Full Steam Back

The Hungarian Constitutional Court Avoids Further Conflict with the ECJ

Nóra Chronowski & Attila Vincze

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On 10 December 2021, almost exactly five years after creating the constitutional identity as a shield against EU law in migration issues by enacting its infamous Identity Decision, the Hungarian Constitutional Court (HCC) was expected by the Government to use that very shield and to declare the ECJ Judgement C-808/08 to be contrary to Hungary's constitutional identity. But the Hungarian Constitutional Court – contrary to the Polish one and as a big surprise for many –dodged the conflict, and avoided to speak of any ultra-vires or to offer the Government ready to use arguments against the supremacy of EU law.

Context: Protecting Constitutional Identity

The grand chamber of the ECJ found in December 2020, that Hungary had breached the EU asylum acquis by setting up transit zones, adopting a consistent and generalized administrative practice, which drastically limited the daily number of applicants authorized to enter those transit zones and establishing a system of systematic detention for asylum seekers in the transit zones of Röszke and Tompa. This also led to the so-called push-back practice, i.e. the removal of all third-country nationals staying illegally in Hungary's territory without observing the procedures and safeguards laid down in the Qualification Directive.

In order to circumvent the decision of the ECJ, the Hungarian Minister of Justice requested an abstract interpretation of the Fundamental Law from the Hungarian Constitutional Court in February 2021, suggesting that the decision of the ECJ conflicted with Hungary's constitutional identity. She claimed that by requiring Hungary to provide the guarantees laid down in the Qualification Directive (also) for the entry of third-country nationals into its territory, Hungary loses control over the population, which is a serious violation of the constitutional identity of the state.

In the Minister's view, the implementation of the ECJ judgment may lead to foreign nationals (with sometimes unknown identity) remaining in Hungary for an indefinite period of time and thus becoming a de facto part of the country's population. According to the Minister of Justice, as long as the European Union does not achieve effective readmission, compliance with the judgment will change the country's population and thereby directly affect Hungary's sovereignty as enshrined in the Fundamental Law, its identity based on its historical constitution and its inalienable right to dispose of its population.

In her request for an interpretation of the Hungarian Fundamental Law before the Constitutional Court, the Minister was therefore particularly concerned with the conditions for EU membership (Art. E(2)) and the right to asylum (Art. XIV(4)). The conditions of EU membership were amended after the migration crisis in 2018 posing new substantive limits on the conferral of competences to the EU. According to Art. E (2) of the Hungarian Fundamental Law, the joint exercise of competences within the EU "shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure". The general obligation to protect Hungary's constitutional identity rooted in its historical constitution was introduced in the constitutional text in 2018 but created by the Constitutional Court already in 2016.

Article XIV(2) of the Fundamental Law prescribes that "(f)oreigners residing in the territory of Hungary may only be expelled under a lawful decision". The Minister did not invoke this rule in her petition, but

relied on Article XIV(4) (the right to asylum) instead. A further exemption was added to this article in 2018, about which the EU Commission had previously expressed concerns: "A non-Hungarian national shall not be entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution".

In 2019, the Constitutional Court expressed that the interpretation of the Fundamental Law cannot be affected by the decisions and interpretations of the law by "other bodies", by which it meant the ECJ. The Court made clear that it is not obliged to respect the decisions of the European judicial organs, which foreshadowed a Polish like direct conflict with EU law. Under these circumstances, it was much awaited how the HCC would decide, and whether it would engage in a full-blown political and constitutional conflict.

Predictions and Preferences

We have tentatively identified four different possible paths for the Constitutional Court:

1. "Procrastination" – the HCC could have postponed the decision until the case somehow resolves itself or becomes somehow meaningless. This is what the HCC did, for example, in its Central European University and the "foreign funded" NGOcases. However, in an abstract constitutional interpretation procedure, initiated by the government, endless prolongation is not a viable option for the Court.
2. "The Polish way" – the CC could have found the ECJ ruling and even some parts of the primary law to be unconstitutional and put the primacy of the EU law under further pressure.
3. "The German PSPP-case way" – the CC could have asked for a preliminary ruling. Again, the difficulty here is that this is not a constitutional complaint in a specific case, but an abstract constitutional interpretation. A further difficulty is that the Hungarian CC has been very reluctant in this respect and never initiated a preliminary ruling procedure, even if it has clarified in a 2020 decision that it might do so if the sovereignty or the constitutional identity were at stake. (Which of course would also question how open the court would be for the arguments of the ECJ).
4. "Counterbalance" – the CC could have ruled on the petition, but without declaring the ECJ ruling unconstitutional, just invoking the protection of constitutional identity or the presumption of reserved sovereignty, which also appeared first in the 2016 Identity Decision in the context of the EU clause of the Fundamental Law. Nonetheless, it has not been clarified yet how this presumption of reserved sovereignty can be reconciled with the constitutional obligation to cooperate with the EU as provided for in the same Article E (1).

It is worth adding that the European Commission has decided on 12 November 2021 to refer Hungary to the ECJ, requesting the Court to order the payment of financial penalties for Hungary's failure to comply with a Court ruling in relation to EU rules on asylum and return. This of course opened the pathway to a Polish-like tragedy.

The Prime Minister, Viktor Orbán spoke openly about which path he would prefer in his regular Friday morning radio interview. He pointed out that Hungary's immigration policy is contrary to that of "Brussels". According to him, Hungarians had already decided against immigration in a referendum. However, the October 2016 quota referendum to which he refers was invalid under public law as the majority of voters did not participate in the referendum. The prime minister said the CC's decision was about immigration and that he expected the HCC to erect a legal fence alongside the physical border fence.

Dodging the Conflict

The HCC finally chose the fourth way and dodged the conflict. It stated that the review of an ECJ judgment cannot be the subject of an abstract constitutional interpretation, nor did the procedure in the present case extend to an examination of the primacy of EU law.

Interpreting the FL in an abstract way, the Court reached three conclusions:

- The joint exercise of competences with other Member States as provided for in the Fundamental Law must comply with the requirement of the protection of fundamental rights and must not restrict Hungary's inalienable right to dispose of its territorial unity, population, form of government and organization of the State. If the exercise of shared competences is deficient, Hungary, in accordance with the presumption of reserved sovereignty, is entitled to exercise the non-exclusive powers of the EU until the institutions of the European Union take the necessary measures for the effective exercise of the shared competence.
- If the ineffective exercise of shared competences can possibly infringe the rights of denizens of Hungary to their identity, the Hungarian State is obliged to ensure their protection.
- It follows from the combined interpretation of Articles E(2) and XIV(4) of the Fundamental Law that the territorial unity, population, form of government are inalienable rights of Hungary following from its constitutional identity.

Good News?

It is certainly a relief that the Constitutional Court has soberly drawn the limit on the power of abstract constitutional interpretation and stated that: "An abstract constitutional interpretation cannot become a position applicable to the specific case giving rise to the petition. Nor can a sufficiently abstract answer be given to a question that is closely linked to a specific problem, and that will continue to be binding in all cases." Thus, in this case, the HCC has not taken the field against the ECJ, which is good news.

The Constitutional Court did not examine whether in the specific case the joint exercise of powers has any shortcomings, nor could it take a position on the question whether the Minister's argument of a de facto change of the Hungarian population due to immigration was correct. It is for the legislature (and not the Constitutional Court) to assess these issues.

The Constitutional Court also held that the last sentence of Article XIV(4) of the Fundamental Law is tangential to the specific constitutional problem, as it defines the category of persons not entitled to the right of asylum, and therefore there is no need for an independent interpretation.

The HCC called the attention to the obligation of the State to ensure full protection of the human dignity of all persons, including asylum seekers, residing in its territory (para 55). The whole decision is strongly human dignity oriented, however, the emphasis is not on the individual's right to self-determination, but on the right to self-identity, which is determined by belonging to a community. At the same time, the HCC also indicates that the present case does not involve the question of whether the State guarantees the human rights of asylum seekers or not.

The application of the presumption of reserved sovereignty was also explained and – more importantly – restricted by the HCC: it may only be invoked exceptionally and only if the deficient exercise of the common competences does manifestly not ensure the effective application of Union law leading to a breach of fundamental rights. Even in such a case, Hungary is entitled to exercise independently a competence falling under Article E(2) of the Fundamental Law only until the European Union or its institutions have created the guarantees for the effective enforcement of Union law; and shall be entitled to exercise such powers only in a manner consistent with the EU Treaties. It is also a precondition that Hungary draws the attention of the European Union to the need to exercise this power jointly (para 80). However, the Constitutional Court did not specify which Hungarian organ is obliged to indicate the need for the joint exercise of powers and what is the appropriate procedure for doing so. Nor did it assess what the situation is when the Member State itself obstructs EU legislation in the area in question.

The HCC has thus removed itself from the sensitive political issue concerning the primacy of EU law

and has also not built a legal barbed-wire fence. It avoided a full-blown Polish like conflict with the EU. The consequences of that kind of conflict were clear to see.

One should, however, not forget that the EU still did not approve the Hungarian recovery plan, leaving more than 7 billion euros in limbo. It is sure that a full-blown constitutional conflict would cause further uncertainties, and hence it was only rational to withdraw from a symbolic battlefield.

ABOUT THE AUTHORS

Nóra Chronowski
Nóra Chronowski is a Professor of Constitutional Law and Senior Researcher at the Institute for Legal Studies, Centre for Social Sciences, Budapest, Hungary.
Attila Vincze
Attila Vincze is a senior lecturer at the Judicial Studies Institute of Masaryk University, Brno.Attila Vincze is a senior lecturer at the Judicial Studies Institute of Masaryk University, Brno.

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