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THE HUNGARIAN CONSTITUTIONAL COURT AND THE CONCEPT OF NATIONAL CONSTITUTIONAL IDENTITY

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Con una decisione molto attesa, pubblicata nel dicembre 2016, la Corte costituzionale ungherese si è pronunciata su alcune questioni relative alla relazione tra l'ordinamento giuridico dell'Unione europea e l'ordinamento costituzionale dell'Ungheria. Con questa decisione i giudici costituzionali ungheresi offrono un contributo alla definizione di due concetti importanti: sovranità statale e identità costituzionale. Il presente articolo intende presentare la decisione della Corte costituzionale ungherese e discuterla in una prospettiva comparata.

In a long-awaited decision published in December 2016, the Hungarian Constitutional Court seems to have settled some of the questions related to the relationship between the EU legal order and Hungary's constitutional order. In this decision, the Hungarian constitutional judges offer some guidance on two important concepts: state sovereignty and constitutional self-identity. This paper aims to present the Hungarian Constitutional Court's decision and to discuss it from a comparative perspective.

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1. Introduction

In a long-awaited decision delivered in December¹ (the only decision officially translated into English that year)² the Hungarian Constitutional Court seems to have settled some of the questions related to the relationship between the European Union's (EU) legal order and Hungary's constitutional order. In this decision, the Hungarian constitutional judges offer some guidance on two important concepts: state sovereignty and constitutional self-identity. With this decision, the Hungarian Constitutional Court deliberately entered the dialogue that is taking place between European domestic courts on the relationship between EU law and national constitutions.³ Its reasoning clearly builds upon the approach taken by the German Federal Constitutional Court (*BVerfG*) setting limits to the primacy of EU law over national constitutions that was followed by many other courts.

2. The Constitutional Court's composition

The Hungarian Constitutional Court was almost unanimous in its conclusions; only one member (Judge Salamon) chose to dissent. Such level of agreement is unsurprising, considering that all ten judges had been appointed by the same parliamentary majority, which had been made possible by a reform of the appointment procedure in 2011.⁴ Interestingly, the decision had been delivered the day before four new judges entered into office. The four new judges, unlike the already sitting members, were elected with the support of one of the opposition parties (LMP). However, even if nine of the ten judges share the conclusions, the reasoning of the

¹ Decision no. 22/2016 (XII.5.) AB of 30 November 2016, in original Hungarian at <http://public.mkab.hu/dev/dontesek.nsf/0/1361AFA3CEA26B84C1257F10005DD958?OpenDocument> accessed 18 July 2017. The (anonymised) text of the petition is also available on the same page.

² English translation available at <http://hunconcourt.hu/letoltesek/en_22_2016.pdf> accessed 18 July 2017.

³ The topic is attracting increasing attention in constitutional scholarship. At the last annual ICON-S Conference, held on 5–7 July in Copenhagen, several parallel sessions were dedicated to the issue, with the participation of many eminent scholars.

⁴ See KELEMEN, *Cinque nuovi giudici alla Corte costituzionale ungherese*, in *Diritti Comparati*, 1 December 2011, <http://www.diritticomparati.it/cinque-nuovi-giudici-alla-corte-costituzionale-ungherese/> accessed 18 July 2017.

decision is enriched and/or contested by five concurring opinions, some of which in fact get close to a dissenting opinion.

3. The decision

The case was initiated by the Ombudsman, who requested the interpretation of two constitutional provisions: the ‘collective expulsion’ clause of art. XIV(1) and the ‘joint exercise of competences’ clause of the EU provision contained in art. E(2). The petition was prompted by the EU’s decision to order the transfer of 1294 asylum seekers from Italy and Greece to Hungary.⁵ The Ombudsman first asked the Constitutional Court whether this collective transfer violated the prohibition on the collective expulsion of foreigners provided by art. XIV(1), since the procedure does not provide for ‘the comprehensive examination on the merits of the individual situations of the applicants’.⁶ Three more questions were posed by the Ombudsman, which concerned more abstract issues related to the ‘joint exercise of competences’ clause of art. E(2). These included:

1) Are state bodies and institutions entitled or obliged to implement EU measures which are in conflict with fundamental rights protected by the Fundamental Law? And, in case, which Hungarian institution may declare this violation?⁷ The question essentially aims to clarify if a fundamental rights-reservation review of EU law might be performed.

2) Where Article E(2) requires that ‘Hungary may, to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties, exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the European Union’, does that mean that the implementation of an *ultra vires* act might be restricted? If so, which Hungarian institution may declare that an EU measure was adopted *ultra vires*?⁸ The question essentially aims to clarify if an *ultra vires* review of EU law might be performed.

3) Do Articles E and XIV authorise or restrict Hungarian institutions and bodies to allow the transfer of a group of foreign persons collectively,

⁵ Council Decision (EU) 2015/1601 of 22 September 2015.

⁶ Para. 3 of the Decision.

⁷ Para. 13.

⁸ Para. 14.

without the assessment of their individual and personal situation, without their consent, and without the application of objectively prescribed criteria?⁹

Regrettably, the Constitutional Court decided to detach the first question and to examine it in a separate proceeding.¹⁰ It answered only the latter three questions in this decision. Thus, notwithstanding the law requires that a petition for constitutional interpretation shall concern a concrete constitutional issue,¹¹ the petitioner's most concrete question has been detached from the rest of the petition. While the petition was phrased in more concrete terms, and the Ombudsman presented all his questions in connection with the controversial EU Decision,¹² the Constitutional Court reasons at a high level of abstraction, and the concepts of state sovereignty and constitutional identity are discussed in very general terms.¹³

Still, the Court offers a few important conclusions. First, as regards the fundamental rights-reservation review (*alapjogi fenntartás*), the Court acknowledges the point of view of the Court of Justice of the European Union (CJEU), but prefers to follow the lead of other national constitutional courts instead.¹⁴ It explicitly refers to, and briefly summarises, the landmark cases of other Member States' constitutional and supreme courts, including Estonia, France, Ireland, Latvia, Poland, Spain, the Czech Republic, the United Kingdom, and Germany.¹⁵ The Court gives an affirmative answer to the Ombudsman's question when it states that «within its own scope of competences ... in exceptional cases and as a resort of *ultima ratio*, i.e. along with paying respect to the constitutional dialogue between the Member States, it can examine whether exercising competences on the basis of Article E(2) of the Fundamental Law results in the violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the state)

⁹ Para. 15.

¹⁰ Para. 29.

¹¹ Art. 38 of the Constitutional Court Act (Act no. CLI of 2011), available in English at <http://hunconcourt.hu/rules/act-on-the-cc> accessed 18 July 2017.

¹² The text of the petition is available in Hungarian at [http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/\\$FILE/X_3327_0_2015_inditvany.002.pdf/X_3327_0_2015_inditvany.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/$FILE/X_3327_0_2015_inditvany.002.pdf/X_3327_0_2015_inditvany.pdf) accessed 18 July 2017.

¹³ In his concurring opinion, Judge Juhász also expresses criticism of the separation of the petitioner's first question on the ground that it postpones the decision for indefinite time, while the EU Council Decision in question is already applicable (para. 84).

¹⁴ Paras. 32–33.

¹⁵ Paras. 35–44. The Court also refers to a number of other foreign judgments (including six decisions of the Italian Constitutional Court) without, however, presenting their content (in para. 34).

and the constitutional self-identity of Hungary».¹⁶ A further constitutional basis for this conclusion would be Article I(1) of the Fundamental Law, which provides that the protection of the inviolable and inalienable fundamental rights shall be the primary obligation of the state.¹⁷

In relation to fundamental-rights review, the Hungarian Constitutional Court also refers to a decision of the European Court of Human Rights,¹⁸ which established that a Member State's liability for human rights violation cannot be exempted by making reference to implementing EU law.¹⁹ In addition, the Hungarian Court expressly relies on the BVerfG's *Solange* jurisprudence when declaring that the level of protection for fundamental rights offered by the European Union is adequate. For this reason, the Hungarian Constitutional Court reaches the same conclusion as its German counterpart, i.e. that fundamental-rights review should be performed only as an *ultima ratio*.²⁰

Second, as regards *ultra vires* review, the Court imposes two limits on the transfer and joint exercise of competences: Hungary's sovereignty and constitutional self-identity.²¹ The review of both would be within the Constitutional Court's competence,²² which has to examine them with due regard to each other.²³ The Court establishes the presumption of maintained sovereignty (*fenntartott szuverenitás védelme*), according to which, by joining the EU, Hungary has not surrendered its sovereignty.²⁴ It is done on the basis of Article B(1) of the Fundamental Law, which provides that Hungary shall be an independent, democratic state under the rule of law.²⁵ The identity review, on the other hand, would be based on art. 4(2) TEU, which provides that the EU shall respect the Member States' national identities.²⁶ In its reasoning, the Court argues that "national identity" (translated as *nemzeti identitás* in the TEU's official Hungarian translation) means "constitutional self-identity" (*alkotmányos önazonosság*),²⁷ and gives

¹⁶ Para. 46.

¹⁷ Para. 48.

¹⁸ *Matthews v. United Kingdom* (1999) 28 EHRR 361.

¹⁹ Para. 48.

²⁰ Para. 49.

²¹ Para. 54.

²² Para. 55.

²³ Para. 67.

²⁴ The Court states that sovereignty is not a competence but 'the ultimate source of competences', and as such it cannot be transferred (para. 60).

²⁵ Para. 59.

²⁶ Para. 62.

²⁷ Para. 64.

a few examples of values that would belong to this concept, such as fundamental freedoms, separation of powers, republican form of state, respect of autonomies under public law, freedom of religion, lawful exercise of power, parliamentarianism, equality before the law, acknowledging the judicial power (whatever that means),²⁸ and the protection of national minorities. These would be achievements of Hungary's historical constitution, which is a concept coined by the preamble of the Fundamental Law.²⁹ However, the Court reserves itself the right to «unfold the content of the concept [of constitutional identity] from case to case».³⁰

The Court is very succinct in its answer to the petitioner's last question, while that is the only one examined in the present case which is related to the constitutional issue that prompted the petition in more concrete terms. The question was whether the Fundamental law authorises or restricts Hungarian institutions and bodies to allow the transfer of a group of foreign persons collectively, without the assessment of their individual and personal situation, without their consent, and without the application of objectively prescribed criteria. The Court finds that if it is likely that the joint exercise of competence violates human dignity, other fundamental rights, the sovereignty or the constitutional self-identity of Hungary (the latter being based on the historical constitution), it may examine, in the exercise of its competences, the existence of the alleged violation.³¹

4. Separate opinions

The Court's conclusion is downsized by Judge Dienes-Oehm in his concurring opinion. He states that EU law measures cannot be object of (preventive or subsequent) constitutional review or of constitutional complaint, because they do not fall within the notion of «legal rules» (*jogszabályok*) as defined by art. 24(2) of the Fundamental Law.³² The

²⁸ The original Hungarian phrase reads «a bírói hatalom elismerése», which literally means «the recognition of judicial power», but it still does not offer much guidance on what it exactly means and whether it is different from the principle of judicial independence.

²⁹ Para. 65. The preamble (named «Avowal of National Faiths») declares: «We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation. We do not recognise the suspension of our historical constitution due to foreign occupations.»

³⁰ Para. 64.

³¹ Para. 69.

³² Para. 79.

Constitutional Court may examine the constitutionality of *ultra vires* EU measures only when exercising its competence of interpretation of the constitutional provisions. This would also mean, according to Judge Dienes-Oehm, that the Constitutional Court cannot impose legal consequences.³³

Another concurring opinion, the one authored by Judge Varga Zs., examines the concept of “historical constitution” more closely and offers a more exhaustive analysis on this point than the majority decision. He argues that «in the case of Hungary, national identity is in particular inseparable from constitutional identity, since the constitutional governance of the country has always been one of the core values the nation has insisted on, even at the times when foreign powers occupied the whole country or part of it».³⁴ He claims that this legal value has been manifested and can be recognised in historical documents, such as the Golden Bull, the Tripartitum, the Torda Laws, the Pragmatica Sanctio, the laws of April 1848, and the laws of the Austro-Hungarian Compromise of 1867.³⁵ The values represented by these documents would form Hungary’s constitutional self-identity, which cannot be waived either by way of an international treaty or a constitutional amendment, because «legal facts cannot be changed through lawmaking».³⁶

5. Reference to foreign case-law: An overview or a comparison?

As pointed out above, the Hungarian Constitutional Court deliberately chose to follow the lead of other national constitutional courts instead of supporting the CJEU’s position. The Court explicitly refers to, and briefly summarises, a number of landmark cases from other Member States’ constitutional and supreme courts.³⁷ But the overview of foreign cases offered by the Court is far from being complete and it is even less comparative. It does not take into consideration some more recent foreign judgments and does not make any comparison between the cases.

³³ Para. 82.

³⁴ Para. 112 (para. 110 in the English version).

³⁵ For a brief account of Hungarian constitutional history see KELEMEN, *La storia costituzionale ungherese*, in FERRARI (a cura di), *La nuova Legge fondamentale ungherese*, Torino, 2012, 1.

³⁶ Para. 112 (para. 110 in the English version).

³⁷ It quotes from 17 foreign (domestic) judgments, to be precise (in paras. 35–49), and references other 13 (in para. 34).

Most surprisingly, the Hungarian Constitutional Court does not include in its overview the Belgian Constitutional Court's judgment delivered in April the same year,³⁸ while the two decisions have much in common. The Belgian judgment is even more concise and abstract regarding the question of reviewing the constitutionality of EU law. The Belgian Court's acknowledgement of jurisdiction in this regard is actually merely *obiter dictum*.³⁹ However, this short *obiter dictum* establishes three limits to the primacy of EU law: constitutional identity, limited attribution of powers, and «the basic values of the protection offered by the Constitution to all legal subjects».⁴⁰ At the same time, similarly to the Hungarian decision, it leaves several questions open, such as the procedure to be followed for constitutional review of EU law, the degree of tolerance granted to European institutions, or whether national identity would remain inviolable and what constitutes Belgian national identity.⁴¹

The Hungarian Constitutional Court's reception of the German solution has been criticised both by scholars and by some of its own members. Two concurring judges expressed their concerns about the reception of a foreign solution without a sufficient justification that would be based on the Hungarian Fundamental Law. Judge Juhász argues that the Court should have analysed the level of protection offered by EU law on the basis of Hungarian constitutional law. He points out that since the adoption of the *Solange II* decision in 1986⁴² new directions of examination in time and space have become necessary due to the expansion of the European Union.⁴³ According to Judge Juhász, the level of protection of the EU cannot be defined in an exact way, and it raises several questions that are still to be answered (such as the relationship between the CJEU and the European Court of Human Rights, for example).⁴⁴ Similarly, Judge Stumpf criticises

³⁸ Decision no. 62/2016 of 28 April 2016.

³⁹ GÉRARD - VERRIJDT, *Belgian Constitutional Court Adopts National Identity Discourse*, in *Eur. Const. L. R.* 2017, 186. The Belgian Constitutional Court did not rule on the merits of the petitions, which were declared inadmissible. While it usually maintains a low threshold when applying admissibility criteria, this time it denied standing to all applicants on the ground that they did not have any personal interest at stake. ID. 184-185.

⁴⁰ See part B.8.7 of the Decision. Gérard and Verrijdt interpret the latter as a procedural safeguard, which would aim to safeguard full access to judicial review, even if EU law dictates otherwise. It would be, therefore, an implicit critique of the CJEU's *Melloni* judgment. See GÉRARD – VERRIJDT, cit., 188.

⁴¹ See GÉRARD – VERRIJDT, cit., 197.

⁴² BVerfGE, [1987] 3 CMLR 225 (22 October 1986).

⁴³ Para. 86.

⁴⁴ Para. 87.

the Court for having copied one sentence from a German judgment without being justified on the basis of the Hungarian Fundamental Law.⁴⁵

Scholars, on the other hand, criticised the Hungarian Constitutional Court for having misused or, at least, misinterpreted the BVerfG's jurisprudence.⁴⁶ Some argued that the Court took the opportunity to make up for the failure of the Seventh Amendment to the Fundamental Law which would have introduced the notion of constitutional identity in several provisions of the Fundamental Law.⁴⁷ According to Gábor Halmai, the Constitutional Court essentially «rubber stamped the constitutional identity-defense of the Orbán-government».⁴⁸

The Hungarian Constitutional Court's reasoning, indeed, stands on weak grounds. Many arguments that the Court puts forward are undeveloped. Disregarding the parts of the decision that offer a statement of the case and references to foreign case-law, the reasoning itself is limited to paragraphs 46–69. The Court fails to offer a satisfactory explanation on several points. For example, it is not clear what is meant by *ultima ratio* exercise of the *ultra vires* review.⁴⁹ It is hardly a sufficient explanation to state, as the Court

⁴⁵ According to Judge Stumpf, para. 66 of the majority judgment would be a translation from BVerfG, 2 BvE 2/08, of 30 June 2009. See para. 108 in his concurring opinion (para. 106 in the English version in which the numbering went wrong). As a matter of fact, para. 66 of the Hungarian decision resembles very closely the fourth headnote (*Leitsatz*) of the German *Lissabon-Urteil*, which also refers to the citizens' living conditions, private sphere of their own responsibility, as well as cultural, historical and linguistic perceptions, for the political formation of which sufficient space should be left to the Member States.

⁴⁶ See, for example, HALMAI, *The Hungarian Constitutional Court and Constitutional Identity*, in *Verfassungsblog*, 10 January 2017, <<http://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/>>; KOVÁCS, *Az alkotmányos identitás árnyéka* [The shadow of constitutional identity], in *Szuverén*, 9 January 2017, <<http://szuveren.hu/jog/az-alkotmanyos-identitas-arnyeka>>; DRINÓCZI, *A 22/2016 (XII. 5.) AB határozat: mit (nem) tartalmaz, és mi következik belőle* [Decision 22/2016 (XII.5) AB: What it does (not) contain, and what follows from it], MTA Law Working Papers 1/2017, <http://jog.tk.mta.hu/uploads/files/2017_01_Drinoczi.pdf>; all accessed 18 July 2017.

⁴⁷ DRINÓCZI, cit., 6. The Seventh Amendment would have amended the preamble and arts. E(2), R(4), XIV(1)-(3), and would have added a new fourth paragraph to art. XIV. The full text is available in Hungarian at <<http://www.parlament.hu/irom40/12458/12458.pdf>> accessed 31 May 2017. About the failed adoption of the proposed Seventh Amendment by the Hungarian Parliament see Uitz, *National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades*, in *Verfassungsblog*, 11 November 2016, <<http://verfassungsblog.de/national-constitutional-identity-in-the-european-constitutional-project-a-recipe-for-exposing-cover-ups-and-masquerades/>> accessed 18 July 2017.

⁴⁸ HALMAI, cit.

⁴⁹ Para. 46. See in this sense, also DRINÓCZI, cit., 11.

does, that respect should be paid to the constitutional dialogue between the Member States. The Court also fails to explain what happens if an EU act is found to violate fundamental rights enshrined in the Hungarian Fundamental Law. As regards *ultra vires* review, it underlines that the direct subject of control is *not* the EU act, the validity of which is not within the competence of the Constitutional Court.⁵⁰ However, a similar statement is not made in relation to fundamental-rights review.⁵¹ In addition, even in relation to *ultra vires* review, it is unclear what would the legal consequences be of such a decision. In his concurring opinion, Judge Varga Zs (joined by Judge Pokol), argues that the Court may conclude that a new authorisation of the Parliament (by two-thirds majority) is required to recognise the binding force of the *ultra vires* act.⁵² This argument is, however, not taken up by the majority. Moreover, the possibility of making a preliminary reference to the CJEU is not even touched upon by the Court.⁵³

As to the concept of constitutional identity, it indeed seems that the Hungarian Constitutional Court copies arguments from the *BVerfG* without, however, a proper foundation in the Hungarian Fundamental Law. Identity review is a part of the *ultra vires* review competence in German constitutional jurisprudence too, but the *BVerfG* anchors it to the German Basic Law's „eternity clause” (*Ewigkeitsklausel*) contained in Article 79(3).⁵⁴ The „eternity clause” prohibits the amendment of certain constitutional principles, and it is explicitly invoked by the Basic Law's EU clause as a limit of Germany's participation in European integration.⁵⁵ There are no similar provisions in the Hungarian Fundamental Law. The only limit that the Hungarian constitution's EU clause imposes to the joint exercise of competences with other Member States are the «rights and obligations deriving from the Founding Treaties».⁵⁶ In addition, the *BVerfG* qualifies the limit by making reference to the principle of openness towards European law (*Europarechtsfreundlichkeit*) and principle of sincere cooperation laid down in Article 4(3) of the TEU.⁵⁷ No similar qualification can be found in the Hungarian decision.

⁵⁰ Para. 56.

⁵¹ See in this sense also DRINÓCZI, cit., 11.

⁵² Para. 114 (para. 112 in the English translation).

⁵³ DRINÓCZI, cit., 13.

⁵⁴ 2 BvE 2/08, 30 June 2009, para. 240.

⁵⁵ Article 23(1) third sentence of the Basic Law.

⁵⁶ Article E(2).

⁵⁷ 2 BvE 2/08, 30 June 2009, para. 240.

6. Final remarks

While this decision may be seen as offering an answer to some questions concerning the relationship between the new Hungarian Fundamental Law and the EU legal order, the issue is far from being settled. There are at least two circumstances that make it uncertain how the Court's case-law will develop in the future. First, the arrival of four new judges to the Court after this decision might bring about a change in its orientation. Five judges decided to write separately in this case, which shows that the Court already lacks complete unity on these issues. However, all fifteen current members of the Court have been elected by the same governmental majority, so a radical change in orientation is highly unlikely in the near future. Second, the high level of abstraction of the Court's reasoning makes it difficult to foresee how more concrete constitutional problems related to constitutional identity will be solved. The most concrete question raised by the Ombudsman – whether the collective transfer violates the prohibition on the collective expulsion of foreigners –, has been separated from the rest of the petition and is still to be answered.

Considering the lacking use of the comparative method and the unsatisfactory reasoning in this decision, we may wonder whether the Hungarian Constitutional Court did really enter the dialogue on constitutional identity or just paid lip service to it. Unlike the German Federal Constitutional Court in the OMT case, the Hungarian Court did not make a preliminary reference to the CJEU and does not even discuss this possibility in its decision. The EU Decision that prompted the Ombudsman's petition has been completely ignored by the Court, which instead delves into an abstract and theoretical discussion about sovereignty and national identity.