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THE HUNGARIAN CONSTITUTIONAL COURT ENTERS THE DIALOGUE ON NATIONAL CONSTITUTIONAL IDENTITY

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In a long-awaited decision published in December ([Decision no. 22/2016 \(XII.5.\) AB](#) of 30 November 2016, the only one officially [translated into English](#) that year), 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.

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

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 ([Council Decision \(EU\) 2015/1601](#) of 22 September 2015). The Ombudsman asked 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' (para. 3). The other questions concerned more abstract issues related to the 'joint exercise of competences' clause of art. E (2). These included:

- 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? (para. 13) The question essentially aims at clarifying if a fundamental rights-reservation review of EU law might be performed.
- Where art. 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*? (para. 14) The question essentially aims at clarifying if an *ultra vires* review of EU law might be performed.
- Do art. E and XIV authorise or restrict 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? (para. 15)

The Constitutional Court unfortunately decided to separate the first

question and to examine it in another (future) proceeding (para. 29). 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 (art. 38 of the Constitutional Court Act), the petitioner's most concrete question has been detached from the rest of the petition. Consequently, the Court reasons at a high level of abstraction, and the concepts of state sovereignty and constitutional identity are discussed in very general terms. Moreover, in his concurring opinion, Judge Juhász 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).

First, as regards the fundamental rights-reservation review (*alapjogi fenntartás*), the Court acknowledged the point of view of the Court of Justice of the European Union (CJEU), but preferred to follow the lead of other national constitutional courts instead (para. 32-33). 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 (para. 34-44). 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 art. 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) and the constitutional self-identity of Hungary' (para. 46).

In its reasoning, the Hungarian Constitutional Court also refers to the decision of the European Court of Human Rights in *Matthews v. United Kingdom* (1999), which established that a Member State's liability for human rights violation cannot be exempted by making reference to implementing EU law (para. 48). In addition, the Hungarian Court expressly relies on the German Federal Constitutional Court's *Solange*

jurisprudence when declaring that the level of protection for fundamental rights offered by the European Union is adequate. For this reason, the Court reaches the same conclusion as the German Court, i.e. that fundamental rights review should be performed only as an *ultima ratio* (para. 49). The reception of the German solution is, however, poorly justified. As also Judge Juhász points out in his concurring opinion, the Court analyse the level of protection offered by EU law on the basis of Hungarian constitutional law. He argues that since the adoption of the *Solange II* decision in 1986 new directions of examination in time and space have become necessary due to the expansion of the European Union (para. 86). 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) (para. 87). Similarly, Judge Stumpf criticises the Court for having copied one sentence from a German judgment (para. 66 of the majority judgment which would be a translation from BVerfG, 2 BvE 2/08, of 30 June 2009) without being justified on the basis of the Hungarian Fundamental Law (para. 108 in his concurring opinion – para. 106 in the English version in which the numbering went wrong).

Second, as regards the *ultra vires* review, the Court imposes two limits on the transfer and joint exercise of competences: Hungary's sovereignty and constitutional self-identity (para. 54). The review of both would be within the Constitutional Court's competence (para. 55), which has to examine them with due regard to each other (para. 67). The Court establishes the presumption of maintained sovereignty (*fenntartott szuverenitás véelme*), according to which, by joining the EU, Hungary has not surrendered its sovereignty (para. 60). This interpretation is in line with several other European constitutional courts' jurisprudence. 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 (para. 62). 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*) (para. 64), and gives 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), and the protection of national minorities living with us. These would be achievements of Hungary's historical constitution (para. 65).

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 (para. 69).

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 (para. 79). The 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 (para. 82).

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'. 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. 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' (para. 112 in the concurring opinion – para. 110 in the English version).

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 unity on these issues. Second, the high level of abstraction of the Court's reasoning in this case 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.