Coping Strategies of the Hungarian Constitutional Court since 2010

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The very first step of Viktor Orbán's Fidesz party after its 2010 electoral victory towards an 'illiberal' constitutional regime was to substantially limit the once very broad review powers of the Constitutional Court by withdrawing its competence to review financial laws and abolishing popular action. The Fidesz government also started to pack the formerly activist Court with loyalist. By 2013, the majority, later the body as a whole, was appointed by Fidesz without any consensus with other parliamentary parties. Before 2013, the Court used some cautious strategies to keep a certain autonomy in the midst of threats to lose its independent status altogether by becoming part of the Supreme Court.

Cautious Resistance

Right after Fidesz, in 2010, started to curtail the Court's power and pack the Court via amendments to the 1989 constitution by filling two vacancies and expanded the number of judges from 11 to 15 to giving themselves more seats to fill, the old judges, still in clear majority, missed an opportunity to review the substance of the constitutional amendments (Decision 61/2011. (VII.13.) AB). When, in April 2011, Fidesz enacted its new constitution, the so-called Fundamental Law, the Court reviewed the Transitory Provisions, an omnibus constitutional addendum to it. Among other things, this reduced the retirement age for judges on ordinary courts from 70 to 62, starting on the day the new constitution went into effect. This change forced 274 judges into immediate early retirement. Those judges include six of the 20 court presidents at the county level, four of the five appeals court presidents and 20 of the 80 Supreme Court judges. In July 2012, the Constitutional Court declared that the suddenly lowered retirement age for judges was unconstitutional (Decision 33/2012 (VII.17.) AB). But by the time the Court ruled, all the judges had already been fired, and the Constitutional Court decision was silent about the fate of the judges.

At the very end of 2012, the Court held that those parts of the Transitional Provisions of the Fundamental Law that are not transitional in nature could not be deemed part of the Constitution and were therefore invalid (Decision 45/2012. (XII. 29.) AB). This non-constitutional status of the annulled Transitional Provisions made it possible for the Constitutional Court to review the substance of some of the cardinal laws, requiring a two-third majority that said the same thing as the corresponding parts of the Transitional Provisions. Most of the provisions struck down by the Constitutional Court when it reviewed the Transitional Provisions were also embedded in cardinal laws that the Parliament had passed earlier, and with these provisions now 'demoted' from constitutional status by the Court's ruling, the Court then undertook to review the almost identical provisions in the cardinal laws. Among these reviewed and annulled laws was one on voter registration, which the Court found unconstitutional on substantive grounds because it constituted an unnecessary barrier to voting (Decision 1/2013. (I. 5.). *AB*). Also, the decision on the constitutionality of the cardinal law on the status of churches declared parts of the law regulating the parliamentary registration of churches unconstitutional, because the provision failed to guarantee procedural fairness in the parliamentary process through which churches were certified (Decision 6/2013. (III. 1.) *AB*.) The fact that the government was defeated in the voter registration and church registration cases shows that, even though the Fidesz government by that time had elected seven of the 15 judges with the votes of their own parliamen-

tary bloc, these judges were still not a reliable majority in the Court. (This happened only in February 2013, when the eighth Fidesz judge joined the bench, followed by the ninth in April.)

The resistance of the Court was certainly the main reason for the government to limit the Court's influence even further. But the Court's earlier reluctance to review the substance of constitutional amendments provided an opportunity for the government to add the annulled provisions into the Fourth Amendment of the Fundamental Law. In response to the Court's decisions, the Fourth Amendment elevated the annulled permanent provisions of the Transitional Provisions into the main text of the Fundamental Law, with the intention of excluding further constitutional review, while the amendment also prohibited the Constitutional Court from reviewing the substantive constitutionality of constitutional amendments. A number of other statutory provisions that were previously annulled by the Constitutional Court have also become part of the Fourth Amendment. One of the reversals of a declaration of unconstitutionality has been the authorization for both the national legislature and local governments to declare homelessness unlawful in order to protect 'public order, public security, public health and cultural values.' (Art. 8 of the Fourth Amendment to the Fundamental Law.) The Constitutional Court had declared the prohibition of homelessness as a status unconstitutional because it violated the human dignity of people who could not afford a place to live (Decision 38/2012. (XI. 14.) *AB*.) But the power to make homelessness unlawful has now been placed into the Constitution and beyond the reach of the Constitutional Court so it cannot be reviewed again. At the end of 2012, the Court had annulled the definition of the family in the law on the protection of families because it was too narrow, excluding all families other than very traditional ones consisting of opposite sex married parents with children (Decision 43/2012. (XII. 20.) *AB*). The Fundamental Law defined marriage as taking place only between men and women. It establishes the parent-child relationship as the basis of the family, excluding not only same-sex marriage, but also all non-marital partnerships. The Fourth Amendment, therefore, overruled yet another Constitutional Court decision.

In addition, the Fourth Amendment also barred the Court from relying on any cases decided prior to 2012 under the previous Constitution. On one level, this made sense, because constitutional court decisions cannot rely on outdated constitutional provisions. But till 2013, the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions was substantially the same, the opinions of the prior Court would still be valid and could still be applied. In cases in which the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment prohibits the reliance to cases that defined and protected constitutional rights and harmonized domestic rights protection to comply with European human rights law.

Fight for Survival?

Ever since the final packing of the Court in 2013, the judges have never contradicted the government in any case politically important, but rather rubber stamped all requests addressed to them. This was the case in 2016, after the first, failed attempt of the Seventh Amendment to the Fundamental Law aiming at explaining the non-compliance of the Hungarian government with the European relocation plan for refugees. The Constitutional Court with its Decision 22/2016. (XII.5.) AB came to the rescue of Viktor Orbán's constitutional identity defence of its policies on migration abusing the concept. On the basis of the review of the case law of many of the Member States' supreme and constitutional courts, including the German Federal Constitutional Court, the Hungarian justices established that they can examine whether exercising competences by the EU on the basis of Article E) (2) of the Fundamental Law results in the violation of human dignity of Hungarian citizens, 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.

In its decision 3/2019. (III. 7.) AB, the Constitutional Court decided on the constitutionality of certain elements of the 'Stop Soros' legislative package, named after the Hungarian-American philanthropist George Soros, which criminalized NGOs and activists aiding 'illegal migrants in any way.' The Court ruled that the criminalization of 'facilitating illegal immigration' does not violate the Fundamental Law. The Court again referred to the constitutional requirement to protect Hungary's sovereignty and constitutional identity to justify this clear violation of freedom of association, freedom of expression hiding behind the alleged obligation to protect Schengen borders against 'masses entering uncontrollably and illegitimately' the EU. Besides infringing the rights of the NGOs, the decision deprives all asylum seekers of the protection of all fundamental rights by stating that "the fundamental rights protection (...) clearly does not cover the persons arrived in the territory of Hungary through any country where he or she had not been persecuted or directly threatened with persecution. Therefore, the requirements set forth by the Fundamental Law regarding the restriction of fundamental rights shall not be applied to the regulation of the above listed cases". With this the Court denies the core of human dignity for migrants, the right to have rights, while protecting the Hungarian citizens' human dignity against them.

In early 2021 the Minister of Justice again filed a notion on behalf of the government with the Court, asking the judges to rule that the judgment of the Court of Justice of the European Union from 17 December 2020 (Case C-808/18) cannot be implemented in Hungary. In this decision, the CJEU ruled that the Hungarian law allowing for the push-back of asylum-seekers from all over the country to the Serbian side of the border fence without initiating any formal procedure is against EU law. The government's petition aimed to disregard the ECJ decision requiring Hungary to allow asylum-seekers to wait inside Hungary for the processing of their cases with reference to the national constitutional identity pertaining to territory and population.

But in its decision 32/2021 (XII. 20.) AB, the Court refused to rule on the disapplication of the judgment, arguing that such a concrete question could not be asked through a request for abstract constitutional interpretation. Apart from this important and exceptional withdrawal from a direct assault on the primacy of EU law, the Court did not retreat from its abusive interpretation of Hungary's constitutional identity by arguing that "Where the incomplete effectiveness of the joint exercise of competences [...] leads to consequences that raise the issue of the violation of the right to identity of persons living in the territory of Hungary, the Hungarian State shall be obliged to ensure the protection of this right within the framework of its obligation of institutional protection.[...]The protection of the inalienable right of Hungary to determine its territorial unity, population, form of government and State structure shall be part of its constitutional identity."

Conclusion

In other words, the Court, in this latest decision, has not changed its abusive interpretation of national constitutional identity, backing up the government's intention not to comply even with the very weak EU efforts of solidarity with migrants. There has been one single dissenting opinion attached to the decision, arguing against the misuse of the concept of human dignity for the protection of Hungarian citizens against migration. (Accompanied by another dissent defying the concept of human dignity altogether.) And there has only been two judges, who in their concurring opinions said that the reasoning of the decision should have mentioned the primacy of EU law.

What could be the reason for these judges, otherwise loyal to the government, backing down from the request of the Minister of Justice to declare the CJEU decision as unconstitutional? One possible explanation is that for the case of a possible change of power as a consequence of the forthcoming April 2022 parliamentary elections, they wanted to send a signal to the that time opposition parties, which were already boil-

ing plans how to get rid of the members of the packed Constitutional Court. But at the same time the President of the Court in an open letter dated on 14 December 2021 and addressed to the President of the Republic, the Prime Minister and the Speaker of the Parliament he asked for the protection of democracy and rule of law by those who together with the Court itself have been responsible for destroying the it ever since 2010. This loyalty oath seemed to be necessary, as Viktor Orbán's Fidesz party has won the 2 April 2022 elections again with a two-third majority required to change the status and the composition of the Court, or even abolishing it altogether any time they wish to do so.

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