

I. ARTICLES

THE DECISION OF THE HUNGARIAN CONSTITUTION COURT ON CONSTITUTIONAL IDENTITY [Decision 22/2016. (XII. 5.) CC]*

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Abstract

In Decision 22/2016. (XII. 5.) CC the Hungarian Constitutional Court introduced in the “vocabulary” of Hungarian Constitutional Law the concept of constitutional identity. The case was based on the request of the ombudsperson for abstract interpretation of the provisions of the Fundamental Law related to the implementation of EU Law, namely an EUC decision on the resettlement of asylum-seekers. While the Constitutional Court did not answer the question of the ombudsperson, it has expressed its position on ultra vires acts of the European Union in general terms. According to the Court, sovereignty of the state, protection of fundamental rights and constitutional identity can pose limits against the implementation of EU Law. Since then, the Seventh Amendment to the Fundamental Law (2018) included these requirements into the text of the constitution. The article offers a detailed overview and a critical analysis of the Decision of the Constitutional Court

Keywords: *constitutional identity, protection of sovereignty, fundamental rights reservation, ultra vires acts, constitutional dialogue, constitutional interpretation*

Résumé

Dans la Décision n° 22/2016. (XII. 5.) CC la Cour constitutionnelle hongroise a introduit dans le „vocabulaire” du droit constitutionnel hongrois le concept

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d'identité constitutionnelle. L'affaire a été initiée par une requête de l'ombudsperson sur l'interprétation abstraite des dispositions de la loi fondamentale relatives à l'application du droit de l'Union Européenne, plus précisément d'une Décision du Conseil de l'UE sur la relocation des demandeurs d'asyle. Tandis que la Cour constitutionnelle n'a pas répondu à la question adressée par l'ombudsperson, elle a exprimé sa position sur les actes ultra vires de l'Union Européenne dans des termes généraux. Selon la Cour, la souveraineté de l'Etat, la protection des droits fondamentaux et l'identité constitutionnelle peuvent mettre des limites à l'application du droit européen. Depuis la décision de la Cour, le Septième Amendment à la loi fondamentale (2018) a incorporées ces exigences dans la Constitution. Le présent article offre un regard détaillé et une analyse critique de la décision de la Cour constitutionnelle

Mots-clés: *identité constitutionnelle, protection de la souveraineté, réserve des droits fondamentaux, actes ultra vires, dialogue constitutionnel, interprétation constitutionnelle*

1. The Petition

The Council Decision (EUC) 2015/1601 of 22 September 2015 (hereinafter: EUC Decision) established provisional measures in the area of international protection of asylum-seekers for the benefit of Italy and Greece. The EUC Decision prescribed the relocation of asylum-seekers from the abovementioned countries to other Member States. In the case of Hungary, the EUC Decision ordered the relocation of 1294 persons. According to the standpoint of the Commissioner for fundamental rights in Hungary (the ombudsperson) the process of the EUC Decision disregards the comprehensive examination of the individual circumstances of the applicants, is collective in nature and differs from the usual approach to fundamental rights protection mechanisms in the European Union. The ombudsperson (hereinafter: Petitioner) requested the abstract interpretation of certain provisions of the Fundamental Law of Hungary regard with the EUC Decision.

The Petitioner filed his request on the examination of the Article XIV para. (1) and (2)¹ and Article E) para. (2)² of the Fundamental Law based on the

¹ Article XIV.

Section 38 para. (1) of the Act CLI of 2011 on the Constitutional Court (hereinafter: the ACC). The questions and argumentation of the Petitioner were the following:

(I.) Does the unconditional prohibition on the collective expulsion of foreigners, regulated in Article XIV (1) of the Fundamental Law, apply to the instrumental acts performed by the bodies or institutions of the Hungarian State as necessary for the implementation of an unlawful collective expulsion executed by another Member State, or only to those cases when foreigners must leave the territory of Hungary based on the decision of the Hungarian authorities? In this regard the Petitioner referred to the recommendations of international organizations and courts as well as provisions of international conventions which prescribe the prohibition of collective expulsion and the right to residence of the asylum-seekers until the final decision in their individual case. According to the Petitioner, the EUC Decision stands against the Dublin III. Regulation based on the individual selections of the applicants and the approval of the receiver state. According to the argumentation of the Petitioner, for executing the relocation from a Member State, the reception in another Member State is a necessary instrumental action. Therefore, if one state assists the unlawful act of the other, both states will be responsible for that procedure.

(II.) The second question about the interpretation of Article E) para. (2) contains three parts:

a. Are the state organs of Hungary, in accordance with Article E) para. (2) of the Fundamental Law, entitled or obliged to implement measures adopted in the framework of the inter-State cooperation achieved in the

(1) Hungarian nationals shall not be expelled from the territory of Hungary and may return from abroad at any time. Foreigners residing in the territory of Hungary may only be expelled under a lawful decision. Collective expulsion shall be prohibited.

(2) No one shall be expelled or extradited to a State where there is a risk that he or she would be sentenced to death, tortured or subjected to other inhuman treatment or punishment.

² Article E)

(2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union.

European Union if such measures are against the provisions of the Fundamental Law on fundamental rights? If it is possible to infer from the provisions of the Fundamental Law that Hungarian state organs are not entitled or obliged to implement such measures, then which Hungarian institution may declare that in a particular case?

b. The second subquestion relates to the “*ultra vires*” acts of the European Union, those acts which are not based on a competence transferred by Hungary to the European Union on the basis of the Founding Treaties concluded with the other Member States. Is it possible to deduct from the provisions of the Fundamental Law that the Hungarian state organs are not entitled or obliged to implement such measures? If yes, which Hungarian institution may declare that fact?

c. Can the provisions of Article E) and Article XIV of the Fundamental Law on the prohibition of collective expulsion be interpreted in a way of limiting Hungarian state organs in executing the provisions of the EUC decision?

2. The Reasoning of the Constitutional Court's Decision

A. *The majority opinion*

The Constitutional Court (hereinafter: CC) emphasized that the petition originates from the person entitled to file a motion and the request relates to a concrete provision of the Fundamental Law (hereinafter: FL). Moreover, the petition fits the requirements related to abstract constitutional interpretation as one of the competences of the CC: it concerns a concrete constitutional dispute and the interpretation can be directly deduced from the FL. The first question of the petitioner (on the interpretation of Article XIV) was separated by the CC from the question on the interpretation of Article E) - the reasoning focuses on the latter.

Regarding the interpretation of Article E), the CC declared that the first and the second subquestions of the question are related to a concrete constitutional dispute which is in direct connection with the FL. However, the third subquestion can only be addressed by the CC in certain respects. According to the standpoint of the CC, the third subquestion can only be interpreted in the light of the first two problems, i.e. the context of fundamental rights reservation and the *ultra vires* acts, as this is the only

level of abstraction satisfying the condition of concreteness under Article 38 (1) of ACC. With due regard to the above, the CC shall explain its response to the third subquestion included in its response to the first two.

The CC declared that it is aware of the fact that, from the point of view of the Court of Justice of the European Union, the EU law is defined as an independent and autonomous legal order. However, the European Union is a legal community, and the core basis of this community are the international treaties concluded by the Member States. The CC quotes the decision of the Bundesverfassungsgericht³ supporting the above statement. This decision declared that, as the contracting parties are the Member States, it is their national enforcement acts that ultimately determine the extent of primacy to be enjoyed by EU law against the relevant Member State's law.

Furthermore, as the CC considers the constitutional dialogue within the European Union to be of primary importance it examined the positions taken by the Member States concerning *ultra vires* acts and the reservation of fundamental rights.

According to the Supreme Court of Estonia, if it becomes evident that the new founding treaty of the European Union or the amendment to a founding treaty gives rise to a more extensive delegation of competence of Estonia to the European Union it is necessary to seek the approval of the holder of supreme (state) power.⁴

According to the decision of the French Constitutional Council, the transposition of a Directive cannot run counter to a rule or principle inherent to the constitutional identity of France.⁵

The Supreme Court of Ireland explained that without further amendment to the Constitution, any amendment to the Treaties shall be considered too broad.⁶

The Constitutional Court of Latvia declared clearly that delegation of competences cannot counter the rule of law and the basic principle of an

³ BVerfGE 75, 223 [242].

⁴ Riigikohus, 12 July 2012, 3-4-1-6-12, 128, 223.

⁵ Conseil Constitutionnel, N° 2006-540 DC.

⁶ Crotty v. An Taoiseach case (9 April 1987).

independent, sovereign and democratic republic based on the fundamental rights.⁷

The Constitutional Court of Hungary examined several decisions of the Constitutional Tribunal of Poland. As established in one of these decisions, the accession of Poland to the European Union did not undermine the supremacy of the Constitution over the whole legal order within the field of sovereignty of the Republic of Poland.⁸ The primacy of the norms of EU regulations takes place in the event of their unconformity with statutes. By contrast, the Constitution retains its superiority and primacy over all legal acts which are in force in the Polish constitutional order, including the acts of EU law.⁹ Due to the status of the Constitution as the supreme law of the Republic of Poland, it is possible to examine whether the norms of EU regulations are consistent therewith.¹⁰

As laid down by the Spanish Constitutional Court, the transfer of the exercise of competences to the European Union and the consequent integration of Community legislation in the Spanish legal system imposes unavoidable limits on the sovereign power of the State. This is acceptable only when European legislation is compatible with the fundamental principles of the social and democratic state and the rule of law, prescribed by the national Constitution. These substantive limits shall also be taken into consideration in the case of sovereignty-transfer defined in the Constitution.¹¹

Regarding the doctrine of primacy of the EU Law, the Constitutional Court of the Czech Republic established that its jurisdiction is restricted to a certain extent.¹² In another decision, the Constitutional Court of the Czech Republic held that the transfer of powers to the organs of the European Union is valid till is in accordance with foundations of state sovereignty, including essential content.¹³

In accordance with the requirement of constitutional dialogue between the Member States, in one of its decisions the Supreme Court of the United

⁷ *Satversmes tiesa*, 7 April 2009, 2008-35-01, 17.

⁸ 11 May 2005, K 18/04.

⁹ 11 May 2005, K 18/04.

¹⁰ Case N^o SK 45/09 of 16 November 2011.

¹¹ Case N^o DTC 1/2004 of 13 December 2004.

¹² Case N^o PI US 50/04 of 8 March 2006.

¹³ Case N^o ÚS 19/08 of 26 November 2008.

Kingdom made a reference to a decision of the German Federal Constitutional Court. According to this, as part of a cooperative relationship between the Federal Constitutional Court and the European Court of Justice, the decision in question must not be read in a way which cannot question the identity of the Basic Law's constitutional order."¹⁴

The German Federal Constitutional Court explained in its decision on the Treaty of Lisbon that it always examines whether legal acts and instruments of the European institutions are within the boundaries of the sovereign powers accorded to them by way of conferral, whilst adhering to the principle of subsidiarity under Community and Union law. Furthermore, the Federal Constitutional Court examines whether the inviolable core content of the constitutional identity of the Basic Law is respected by way of these acts of the Union.¹⁵

Based on the review of the case law of the Member States' supreme courts performing the tasks of constitutional courts and of the Member States' constitutional courts, the Constitutional Court established that within its own scope of competences, on the basis of a relevant petition, 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 (a) whether exercising competences on the basis of Article E) para. (2) of the Fundamental Law results in the violation of human dignity or the essential content of any other fundamental right, (b) the sovereignty of Hungary and (c) the constitutional self-identity of Hungary.

Regarding the reservation of fundamental rights, the Constitutional Court declared that any exercise of public authority in the territory of Hungary is linked to the fundamental rights: as the protection of fundamental rights is a primary obligation of the State, this shall precede the enforcement of any other state interest. As demonstrated in the opinion of the German Constitutional Court, detailed in the so called 'Solange-decisions', due to the institutional reforms, the Charter of Fundamental Rights and the Court of Justice of the European Union in most cases can grant the same level of protection for fundamental rights as the level secured by the national constitutions. However, the CC cannot set aside the *ultima ratio* protection of human dignity and the essential content of fundamental rights.

¹⁴ State v. Secretary of State for Transport, 22 January 2014.

¹⁵ BverfG, 2 BvE 2/08 of 30 June 2009.

As regards the petitioner's motion related to transgressing the scope of competences, the CC notes that when the *ultra vires* nature of an act under EU law occurs, the Government, representing Hungary in the Council empowered to adopt legislation in the Union, may take the available steps.¹⁶ Furthermore, the National Assembly of Hungary or the Government of Hungary may file a claim with the Court of Justice of the European Union alleging the violation of the principle of subsidiarity by the legislative act of the European Union. In the following, the CC explicates that the joint exercise of competences, nevertheless, is not unlimited, as Article E) para. (2) of the Fundamental Law not only grants the validity of EU law in respect of Hungary, but at the same time it imposes limitations on the transferred and jointly exercised competences. On the one hand the joint exercise of a competence shall not violate Hungary's sovereignty (sovereignty control), and on the other hand it shall not lead to the violation of constitutional identity (identity control). Respecting and safeguarding the sovereignty of Hungary and its constitutional identity is an obligation of the National Assembly contributing to the European Union's decision-making mechanism and of the Government directly participating in that mechanism. However, according to Article 24 para (1) of the Fundamental Law, the main organ responsible for such protection is the Constitutional Court. The CC emphasizes that the direct subject of sovereignty- and identity control is not the legal act of the Union or its interpretation, therefore the Court shall not comment on the validity, invalidity or the primacy of application of such Union acts.

As regards sovereignty control, the CC notes that it is based on Article B) of the Fundamental Law. According to the abovementioned article, in Hungary, the source of public power shall be the people, and power shall be exercised by the people through elected representatives or, in exceptional cases, directly. As long as Article B) of the Fundamental Law contains the principle of independent and sovereign statehood and indicates the people as the source of public power, these provisions shall not be emptied out by the Union-clause in Article E). Moreover, the CC

¹⁶ Based on Article 6 of the Protocol that forms an integral part of the Founding Treaties the National Assembly, and – in accordance with Article 16 para. (2) of TEU – the Government.

declares the principle of '*maintained sovereignty*'.¹⁷ Sovereignty has been laid down in the Fundamental Law as the ultimate source of competences and not as a competence. Therefore, the joint exercising of competences shall not result in depriving the people of the possibility of possessing the ultimate chance to control the exercise of public power.

On the identity control, the CC notes the following: according to Article 4 (2) TEU,¹⁸ the protection of constitutional identity should be granted in the framework of an informal cooperation with EUC based on the principles of equality and collegiality with mutual respect to each other. The Constitutional Court of Hungary interprets the concept of constitutional identity as part of Hungary's self-identity based on the overall Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of the country's historical constitution – as required by Article R) para. (3) of the Fundamental Law. The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted – can be highlighted as examples: fundamental freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, legally bound public power, parliamentarianism, the equality of rights, acknowledging judicial power, the protection of the national minorities. Moreover, achievements of the historical constitution can be mentioned, which the Fundamental Law and thus the whole Hungarian legal system are based upon. Furthermore, the Constitutional Court declares that the protection of constitutional self-identity may be raised in cases having an influence on the living conditions of the individuals, especially their privacy protected by fundamental rights, on their personal and social security, and on their decision-making responsibility, as well as when Hungary's linguistic, historical and cultural traditions are affected. The Constitutional Court declares that the constitutional self-identity of

¹⁷ As by joining the European Union, Hungary has not surrendered its sovereignty, it rather allowed for the joint exercise of certain competences, the maintenance of Hungary's sovereignty shall be presumed when examining the joint exercise of further competences, additional to the rights and obligations provided in the Founding Treaties of the European Union. See: Decision 22/2016 (XII. 5.) CC [60].

¹⁸ The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

Hungary is a fundamental value acknowledged but not created by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty. Therefore, the protection of constitutional identity shall remain the duty of the Constitutional Court until such time as Hungary is a sovereign State. Accordingly, sovereignty and constitutional identity have several common points thus their control shall be performed with due regard to each other in specific cases.

On the Petitioner's question related to the implementation of the EUC Decision by the Hungarian state organs the CC gives an abstract answer. If human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution can be presumed to be violated due to the exercise of competences based on Article E) para. (2) of the Fundamental Law, the CC may examine based on a relevant petition, in the course of exercising its competences, the existence of the alleged violation.

B. Concurring opinions and dissenting opinions

Egon Dienes-Oehm agrees with the CC with regard to the assessments expressed in the decision related to the joint exercise of competences and declaring the general designation of its review competence. However, according to his standpoint, the reasoning does not give an exhaustive list of the limitations in concrete cases of the review competence, which is therefore specified in general terms, allowing for several potential interpretations in this respect. In his concurring opinion he gives a summary of the limitations originating from the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the Fundamental Law and the Act CLI of 2011 on the Constitutional Court (ACC).

First, he points out that the petition aimed at establishing the *ultra vires* nature of the Union's legal act can only result in an obligation of review by the Constitutional Court with temporal limitations. Furthermore, he notes that any legal debate after the adoption of a piece of EU legislation falls exclusively into the scope of competence of the Court of Justice of the European Union (CJEU) in accordance with Article 344 of TFEU. It is a question to be addressed independently, what are the conditions upon

which the Member States' constitutional courts or supreme courts can still play a role in preventing the transgressing of competences. In his opinion, the CC shall not review the judicial acts of the Union either.

Furthermore, he declares that as the sources of EU law directly enforceable in the Member States without any legislative measure taken by the Member States are not "legal regulations" according to the Fundamental Law¹⁹ and the ACC.²⁰ These cannot form the subject matter of preliminary or posterior review, and the same applies to constitutional complaints as well. Consequently, he holds that the possibility of reviewing EU legislation of *ultra vires* nature can only be based upon Section 38 (1) of ACC (abstract interpretation of the provisions of the Fundamental Law).

He accepts the principle of maintained sovereignty with the interpretation that it can be regarded as a procedural requirement providing guidance for the Constitutional Court's future activity in the field of sovereignty-control. It can play a role during the constitutional review in the case of transferring new (further) competences for joint exercise. He also notes that the cases where this requirement is applicable can be only exceptional situations. He refers as examples to the development of EU law regulations in the field of expected future policies related to border control, asylum and immigration.

According to the standpoint of Imre Juhász, separating the petitioner's claim on interpreting Article XIV of the Fundamental Law is questionable especially in the light of the fact that the EUC Decision is applicable to the persons who arrive(d) to the territory of Italy or Greece between 25 September 2015 and 26 September 2017, as well as to those applicants who have arrived to the territory of the Member States since 24 March 2015.

In his opinion, the level of protection of fundamental rights as secured by the law of the European Union should have been analyzed more deeply, on the basis of Hungarian constitutionality. He holds that the fundamental rights' protection level of the European Union cannot be specified in an exact way, and the present state of fundamental rights' protection is not without debates and it rises questions that are yet unanswered. According to the standpoint of Mr. Juhász, the force of the Beneš-decrees based on the principle of collective guilt, the application of a 'double standard' in

¹⁹ Article 24 para. (2) of the Fundamental Law.

²⁰ Sections 23–31 of ACC.