which the constitutional identity rests.<sup>75</sup> Up until the recent constitutional capture, the Polish Tribunal was the only court in the V4 which applied the concept of constitutional identity in a politico-constitutional sense instead of basing it on historical events and ethnocultural traditions. Moreover, the *Lisbon decision* differentiated between constitutional and national identity, arguing that the latter includes the tradition and culture of the state.<sup>76</sup> Later the decision *on the contempt of the Polish nation*<sup>77</sup> stressed that the notion of nation covers both the political and the cultural community. It is far from clear what the relationship between this national identity and the concept of constitutional identity is.<sup>78</sup>

Second, when V4 courts decide on the content of constitutional identity, they very often lack the exact criteria to select constitutional essentials. The Czech, the Hungarian and the Polish decisions list various principles as constitutional essentials. The selection of values for which there can be identity review, however, raises the following questions: Why these values and not others? Why the exercising lawful authority and freedom of religion in the Hungarian case, but not the rule of law and equal human dignity? Why prohibition of retroactivity and generality of law<sup>79</sup> in the Czech case, and the principles of social justice and subsidiarity in the Polish case?<sup>80</sup> In understanding the motivation behind the haphazard selection, there is little point in searching for principled reasons. It seems that courts decide on the content of constitutional identity on a case by case basis, and by using the notion of constitutional identity they express their understanding of the sovereignty of the respective state.

Third, V4 courts do not connect the list of values protected by the identity review to a non-amendable constitutional provision. The main reason is that most of the V4 constitutions, including the Hungarian, the Polish, and the Slovak constitutions do not render any constitutional provision or principle explicitly unamendable, and the constitutional courts do not interpret any constitutional provision as non-amendable. Even the Czech court defines the content of constitutional identity much more broadly than the values—democratic state governed by the rule of law—protected by the constitution’s non-

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<sup>75</sup> See *Slovak pension decision*, supra note 50; *Identity decision*, supra note 52, para. 65.

<sup>76</sup> See *Lisbon decision of the CT*, supra note 38, § 2.1.

<sup>77</sup> Constitutional Tribunal [CT], 21 September 2015, K 28/13.

<sup>78</sup> See Anna Śledzińska-Simon & Michał Ziółkowski, *Constitutional Identity of Poland: Is the Emperor Putting On the Old Clothes of Sovereignty?* 4 (Jul. 11, 2017) (unpublished manuscript) (on file with author).

<sup>79</sup> See Constitutional Court 10 September 2009, PI OS 27/09, N 199/54 SbNU 445 (Meledk) (Cz.).

<sup>80</sup> See *Lisbon decision of the CT*, supra note 38, § 2.1.

amendable clause, Article 9(2).<sup>81</sup> Thereby in the V4 jurisprudence the “constitutional essentials” seem to be much broader than the constitutional core.

Fourth, V4 court decisions interpreting constitutional identity are mainly those dealing with EU integration issues. It seems therefore that in these countries the national identity is formed as limit to European integration. V4 courts assume the supremacy of domestic constitutions and tend to hold that if EU legislation takes precedence over domestic constitutions, it is only because a constitutional provision allows this rule to apply. Hence, these courts believe that they are competent to declare EU law inapplicable in their domestic legal order to the extent that it conflicts with national identity. For instance, the Czech and the Hungarian interpretations of identity were used as a means to fend off European Union authority over these countries. And although V4 courts usually emphasize the importance of cooperation with the CJEU,<sup>82</sup> they do not base their identity review of an EU act on the interpretation provided by the CJEU.

Last but not least, when deciding on the essence and scope of this control, the V4 courts refer frequently, although usually ornamentally,<sup>83</sup> to the case law of the FCC. They argue that the identity review they perform is basically the same as the identity review performed by the FCC. The last part of the article will briefly explore this claim. A detailed analysis of the German jurisprudence falls outside of the scope of this article. Here it will only focus on the issues in which the V4 courts deviate from their German counterpart.

Today the concept of constitutional identity is understood as one of the main attributes of the German constitutional case law. Although the *Solange II*<sup>84</sup> decision of the FCC already used the notion of identity to “demarcate what is acceptable and not acceptable as concerns the constitutional impact”<sup>85</sup> of the EU law on the German constitutional order, it was the *Lisbon* judgment that introduced the language of identity.<sup>86</sup> The FCC, when examining transfer of powers to the EU or international institutions that amounts to a constitutional amendment, links the concept of identity to the values enshrined by the 1949 Basic Law’s

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<sup>81</sup> See Ladislav Vyhnanek, *The Eternity Clause in the Czech Constitution as Limit to European Integration*, 9 ICLJ. 243 (2015).

<sup>82</sup> See *Slovak pension* decision, *supra* note 50; *Identity decision*, *supra* note 52, para. 65.

<sup>83</sup> See Jan Komárek, *Playing with Matches: The Czech Constitutional Court’s Ultra Vires Revolution*, VERFBLOG (Feb. 22, 2012), <http://verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution/> (last visited Oct. 25, 2017).

<sup>84</sup> Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Nov. 22, 1986, BVerfGE 73, 339, 2 BvR 197/83.

<sup>85</sup> Besselink, *supra* note 3, at 47.

<sup>86</sup> See Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], June 30, 2009, 2 BvE 2/08.

non-amendable clause, Article 79(3), which protects the basic principles of Germany's constitutional order, such as the inviolability of human dignity, the principle of democracy, separation of powers, essential elements of the rule of law, federalism, and the social state. In the Court's view, the non-amendable elements of the constitution constitute the constitutional identity, which is neither open to constitutional amendments, nor to European integration. Thus, the concept of constitutional identity in Germany is based on an attachment to the values of the democratic constitution. In the Court's view it is the task of the Court to safeguard the constitutional values by identity review.<sup>87</sup> The logic is that the underlying principles of the German constitutional state cannot be altered by the super-majority via constitutional amendment or via international treaty confirmed by the same super-majority. Changing constitutional identity would amount to an illegitimate usurpation of the constituent power of the people.<sup>88</sup>

The FCC expressly stated several times that it exercises identity review cautiously and in a way that is open to European integration (*europarechtsfreundlich*).<sup>89</sup> It also emphasized that the identity review cannot entail substantial risks for the uniform application of EU law, thus the FCC bases its review of the European act in question on the interpretation of that act provided by the CJEU also in the context of the identity review.<sup>90</sup> Despite this, the identity review mandated by the FCC is not obviously European-friendly, because the FCC bases its decisions on an idiosyncratic "German" understanding of democracy which is limited to a state with a people and its territory.<sup>91</sup> This understanding provides a reference point to the interpretation of the V4 courts.

Ostensibly the jurisprudence of the FCC served as a role model for the V4 courts, but the identity review of these courts does not correspond to their German counterpart. The identity review of V4 courts differs from that of the FCC in three important ways. First, there is a difference with regard to the substance of the elements identified as defining part of the respective constitutional identity. The FCC has developed a universal integrative mirror-identity in which members of German society may recognize themselves. It is connected to the text of the Basic Law as well as the principles and values of the domestic constitution. By contrast, V4 courts tend to launch exclusionary wall-identities which efficiently shut out

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<sup>87</sup> Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Dec. 15, 2015, [2 BvR 2735/14], para. 41.

<sup>88</sup> This may remind us of the view of Carl Schmitt in the early years on the possibilities of changing the identity of the constitution.

<sup>89</sup> See, e.g., Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], June 21, 2016, BVerfGE 142, 121, 2 BvR 2728/13.

<sup>90</sup> See Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Dec. 15, 2015, 2 BvR 2735/14, para. 46.

<sup>91</sup> See Daniel Halberstam & Christoph Möllers, *The German Constitutional Court Says Ja Zu Deutschland*, 10 GERMAN L.J. 1241, 1258 (2009).

“the other” by referring to specific historical events or traditions instead of the established constitutional values in the given democratic context.

Second, V4 courts assume the supremacy of domestic constitutions and hold that if EU law takes precedence over domestic constitutional law, it is only because a constitutional provision allows this rule to apply. By contrast, the FCC does accept the claim of EU law to primacy over “ordinary” German constitutional law. The FCC challenges the CJEU’s unqualified claim only with regard to the non-amendable parts of the Basic Law.

And last, but not least, the identity review of V4 courts appears to be following the identity review of the FCC from the point of view of the national apex courts’ relationship with the CJEU. But in reality, the particular adaptation of the German identity review amounted to a claim that in some cases the Czech, the Hungarian, the Polish or the Slovak tradition, laws and interests are so special that they cannot follow a particular EU law. As a result, the V4 interpretations weaken the authority of the CJEU, and therefore, ultimately, the rule of law in the EU.

## F. Conclusion

There is an emerging trend in the V4 constitutional courts’ case law which assumes a common ethnocultural tradition of the respective country. The apex courts of the V4 countries seem to accept the reasoning of their governments on the need to protect the country’s exclusionary national identity in an era of global migration. This Article took the 2016 Hungarian decision on constitutional identity as a reference point for developing a critique of the corresponding interpretation of identity among the V4 apex courts.

Ostensibly, the FCC served as a role model for these courts to empower themselves to exercise identity review. In fact, however, the identity reviews exercised by those courts are not identical. The essence, the scope and the aim of the identity control are different. Although the deliberate switch of language to the concept of identity by the FCC’s *Lisbon* decision lent a helping hand to the V4 courts, the constitutional identity concept led to very different results in this region. The concept of constitutional identity as developed by the FCC is understood in a politico-constitutional sense. By contrast, V4 courts tend to provide an ethnocultural background for the concept of identity. V4 courts rely on the concept of national identity under Article 4(2) of the TEU when derogating from some of their obligations under EU law. The CJEU, the ultimate interpreter of the TEU, has never endorsed even the FCC’s argument on constitutional identity,<sup>92</sup> and it seems improbable that the V4 courts’ interpretation qualify as legitimate cultural defenses<sup>93</sup> under the EU law.

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<sup>92</sup> ECJ, C-62/14, *Gauweiler et al. v. Deutscher Bundestag*, ECLI:EU:C:2015:400, Judgment of 16 June 2015, paras. 5–31.

<sup>93</sup> See LIAV ORGAD, *THE CULTURAL DEFENSE OF NATIONS, A LIBERAL THEORY OF MAJORITY RIGHTS* (2015).