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## Efficiency in Protection of Rights and Frontiers: Hungarian Law and Practice of External Borders Control

- **ABSTRACT:** *Migration of human beings was always an essential activity, a permanent part and changing factor of civilisations. As such, particularly in Europe, migration is to be considered as an activity comprising switching between locations and shifting between historical periods. Moreover, these movements of people have been an important factor of cultural enrichment for all the new periods of European civilisation. However, with the formation of nation-states an important change, at least from a legal and political viewpoint, was revealed: as much as individual rights of persons acquired a constitutional importance, the protection of the state and the nation that is defined also with cultural characteristics became a state-aim: fundamental rights of people should be protected as well as public policy should be maintained and national security safeguarded. Moreover, human rights' protection became increasingly important at a supranational level, and because of the achievement of the Schengen zone, the regulation on the movement of people became a shared competence between the European Union and its Member States. For a country, such as Hungary, having a rich, sometimes tragical historical experience of the protection of its borders that are also first frontiers of Western Europe, in times of globalisation, also with regards to its sovereignty, several questions were raised and discussed for the adoption of legal regulation in application nowadays. Hungary challenged supranational law on the abstract matter of fundamental rights of migrants and on the EU-rules defined by directives in a field of shared competences. When presenting Hungarian regulation, it is to be examined how a special equilibrium can be achieved between rights and state-aims, supranational and national law, a phenomenon of globalisation and the preservation of national sovereignty.*

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## 1. Introductory remarks on the challenges of migration

To obtain a comprehensive understanding on the timely discussion about Hungary's policies on border protection with sufficient complexity and nuances, a longer introduction presents some general challenges on migration policy, and thereafter, specifically applies to a Central European and Hungarian context. The next section presents the Hungarian institutional and legal framework of border control with specific focus on its recent developments according to political decisions. Section 3 presents the supranational legal context as Hungary should and shall react according to decisions, particularly judgements taken in the European supranational law. That is how in law and in practice, the section aims to speak as much about protection of rights as protection of borders, however, selecting the concept of efficiency as a guiding idea for the study.

First, it would be important to highlight some fundamental ideas about migration. As much as the word has been in use, particularly in political discourse, more recently it is often misunderstood. Migration should be defined and placed in a historical and geographical context to obtain a clear view of a common social phenomenon. The first part of the introduction examines migration and the political and legal responses from a historical perspective considering contemporary challenges.<sup>1</sup> The second part presents ideas on the special Central European concept on migration. These elements examine the extent to which the Hungarian migration policy and the legal and institutional framework is established and the challenges for harmonisation with supranational expectations can be contextualised.

### ■ 1.1. General considerations on migration

Migration is defined as one of the most common human activities: changing location between two geographical places. It comprises three specific actions: leaving, moving, and arriving. When migration crosses national borders, it is called international or nowadays, transnational migration, which necessitates the control of national borders. Migration is not only between countries, often none of such national borders is crossed, as it can be intranational movement of people. Moreover, it is increasingly common that several national frontiers are crossed during migration as new migration roads are longer.

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1 Ritecz and Sallai, 2016, p. 26.

National borders do not mean the same frontiers that existed from the beginning of an international order created by sovereign states. After the second world war, owing to important development of international cooperation, particularly, at a regional level, mostly in Europe, supranational orders were progressively established. One of the aims for the project of a regional integration was to unmake the borders; and such a project of regional integration demanded for the supranational legal order to be realised effectively and efficiently.

However, before reaching the end of historical development, it should be recalled that migration is not only an individual but also a social phenomenon; mostly, it is characterised by the mass movement of people. As such, it has contributed significantly to the development of European civilisation as the migrants bring both their material goods and cultures to their new living place. Moreover, historical periods are often established according to such movements of people as they are precursors of a new era. The Greek civilisation—the mythic origin of the name “Europe” is proof of that—is founded on the cultural heritage of Asia minor. The Roman dominance in Europe did not remove the ancient Greek roots of European civilisation; contrarily, entered into a fecund dialogue with it. The arrival of Christians in many parts of Europe brought a new religion and their different cultural backgrounds. The Barbarians arrived with their own traditions, however, became used to the common European stock of civilisation (ancient Greek culture, roman law, Christianity). The list could be continued including the Arabic occupation of the Mediterranean region for intellectual and cultural life in Europe or one could analyse the civilisational crash after the discovery of other continents by Europeans.

Sometimes on the crossroads between cultures, the newcomers brought more than they could receive, and sometimes, contrarily, they mostly embraced what they found, substituting their own traditions with the new one. Although such processes require several generations, it is clear that some of these interactions were more aggressive than others, slower and more peaceful.

However, four centuries ago, something important changed, in a more general aspect but directly concerning the theme of migration. The rise of capitalism, reform of the Church and discovery of the world by Europeans, led, first, to a European hegemony and thereafter to colonisation. However, to ensure the pacific coexistence of political communities in Europe, the international order appeared, ruled by legal concepts replacing the dogmas of the universal catholic church.

The European community of values became a community based on legal norms. For centuries, Europe became the leader of the international community, and it often forced its own concepts and ways to be accepted in international relation. Alternatively, it promoted the international legal order based no more on religious doctrines but legal principles following progressively the ideas of Enlightenment. One should remember that Grotius questioned the universal

character of religion when defending the possibility of contractual obligations with Indonesian people.

Regarding migration, it is significant to recall the reinforcement of the nation-state that brought to the legal doctrine the strong principle of sovereignty exercised on a determined national territory and a defined population. With respect to the population, the concept of nation became crucial even under a cultural aspect. It should be remembered that even the states following the concept of political citizenship, used education and cultural life to reinforce the same civilisational characteristics for their entire population and even in their colonies from the end of the 19<sup>th</sup> century.

Prior to that, the identity of citizens was not so closely defined by their nationalities. Although, in ancient Greece, there were specific legal regulations on the status of the person with respect to the state, the polis that the person belongs to, and the legal rules of the polis defined the status of others, sometimes with different layers of relationships to the polis (*meteikos* in Athens, *pereikos* in Sparta); the identity of those people was simply Hellenic. In Rome, particularly, when it became an empire, different identities lived together. Their status was important only politically as the different changes in Roman civic law proves— sometimes considering the citizenship as a privilege, sometimes as a burden depending on the historical context. Finally, for medieval Europe, the identity was religious, and the Church was universal. Moreover, the status of the person depended on its place and role in the feudal structure of the society. The national identity and protection of national civilisation arrived with the nation-states from the beginning of the aforementioned period because of the radical changes already mentioned.

During historical periods, there were always some regulations regarding migration, for example, the *ius pellegrini* from Roman law. During feudalism, the right to leave the region of the lord, was a privilege that could not be easily obtained. The personal relation between persons according to the feudal order meant an obligation to remain on the same geographical location. Thus, for the movement of people, liberalism that appeared during the same historical period, was an important step forward.

Furthermore, states became increasingly protective about their territory and attempted to create a homogenous nation on it; simultaneously, the individual freedom of people could receive legal protection. The free movement became a birthright of citizens who could decide, not without important restrictions, to change their place of living. In the historical context, the development of industry and commerce required people to move freely and the states attempted to attract capital, products and people for their economic development. Until the end of the 19<sup>th</sup> century, the legal regulations were defined by these conditions.

### ■ 1.2. *The Central European and the Hungarian context*

The circumstances were somehow different for the Central European countries, and for a detailed understanding it is important—to understand, for example, why V4 countries are helping Hungary to protect its borders nowadays and not Frontex—to clearly see these differences. They are owing to two related factors: the specific geographical position of the Central European region and its proper historical development and experience.

Central Europe is a region between East and West also connected to the South of Europe. This geographical position made it more sensitive not as much for migration, but for the consequences that migration can have. The position of Central Europe places the region in between, particularly, in between cultures and civilisations. Sometimes, it is a question of choice, as the region opted to be a part of Western Europe more than one thousand years ago. However, sometimes, it makes the region more receptive to other influences, particularly when those influences are militarily or economically stronger. A complicated effort is required to determine the equilibrium in this in between region, attempting to follow its development according to its proper intentions and under the conditions and the circumstances forced from outside of the region.

It had an important consequence on the political and social vision on migration. However, more importantly, the fact that the region was often under occupation and that the aforementioned historical transition could not be achieved as elsewhere in Europe, affected the development of the region in a way that directly concerns the issue of migration. When other European regions opened to the world, Central Europe attempted to close itself for its own protection. Later, when national culture and traditions were flourishing in Western Europe, their development in Central Europe faced many obstacles: lack of independent state, different states for the same nationalities and different nationalities in the same state, external manoeuvres to weaken the region by misusing nationalism as a political ideology.

However, an important example, the concept of national minority and the need for its protection appeared in Central Europe and became important because of the experience of being governed in multi-ethnic empires. Simultaneously, strong historical nations raised their own demands for sovereignty although such demands were not met for a century. The example of Hungary is one of the most characteristic, maybe with Poland. The concept of nation and state-territory could form in difficult conditions and could not follow the same target of development as in Western Europe.

For those multi-ethnic and multi-religious empires, the movements of people were sometimes restricted to maintain the late feudal order as well as a fragile equilibrium between ethnicities. Contrarily, sometimes, the central empirical power decided to oblige people to move from one region to another, changing sensitively the cultural conditions with a mass movement of people.

These movements were sometimes sustained by the concerned population, whereas during other periods and locations, only a violent order of the state could move those people. Moreover, it should be noted that this type of obligatory movement of people based on their religion or ethnicity was ordered, shamefully, during the middle of the 20<sup>th</sup> century in Central Europe (moving Germans, but also Hungarians, from their homeland to other different countries).

This historical experience, instead of creating openness and encouraging self-defence, and the lack of nation-state and the fragile orders changed the ethnical equilibrium of different regions, made the Central European approach different to the issue of migration. Some multi-ethnic countries could become a strong nation after the fall of empires, however, mostly the historical conflicts reappeared or reappears even nowadays making the region more reluctant and resilient to the issue of migration.

Finally, for Central Europe, the experience of socialism is an important factor. As much as ideologically, communism argued for universalism and openness owing to the dictatorial and oppressive character of the regime; it was a period of closed and strongly defended borders. The iron curtain was the reality of borders for many central Europeans for half a century; the free movement of people was unimaginable and the control, the protection of the border was one of the most essential tasks of the socialist states. One would say that the border became a fetish for the regime as much as it could become a symbol for freedom and change, when finally, it could be reopened. This experience combined with the unfortunate period of wars in the region (Yugoslavian civil war and now the war in Ukraine) had an important impact on the definition of legal and institutional framework for border protection in the region and in Hungary.

## **2. The Hungarian legal and institutional framework**

This section presents the Hungarian legal and institutional framework of border protection. For the institutional aspects, this section recalls important reforms in the last three decades.<sup>2</sup> First, the Socialist military organised border control became a modern function of the police; thereafter, different measures attempted to reinforce the capacity of Hungary with respect to the demands of new European regulations; and finally, the increasingly important challenge of the appearance of the illegal migration phenomenon at the Southern border of Hungary. From a legal perspective, with every change in its legislation, Hungary attempted to sustain the intention to effectively protect the Hungarian and European borders as its historical heritage also predestines the country. However, owing to the supranational legislation and its interpretation by supranational courts, presented

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<sup>2</sup> Ritecz, 2017, p. 654.

in detail in Section 3, these legislations should have been changed frequently to ensure efficient protection of borders, the original will expressed by Hungarian political majority, and to respect the requirement of efficient protection of migrant people imposed by supranational institutions and organs. As much as Hungary remains open to a legally regulated migration, from the European countries owing to the free movement of people, and in the framework of the different processes for visa, benefitting third-country nationals, it remains strict when it fights any forms of illegal migration, particularly founded on an abusive exercise of the right to asylum. By ensuring the necessary material and legal conditions, Hungary attempts to avoid the massive influx of migrants who are not eligible for international protection, but are only aiming to enter the Schengen zone.

### ■ **2.1. Recent changes and development of the bodies controlling Hungarian borders**

After the change of regime, the protection of national borders of Hungary remained the duty of the Hungarian Army. An important body comprising 20,000 soldiers was assigned with the task, however, their number was soon reduced. Moreover, the nature of protection changed with the fall of iron curtain. However, for 17 years, the army continues to be responsible for the border control with the special body of the border guard integrated into the army.

During this period, the first important change was to replace the circumscribed soldiers with professional ones. The reform was applied gradually and became effective from 1998. From this period, only professional soldiers were tasked with guarding the borders of Hungary. The other important reform was to create an independent body for the protection of the borders. In 2004, it was decided to separate the border guard from the army. Regarding the numbers, although the Parliament authorised to recruit 12,000 people to protect the borders, this number could never be achieved.

Hungary became a member of the Schengen zone on 21 December 2007. To achieve this an important preparation was realised in the development of technical and material support and under an institutional and legal aspect to better organise the protection of the borders and the administrative tasks related to the border control. From 1 January 2008, the border guard was integrated into the police which means that the protection of national borders became a function of Hungarian Police after three years of independence of the border-protecting body.

As a consequence of the accession of Hungary to the Schengen area, the national border was divided into two categories: more than half of the national border (1,139 km) became an internal border in the Schengen zone, and the other half (1103,5 km) an external frontier of the zone attaching special importance to and requiring the respect of European standards for its protection. The situation changed when Croatia recently entered the Schengen zone as the 345 km long common border became an internal one.

For the external border of Schengen area, Hungary ensures the protection according to European regulations as implemented in its internal legal order, at three levels of control. The first level of control where the control is at high intensity, is guaranteed by the border guard at the external border of the Schengen area—for the internal borders the same function is conducted by the local police. The second level of control is applied by the departmental police, disposing of special units for border control, deep control, and the administration of foreigners. Finally, as a third level, the rapid intervention police with competence covering the entire national territory, can proceed to deep control. The latter became particularly important after 2016 with a special intensity of those controls.

First, as an answer to the migration crisis,<sup>3</sup> the rapid intervention police was reinforced for the protection of national security and public policy under the new circumstances. When the new directorate of border guard of the rapid intervention police began to work in 2016, it had a personal capital of 2000 policemen. However, despite such an impressive reinforcement, it was difficult to organise the effective control at the southern regions of Hungary.<sup>4</sup>

Finally, the recent establishment of the border-hunters aims to fulfil the need for human resources to ensure the efficient protection of the border. However, the existing units were insufficient in exercising the same intensity of control at the southern border of the country, especially after the war began in Ukraine. First, the army was redirected to the protection of the national borders, and thereafter the establishment of the border-hunter unit was decreed. This new unit should comprise 4,000 policemen, however, in the first step, only 2,208 will be employed – by the end of 2022, more than 1,000 men and women were engaged.

Therefore, the primary functions of Hungarian authorities participating in border protection are defined according to European regulations. However, because of the political choice of Hungary to ensure the protection of its borders according to its proper policies after the crisis of 2015, the Frontex Agency decided to cease its operations in Hungary. Consequently, Hungary requested the help of the V4 countries and Austria to control the southern border of Schengen area in Hungary.

Hence, the protection of the external Schengen border in Hungary is organised according to European legalisation, but in conformity with Hungarian political choices employing the Hungarian police and some representatives of the national authorities of the neighbouring countries. As the Fundamental Law of Hungary states, the Police participates in the fight against illegal migration. According to the Act on Police,<sup>5</sup> the primary functions of the police are the protection of the borders; prevention, investigation, interdiction of the illegal passes on

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3 Varga, 2016, p. 97.

4 Varga, 2017.

5 Act XXXIV of 1994 on the Police.



the borders; control of persons, vehicles, and products passing by the borders; organisation of the conversion at the border; insurance of the security of the check points; and organisation of their everyday working methods.

### ■ 2.2. A continuous legal reform for the efficiency of border control after 2015

As aforementioned, prior to its accession to the Schengen zone, Hungary prepared its national legislation on the protection of borders in accordance with the European rules. The Act on the National Border<sup>6</sup> and Act on Asylum<sup>7</sup> were adopted in 2007 having the same aim of transposing European directives and ensuring conformity with Hungarian legislation. The institutional and organisational background was ready with the new border guard in the framework of the national police. Therefore, although its techniques had to be developed and equipment renewed, Hungary was able to ensure the protection of external Schengen borders.

However, the events of 2015 made Hungary entirely reinvent the legal background for an efficient protection of its borders.<sup>8</sup> The immigration crisis resulted in a never experienced increase in the number of people arriving at the southern border of Hungary, passing the border by any means with the intention of asking for international protection. Simultaneously, the majority of people coming from Syria, but also from Pakistan, Bangladesh or Afghanistan did not aim to stay in Hungary, but settle down in Western European countries expecting better conditions of life and opportunities after a long and dangerous journey through some already secure third countries outside the Schengen zone.

As the European statistics reflect, more than three-fourth of the incoming migrants asking for international protection, do not receive any form of asylum and are required to leave the Schengen area. However, because of the important number of those people, but particularly as their countries of origin refuse to welcome their citizens back to their homeland, European states face significant difficulty in sending them back or making them leave the Schengen area. This leads to complicated social and human situations.

Hungary decided to use every legal possibility at its disposal to avoid the entrance of people outside its check points and their retention for the administrative procedure to examine their demand for international protection.<sup>9</sup> This task was not easy.<sup>10</sup> First, Hungary had insufficient human resources for better protection of borders. Additionally, it was decided to construct fences at the southern border to help the control. This important investment was realised promptly, at the personal request of the Prime Minister; fences were installed by the beginning of autumn of 2016.

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6 Act LXXXIX of 2007 on the State Borders.

7 Act LXXX of 2007 on asylum.

8 Balla, 2017, p. 91.

9 Balla and Kui, 2017, p. 234.

10 Bezerédi, 2018, p. 22.

However, in addition to the reinforcement of human capacities and the technical instruments of protection, the legal framework had to be revisited. In many legal acts, different reforms were applied to constitutionalise some aspects of the fight against illegal migration, to penalise some behaviour in relation with the illegal passes of the national borders, to reorganise the administrative process of the examination of demands for international protection. Moreover, as explained in detail in the next section, the legal reforms—the construction of a legal fence for the borders as the political communication introduced it for the public opinion—had to be in accordance with international engagement of Hungary and the EU law. Hungary continues to receive people under international protection (many Ukrainians fleeing the war received the protection from Hungary), including many third-country nationals with other visa titles (such as students, workers). The only, but statistically the most important category of third-country nationals making Hungarian authorities rethink the legal framework, is the group of people often coming from countries far away from Hungary, but entering the Schengen area through Hungary, willing to apply for international protection.

However, European regulations that proved insufficient to administrate such a situation, appear to be an obstacle for Hungarian legal solutions. Therefore, since 2017, the Hungarian legislation that has been progressively declared, as much as the Hungarian practice considered, as illegal, should be changed. This implies that a continuous reform of the Hungarian legislation was conducted simultaneous to a permanent political and legal discussion at the level of European organisation. The present section does not aim to analyse the political discourse, and the legal disputes are presented in the next section. However, the mention of the supranational reactions is important to understand the rapid development of measures and their abrogation a couple of years after their adoption.

The basic problem was not related to the physical protection of the external borders of Schengen area. Hungarian police with the help of Frontex were able to exercise necessary control. Neither was it related to the visa procedures or other administrative aspects related to the treatment of foreigners in Hungary. Further, for privileged or general categories, for employment or studies, third-country nationals could arrive without any obstacles.

The only category of third-country citizens willing to pass the national borders was refugees, people asking for international protection. As much as in Greece and Italy, in Hungary that is at the southern border of the Schengen area, the administrative handling of such an incoming mass of people represented a significant challenge. However, contrary to Greece or Italy, Hungary attempted to solve the problem at the arrival of people, as the continental and not maritime border allowed Hungary to do so, by stopping the people at the border, and not allowing them to enter before the administrative procedure of the examination of their demands, and refouling them in case of a negative decision.

First, Hungary wanted to ensure that all people arrive legally to its territory. Therefore, it reinforced the protection of the borders, penalised the illegal pass with consequence of refusal to enter the national territory and expulsion, and for those who arrived legally, it organised prompt and efficient procedure for the judgement of the demands at a half-closed zone, the transit zone. Further, Hungary decided to incriminate the action of non-governmental organisations helping migrants cross the border illegally. Finally, it made the administrative process speedy; the judicial structure could pronounce the necessary decisions for retention or expulsion.

The third-country national who wanted to arrive in Schengen zone by passing the Hungarian borders on the Balkan Road, could attempt to pass the border illegally, however, if and when arrested, they were expelled automatically by the judges despite their demand for international protection, as they cannot remain on national Hungarian territory when they arrive illegally. Those who passed the check points, were obliged to stay in the transit zone that they could not leave in the direction of Hungary, while waiting for the decision of the administrative process related to their demand for international protection; in case of a positive outcome, they could enter Hungary, in case of refusal, they were sent back to Serbia. Once transit zones were closed after the judgement of the Court of Justice, considering those to be a form of illegal retention of people, and condemning Hungary for that, according to a new legislation only those who had already received a positive preliminary response at Hungarian embassies could pass the border to request international protection in Hungary.

Under the framework of the new Hungarian legislation, according to the provisions of the national Act on the transitional rules relating to the end of the state of emergency and on the pandemic crisis, only those people could access the procedure of granting international protection or of making an application for that, who had already initiated a procedure at a Hungarian diplomatic representation. Therefore, because of the pandemic crisis, and even after that, to avoid the massive arrival of third-country nationals in Hungarian territory—simultaneous to the argument on the protection of public health, to maintain public policy and to safeguard national security—making an application for international protection in Hungarian territory, including the borders, is conditioned to such an undergoing procedure initiated, as the relevant government decree states, at Hungarian embassies in Belgrade or in Kyiv, the neighbouring countries that are not members of the European Union. This procedure comprises presenting a declaration of intent in respect of lodging of an asylum application by filling an administrative form at the aforementioned embassies. The declaration is examined by competent authorities who can also conduct remote interviews. In two months, those authorities shall provide a first decision authorising the person with a single-entry travel document issued by the embassies to arrive at Hungary and make its application. When the person arrives at the Hungarian border with

such an authorisation valid for one month, he or she can enter the country, make its application and the procedure will efficiently be followed. For example, the border police has the obligation to conduct the person with such a travel document before the competent authority within 24 hours to enable him or her to make the application for international protection.

However, some categories of people are exempted from these rules and can without such a declaration of intention, demand international protection in Hungarian territory. People who are beneficiary of subsidiary protection, the family members of the refugee or beneficiary of secondary protection or persons subject to coercive measures are not obliged to undergo such a procedure for the presentation of the declaration of intent at Hungarian embassies. Moreover, Ukrainian nationals or legal residents in Ukraine could make their application without such a requirement of the declaration according to the government decree adopted the day after Russia attacked Ukraine. However, those who arrive at the Hungarian borders without filling the form at the embassies and carrying the aforementioned travel document, cannot make an application for international protection, and should return to Belgrade to fulfil the requirement of such a declaration of intent. Further, those who cross the borders irregularly and are captured by Hungarian authorities, are returned to Serbia without the possibility to make an application; they have to make the declaration of intention in Belgrade and come back with the valid travel document to be able to do so.

Such a regulation is founded on the intention to avoid the massive arrival of people to the national territory in a pandemic crisis. The more efficient organisation of their entry owing to the filter and the preparation of their procedure can help to avoid contact between them and the people who are regular residents of Hungary. Moreover, the regulation is motivated by the voluntary choice of Hungary to protect its borders efficiently and the individual rights of the persons applying for international protection or residents in Hungarian territory. Nevertheless, as always, maintaining the public policy and safeguarding the national security remain the primary aim in this regard. Furthermore, Hungary argues its sovereign right, even as a member state of the European Union and the Schengen area, to decide about the conditions to access its national territory in conformity with its international and European engagements. The next section demonstrates that for the Court of Justice of the European Union, such a Hungarian regulation is always in force because of the recent character of the judgement, but is not in conformity with the European law.

### **3. Hungarian measures with regards to its supranational obligations**

Legal reforms in Hungary to determine an efficient solution for the immigration of people requesting international protection—only a small percentage of them

obtain the right to be protected under asylum by the end of the administrative procedure—were not so easily implemented because of two basic difficulties: first, the supranational law of the European Union applies as immigration, visa and asylum are subject to a shared competence of the EU; second, migration closely concerns individual human rights and their violations as pronounced by supranational fora. Thus, Hungarian legislation was abrogated and new rules were adopted.

Particularly, the dispute with European institutions and some of the member states who were not open to radically change the former European legislation, nor to apply it in a more severe way so that the abusive demands for international protection did not lead to a permanent stay of increasingly more people in Schengen zone without any permit or status allowing them to do so, obliged Hungary having a strict position on this subject, to use all the constitutional and legal instruments that it had, to organise the border control as it wanted to.

The present section analyses, not in a chronological but a hierarchical order, the Hungarian legal rules, the equilibrium that they attempted to establish between efficient protection of borders and rights of people, and the way they attempted to protect Hungarian sovereign right to control its borders, particularly the incoming flux of people to its national territory.

The highest level employed was the referendum organised in October 2016. The referendum about migration only concerned the immigrational challenge in an indirect way. The question of Hungarian electors was formulated not on the migration itself but about the competence of the EU to regulate the issue: ‘Do you agree to the right of the EU to settle foreigners on national soil without the approval of Hungarian National Assembly?’ This question is interesting but dwells on the opposition of Hungary to the idea of relocation of people demanding international protection—the relevant Decision of the Council were attacked by Hungary and Slovakia for annulment before the Court of Justice<sup>11</sup>—by the European Union, and the protection of its sovereignty to decide on such a matter than on the immigration itself. As is well known, the referendum was invalid as majority of the electors were absent from the vote.

The next level was constitutional. The Government introduced the seventh amendment to the Fundamental Law to incorporate into the European clause of the Hungarian Constitution, the right of Hungary to decide about its population alone. At the time, when it was introduced, the political majority lost its two third of voices in the National Assembly, therefore, the amendment could only be adopted after the legislative elections in 2018, when the same political force obtained the majority required for constitutional reform. The reform also added to the constitutional regulation of asylum that those persons who came from a third secure country were not eligible for such a right.

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11 CJEU, C-643/15, C-647/15 joined cases *Slovak Republic and Hungary v. Council of the European Union*, Judgement, 6 September 2017, EU:C:2017:631.

According to the relevant decision of the Constitutional Court of Hungary this latter modification does not imply that someone who arrives in Hungary, cannot obtain asylum in Hungary. Actually, the Constitutional Court of Hungary had to intervene three times on the subject of migration. As a next level of the normative fight on European migration policy, those decisions should be explained.

The first one pronounced by the end of 2016,<sup>12</sup> was adopted on the request for constitutional interpretation by the Hungarian ombudsman who asked several questions about the constitutionality of the eventual application of the Council decision about relocating those who ask for international protection in Greece or in Italy. As it has been explained, Hungarian Government being against the decision organised a referendum not on the decision itself, neither on its consequences, but on the question about sharing competences between national institutions directly representing the nation and the institutions of the European Union.

In this context, simultaneously, the Hungarian ombudsman worried about the constitutionality of the application of such a decision by Hungarian authorities. The Constitution Court decided not to answer on the substantial question whether the application of the decision would not be in conformity with international engagements and constitutional provisions. Rather, it used the case to consider the relationship between national constitutionalism and the legal norms of the EU. It stated that it has, as national constitutional court in cooperation with the Court of Justice of the EU, the competence to control the constitutionality of the application of a decision adopted by European institutions. Further, it summarised what constitutional principles could be an obstacle to the execution of such European acts. However, by avoiding to speak on migration itself, it avoided a direct contradiction with European law.

In the second decision<sup>13</sup> that we already mentioned, it should also pronounce on the merit of the case as it had to provide an interpretation of the newly adopted constitutional provision. The interpretation was created to once again somehow escape a direct contradiction, as a total refusal of demands for international protection would clearly result in non-conformity with European law and that, on the level of the constitutional text. Simultaneously, the Constitutional Court of Hungary used that case as well to reinforce its competences: it said that it was alone responsible for the authentic interpretation of the Hungarian constitution, and that its interpretation is obligatory to any other institutions, including European ones. It is clear that the two statements were required to avoid the third one, an eventual judgement of the Court of Justice concluding to an opposition to the EU law by a constitutional provision of Hungary.

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12 Decision of the Constitutional Court of Hungary 22/2016. (XII. 5.).

13 Decision of the Constitutional Court of Hungary 2/2019. (III. 5.).

Thereafter, a third decision<sup>14</sup> was pronounced by the end of 2021 on the question of relocation of migrants. This third decision is also more interesting in its aspects concerning the relations between national constitutional law and the legal order of the EU than on the migration itself, where it is once again creative. The interesting part is about efficiency, and Hungarian Constitutional Court states that if in the field of shared competences, the EU cannot produce an efficient regulation capable to guarantee the respect of fundamental rights then the member states can retake the competences to apply them with more efficiency. The reference is clear when the direct effect and the primacy of EU law, according to the historical jurisprudence of the Court of Justice, is founded on the idea of efficiency of the integration.

Regarding the migration, the Constitutional Court of Hungary provides a special explanation about violation of fundamental rights: it is about the right to human dignity of the Hungarian citizens and Hungarian residents. According to the opinion of the majority of the judges, the determination of the cultural background in which those citizens and residents would like to live, is part of their right to human dignity. Hence, when this background is modified because of the relocation of people with different cultures and traditions, this right would be violated.

As much as the Hungarian Constitutional Court, the Court of Justice also had to pronounce some decisions about Hungarian legislation on migration. One can easily determine that usually those decisions concluded to the non-conformity of Hungarian norms with EU law on migration. It is important to highlight that when sanctioned by the Court of Justice, Hungary always respected the decision and changed its legislation. Simultaneously, Hungary always aimed at the protection of its border against illegal migration with new normative measures.

Before the condemnation of the Hungarian legislation, the first judgement of the Court of Justice on the matter, was about the validity of the Council decision on the relocation of migrants requesting international protection.<sup>15</sup> When Hungary and Slovakia argued for the invalidity of the decision, although at least eleven different legal arguments were presented by those two countries, and Poland that intervened in the case, the Court decided that the decision is valid. However, nowadays, it is evident that this decision was not necessary and proportional and that it had more important consequences than a temporary measure could provide.

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14 Decision of the Constitutional Court of Hungary 32/2021. (XII. 20.).

15 CJEU, C-643/15, C-647/15 joined cases *Slovak Republic and Hungary v. Council of the European Union*, Judgement, 6 September 2017, EU:C:2017:631.

Thereafter, in a procedure of preliminary ruling,<sup>16</sup> and later on in a procedure for failure to fulfil obligations,<sup>17</sup> the Court of Justice decided that the Hungarian legalisation obliging the asylum seeker to present their application for asylum exclusively in transit zones which was only accessible for a small number of persons, was not in accordance with European directives nor the practice of Hungarian authorities automatically returning those who stayed illegally in Hungary to a third country.

In the next case produced also in the framework of a procedure for failure to fulfil the obligations, the Court of Justice sanctioned the Hungarian legislation about the criminalisation of the activity of an organisation helping the asylum seeker, when their activity could contribute directly to encourage them to illegally pass the national borders. Although the noxious role of those organisation was denounced several times, it is clear that this type of criminal provisions are risky and particularly, difficult to apply as it is impossible to prove a direct link between the intention of a migrant to illegally cross the border and the activity of a non-governmental organisation.

The latest case when once again for failure to fulfil its obligations, Hungary was condemned by the Court of Justice of the European Union, was about the Hungarian legislation obliging, after the interdiction of transit zones, those who ask for international protection, to make a declaration of intent first in Hungarian embassies in the neighbouring secure third countries and arrive in Hungary already filtered owing to this preapplication approved beforehand by national authorities.<sup>18</sup> The chief aim of this last national legislation, as already mentioned, was to prevent health risk in a pandemic context, owing to illegal immigration, however, not allowing people to arrive by any means in a member state when they would like to apply for asylum, is not possible in a way that would be in conformity with European directives.

To conclude this section, it is evident that Hungary aimed to avoid illegal migration by every possible level of legal regulation. However, it is also clear that it did not succeed to do so, at least, not in a way that would be in conformity with European law. As Hungary always respected the decision of the Court of Justice, it always abrogated its rules. Simultaneously, this dispute between Hungarian government and European institutions resulted in interesting constitutional and European case laws not largely on migration but on the relationship between national constitutional and European legal orders.

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16 CJEU, C-924/19 PPU, C-925/19 PPU joined cases *FMS, FMZ, SA, SA junior*, Judgement, 14 May 2020, EU:C:2020:367.

17 CJEU, C-808/18 *Commission v. Hungary*, Judgement, 17 December 2020, EU:C:2020:1029.

18 CJEU, C-823/21 *Commission v. Hungary*, Judgement, 22 June 2023, EU:C:2023:504.



To conclude it is important to recall the chief characteristics of the Hungarian approach to the protection of border. First, it should be highlighted that migration has always been an important phenomenon in Europe on a historical scale. The European civilisation is constructed and enriched by the dialogue created between cultures travelling with people, although that dialogue was not always balanced between the newcomers and the autochthons. An important change intervened several centuries ago offering a new framework. Second, it should be also remembered that Central Europe exactly during the same period of history was detoured of its organic evolution. If the geographical position of the region caused a necessary and continuous manoeuvring between different centres of power, the occupation by empires and their action on migration had an important impact on the approach of the countries of the region to this issue, making them reluctant to open their borders.

Regarding the legal aspects, the first important constat is that despite migration being a social phenomenon, it is on an individual level that the rules are defined which causes many paradoxes. The status of the person passing the border is defined and in modern constitutionality, his or her fundamental rights are protected. The protection of rights of migrant people is in conflict with the aim of the protection of borders of the state based on its constitutional obligation to defend national security and public order. A balance should be found between those rights and national sovereignty exercised when borders are protected. Second, it should also be recalled that the supranational law became increasingly important in the field of border control. The supranational protection of fundamental rights weakened the capacity of the states to act according to their political will. Alternatively, more importantly, the protection of borders is a shared competence between European Union and member states in the Schengen zone.

Concerning Hungary, it has some recent experiences on the protection of its borders. First, because during socialism, the protection of the iron curtain was ensured by Hungarian People's Army. Thereafter, during the same period when the first institutional reforms were realised making national police responsible for the protection of borders, a first refugee crisis concerned Hungary directly. It received about 160,000 refugees from ex-Yugoslavia and at least another 200,000 people arriving in Hungary to escape the war but without asking for international protection. Second, it is already a part of the Schengen area for which Hungary again reorganised its institutional and legal framework on border protection that it entered into owing to the crisis beginning in 2015, and more recently hosted many—their number continues to rise unfortunately, therefore, it would be difficult to provide an exact number—Ukrainians, also coming because of the war in this neighbouring country.

It is clearly the crisis of 2015 and the severe intention of Hungary to determine a solution against illegal migration that made border control the focus of political discussion, law-making and jurisprudence. This political position of

Hungary made it face critics from supranational institutions making migration the primary example for studies on the dynamics of relationships between national and supranational legal orders. However, by all means, Hungary attempted to construct its political approach guiding its migration policies but could not do so because of the frequent sanctions from supranational bodies. It is noteworthy that Hungary always respected the verdict of those courts despite their conclusions being disputable. As part of the Schengen zone, without any help of the organs of the EU, Hungary organises an efficient control of its borders and attempts to ensure the protection of individual rights simultaneously, however, clearly outside of the logics of supranational acts. The conflict remains open and the political discussions as much as the legal disputes continue providing more material to study on the matter. It is expected that when participating in such discussions and disputes, the chief political and judicial actors will approach the cases with sufficient understanding of the complexity and information on the nuances of the Hungarian situation.

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