accordance with the basic principles of international law and in the spirit of cooperation. As the findings of the Constitutional Court decision demonstrate, the positions of the ECHR and the Russian Federation have much more in common than it seems at first sight.

The decision has attracted special interest in the light of recent statements by a number of Russian politicians about the necessity of deleting Article 15(4) of the Russian Constitution because it enshrines priority to international treaties over federal legislation and thus is viewed as encroaching on national sovereignty. To be sure, such statements have very little to do with reality, since acceptance by the state of treaty obligations is not a limitation on sovereignty when it is done on the basis of free will and takes into account the relevant national interests. However, since there are growing concerns about unduly broad interpretations of international agreements, influencing the very nature of international law which is based on consensus, it is entirely reasonable to take a delicate approach to the assessment of decisions of international judicial and quasi-judicial bodies.

A.Kh. Abashidze, M.V. Ilyashevich and A.M. Solntsev
RUDN University
doi:10.1017/ajil.2017.31

European Union law—relationship to national constitutions—role of national constitutional courts—sovereignty—national constitutional identity—fundamental rights—ultra vires *review*

Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E)(2) of the Fundamental Law. *At* http://hunconcourt.hu.
Constitutional Court of Hungary, December 5, 2016.

In a case of first impression, the Constitutional Court of Hungary (CCH or Court) ruled on November 30, 2016 that, in exceptional cases, it is competent to consider whether Hungary's obligations to the European Union (EU) violate fundamental individual rights (including human dignity) or Hungarian sovereignty as protected by the Hungarian Constitution.[1] The decision places Hungary squarely within the growing group of EU member states whose constitutional courts have decided that, despite the decisions of the European Court of Justice regarding the primacy of EU law, EU member states are not compelled to violate their domestic constitutional obligations in carrying out their shared EU commitments.

The proceeding arose in the context of a disagreement between Hungary and the EU about the mandatory relocation of asylum seekers to member states pursuant to the EU Council's Decision 2015/1601 of September 22, 2015. That decision established provisional measures in the area of international protection for the benefit of Italy and Greece and, in the specific case, resulted in the transfer of 1,294 migrants to Hungary. The Hungarian Commissioner of Human Rights (i.e., the national ombudsman) considered that, because this "quota" decision mandated the transfer of a specific group of individuals without their consent and without

[1] Decision 22/2016 (XII.5), AB on the Interpretation of Article E) (2) of the Fundamental Law (Const. Ct. Hung. Nov. 30, 2016), *available* (in English) *at* http://hunconcourt.hu/letoltesek/en_22_2016.pdf [hereinafter Decision].

regard to their particular circumstances or the merits of their claims to asylum, it would amount to a collective expulsion contrary to otherwise applicable EU requirements. The question put to the CCH by the commissioner was whether the participation of relevant institutions of the Hungarian state in implementing this decision would violate the unconditional prohibition on collective expulsions contained in Article XIV(1) of the Fundamental Law of Hungary (FL) or whether that article should be interpreted to apply only to those cases when foreigners must leave the territory of Hungary as a specific result of the decision of the relevant bodies of the Hungarian government.

More broadly, the CCH was faced with deciding whether the bodies and institutions of the Hungarian State are entitled or obliged to implement measures adopted within the EU's framework of interstate cooperation if such measures conflict with the provisions of the FL, and whether the relevant EU provisions can authorize the Hungarian state to undertake acts it is not otherwise authorized to carry out because of their *ultra vires* character.

Hungary acceded to the European Union in 2004, several years before its National Assembly (or parliament) adopted a new Constitution, the FL, in 2011. That Constitution entered into force a year later.[2] In general, Hungary follows a dualist approach to international treaties by requiring their legislative implementation, while some other sources of public international law become part of domestic law automatically. But under Hungarian law, the country's obligations pursuant to European Law enjoy a privileged position, more favored than general treaties. A specific provision in the FL (the "EU integration clause") provides as follows:

> (1) In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity.
>
> (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 set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union.
>
> (3) The law of the European Union may, within the framework set out in Paragraph (2), lay down generally binding rules of conduct.
>
> (4) For the authorization to recognize the binding force of an international treaty referred to in Paragraph (2), the votes of two-thirds of the Members of the National Assembly shall be required.[3]

After the 2007 Lisbon Treaty entered into force, the CCH (like many other constitutional or supreme courts within the EU) had occasion to examine the relationship between that treaty and their own national constitutions. In its so-called "Hungarian Lisbon Decision"

[2] However, at the time of accession, Hungary's approach to EU law was governed by the so-called "EU integration clause," which had been put into the previous constitution in 1989. The Fundamental Law of Hungary's article on the treatment of international law resulted in some minor amendments as compared to the previous one, and so did the new "integration clause."

[3] Fundamental Law of Hungary, Art. E, paras. 1–4, *available* (in English) *at* http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf (official translation).

https://doi.org/10.1017/ajil.2017.32 Published online by Cambridge University Press

in 2010,[4] the CCH held that the Act promulgating the Lisbon Treaty in Hungary was not contrary to the Hungarian Constitution because the treaty "did not create a European superstate [but] was adopted and ratified by sovereign member states, agreeing to share partially their sovereignties by using the method of supranational cooperation."[5]

However, that decision did not address the relationship between the two legal orders in its entirety. Notably, the Lisbon Treaty expanded the circle within which the EU legislative institutions may create law binding on member states, even if one or more of them oppose the legislation in question. Since the relevant EU institutions have been significantly empowered by the Lisbon Treaty, the possibility exists that those institutions can create a binding rule of law that conflicts with the laws (or even the constitutions) of member states. For its part, the Court of Justice of the European Union (CJEU), which is the only judicial organ empowered to interpret the founding treaties authoritatively, has given the EU legal order primacy of application over national legislation, including constitutions, even though it has no power to nullify national legal acts contrary to EU law.[6]

It was in this context that the CCH addressed the specific issues put before it by the National Commissioner of Human Rights. The issues first arose as a political debate between Hungary and the EU's institutions when the EU Council adopted two decisions regarding the relocation of third-country nationals (migrants) who applied for international protection upon their arrival in Greece and Italy in 2015 to other EU member states pursuant to certain quotas.[7] Hungary, together with Slovakia, the Czech Republic, and Romania, voted against these decisions (Quota Decisions) while Finland abstained. However, that was insufficient to form a "blocking minority" by which the adoption of an act of the Council could be prevented. Some weeks after the vote, one of the decisions was challenged by Hungary and Slovakia on the basis (among other points) that the EU Council had exceeded its powers and infringed some articles of the founding treaties.[8]

Separately, the Hungarian Commissioner for Fundamental Rights, acting under his constitutional authority to file such requests, asked the Constitutional Court for an interpretation of the relevant articles of the Hungarian Fundamental Law in light of the Quota Decision.

The CCH delivered its judgment at the end of 2016 and, presumably due to the importance of the case, the president of the CCH appointed himself the judge-

[4] Decision 143/2010 (VII. 14), AB of the Constitutional Court of the Republic of Hungary on the Constitutionality of the Act of Promulgation of the Lisbon Treaty, MK 2010/119/h (Const. Ct. Hung. July 12, 2010). For a brief summary of this decision in English, see http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2010-2-007?fn=document-frameset.htm$f=templates$3.0.

[5] *Id.*, para. 2.5.

[6] Case 6/64, Flaminio Costa v. ENEL, 1964 ECR 585, *available at* http://eur-lex.europa.eu. It is also true that the EU member states never put the principle of primacy expressly into founding treaties; only a non-binding declaration was attached to the Lisbon Treaty in 2007 that refers to this issue. *See* Declaration Concerning Primacy, Annexed to the Final Act of the Intergovernmental Conference, 2008 OJ (C 115), *at* http://eur-lex.europa.eu/oj/direct-access.html.

[7] Council Decision (EU) 2015/1523, 2015 OJ (L239/146) (establishing provisional measures in the area of international protection for the benefit of Italy and of Greece); Council Decision (EU) 2015/1601, 2015 OJ (L248/80) (establishing provisional measures in the area of international protection for the benefit of Italy and Greece).

[8] Case C-643/15, Slovak Repub. v. Council of the EU (pending); Case C-647/15, Hungary v. Council of the EU (pending). The Court of Justice of the European Union might deliver its judgment in the second half of 2017.

https://doi.org/10.1017/ajil.2017.32 Published online by Cambridge University Press

rapporteur.[9] After describing the specific request from the Commissioner of Fundamental Rights, the Court offered an overview of the relevant decisions of EU member states' own constitutional or supreme courts, as well as the CJEU's relevant case law, before turning to the merits (paras. 32–45).

On the basis of its review, the CCH concluded, somewhat cautiously, 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 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) and the constitutional self-identity of Hungary. (Para. 46)

Here it is important to note that, with regard to the Fundamental Law, the CCH's case law distinguishes between "traditional" international treaties and the founding treaties of the EU and, in doing so, it treats the EU's legal order as an entirely separate body of law. The joint exercise of competences under the EU treaties is subject to two main limitations: it must not infringe the sovereignty of Hungary ("sovereignty control") or its constitutional identity ("identity control"). These limitations derive from the Hungarian Constitution and are not within the EU's legal competence (paras. 54, 56).

As to the former, the CCH held that in joining the EU, "Hungary ha[d] not surrendered its sovereignty [but only] allowed for the joint exercising of certain competences . . ." together with other member states (para. 60). For this reason, "the maintenance of Hungary's sovereignty should be presumed when judging upon the joint exercising of further competences additional to the rights and obligations provided in the Founding Treaties of the European Union . . ." (*id.*). The Court further described constitutional identity broadly, not consisting of "static and closed values," and it reserved its right to pronounce them on a case-by-case basis (paras. 64–65). In general, it said, Hungary's constitutional identity encompasses fundamental freedoms, internal allocation of governmental powers, a republican form of government, exercise of lawful authority, respect of autonomies under public law, freedom of religion, parliamentarism, equality of rights, acknowledging judicial power, and protection of the nationalities living in Hungary (para. 65).

The CCH also proclaimed that "the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law—it is merely acknowledged by the Fundamental Law" (para. 67). Therefore, the CCH said, that constitutional identity cannot be waived by ratifying an international treaty, but can only be removed by terminating Hungary's sovereignty and independent statehood (*id.*).

Based on all these considerations, the Court concluded that it is entitled, in a given case, to examine whether the joint exercise of EU competences violates either the identity of Hungary based on its "historical constitution," questions of human dignity (another fundamental right), or the sovereignty of Hungary (para. 69).

[9] The judge-rapporteur is chosen from the fifteen members of the Constitutional Court of Hungary by the president to work on the given case and to draft the judgment. The president may also choose himself/herself to act as a judge-rapporteur, though it rarely occurs.

https://doi.org/10.1017/ajil.2017.32 Published online by Cambridge University Press

Decisions of the Court are delivered by a majority vote in the plenary session, and judges may attach either a concurring or a dissenting opinion thereto. In this case, five members of the Court did submit concurring opinions, while one judge dissented. The concurring opinions highlighted either the possible limits of such reviews or the lack of a human rights approach within the ruling as well as the laconic character of the reasoning. One judge wished to restrict the right of initiating such reviews strictly to the government. Finally, the dissenting judge opposed the decision on the ground that the CCH had not fully responded to the questions of the ombudsman.

* * * *

In this case, the CCH was faced with a number of issues that the constitutional courts of some EU member states have already had to address: the relationship between national constitutional courts and the CJEU, the question of the treatment of *ultra vires* acts of the EU, and the definition and protection of national constitutional identity under the so-called "identity clause" in Article 4(2) of the Treaty on European Union (TEU).[10] While this was not the first time the CCH has addressed the relationship between EU law and Hungarian law, it was the first occasion for the Court to consider the possibility of reviewing (and perhaps displacing) EU law, and accordingly the decision was highly anticipated politically.

It is particularly interesting to note that, in reaching its decision, the Constitutional Court expressly referred to and summarized the most relevant case law of other EU member states' constitutional courts, thus emphasizing the importance of judicial dialogue between those courts themselves and with the CJEU. In this connection, it seems that the Constitutional Court views the German Federal Constitutional Court (the *Bundesverfassungsgericht*) as its greatest influence. In and of itself, that is not problematic, but the Court's approach appears somewhat oversimplified (a "cut-and-paste" affair) that failed to provide a deeper dogmatic analysis of why the Hungarian and German constitutional systems do or should share the same constitutional core or follow the same avenues of control. A deeper, more nuanced elaboration could have provided more convincing reasoning.

Essentially echoing the approach of the *Bundesverfassungsgericht*,[11] the CCH introduced two novel elements of review in this decision: a "fundamental rights reservation," and an *ultra vires* review which encompasses both sovereignty control and identity control. As for the first, the CCH positioned itself as the *ultima ratio* defender of human dignity and the core of other fundamental rights, stating that it has to ensure the protection of these rights even in relation to competences exercised jointly with other states within the EU framework. To some extent, this echoes the landmark *Matthews* judgment of the European Court of Human Rights, which stated that member states had to guarantee the rights contained in the European Convention on Human Rights regardless of the fact that they joined a supranational community.[12]

[10] Consolidated Version of the Treaty on European Union, 2016 OJ (C 202) 13.

[11] As summarized most recently in its outright monetary transactions decision: BVerfG, Judgment of the Second Senate of 21 June 2016, 2 BvR 2728/13, *available* (in English) *at* https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html;jsessionid=A3A4EF1159F040E47A225CAB0A381CB6.1_cid383.

[12] Matthews v. United Kingdom, App. No. 24833/94, 28 Eur. H.R. Rep. 361 (1999).

https://doi.org/10.1017/ajil.2017.32 Published online by Cambridge University Press

The first element of the *ultra vires* review concerned "sovereignty control." The Court clearly considered sovereignty to be the ultimate source of all state competences and that among its critical tasks as a constitutional court is ensuring control by the people over the exercise of public authority, whether exercised individually or jointly with other states. It said that this obligation is reflected first in the requirement that the National Assembly must accept the binding force of any international treaty resulting in the joint exercise of competences in the EU framework by a two-thirds majority, and second in exceptional cases by the exercise of the right to a referendum as provided in the FL. While the first part of this statement is unquestionable, the intended meaning of the latter part is less clear. It cannot mean that the people, by way of a referendum, could overturn legal acts of the EU in individual cases. The CCH failed to note that referenda on certain issues are expressly prohibited by FL Article 8(3), including, in particular, any obligation arising from international treaties.[13]

The "identity control" element is based on a recognition of the content of TEU Article 4(2), with the CCH taking the view that the national identity of Hungary needs to be ensured "with" the CJEU, in the spirit of cooperation based on mutual respect and equality of the courts involved. The CJEU also takes the view that a "spirit of cooperation . . . must prevail" between the courts.[14] However, in its decision, the CCH did not even consider requesting a preliminary ruling from the CJEU. On the other hand, it did attempt to define the constitutional identity of Hungary for the first time. In holding that identity is not a static, closed catalogue of values, the Court committed itself to elaborating the meaning of the concept on a case-by-case basis in the future as necessary. It gave a non-exhaustive list of elements (summarized above) and added that these values were also achievements of Hungary's historical constitution. The question of what exactly the historical constitution contains is not clear and thus brings some uncertainty to the definition. The examples that the CCH mentioned regarding when the need for protection of constitutional identity may arise were, surprisingly, taken essentially word for word from the Lisbon Decision of the German Federal Constitutional Court.[15] There was no mention of the German decision in this regard, and no explanation of the total overlap of central core values.

Further, the fact that the Constitutional Court stated that constitutional identity is not established but only recognized by the FL, and cannot be relinquished not even in an international treaty, implies the existence of an "invisible constitution" which cannot be changed. It should be noted that the FL contains no *Ewigkeitsklausel* (or "eternity clause") providing that it cannot be changed by amendment. In his concurring opinion, Judge Stumpf warned that decoupling constitutional identity from the Fundamental Law would lead to an identity interpreted in unclear ways and would in fact be unconstitutional, as the CCH has the duty to protect the Fundamental Law.[16]

[13] The same concern was noted in the concurring opinion of Judge István Stumpf. Decision, Concurring Op., Stumpf, J., *supra* note 1, para. 106.

[14] *See, e.g.*, Case C-144/04, Mangold v. Helm, 2005 ECR I-9981, para. 36.

[15] BVerfG, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, para. 249.

[16] Decision, Concurring Op., Stumpf, J., *supra* note 1, para. 107.

https://doi.org/10.1017/ajil.2017.32 Published online by Cambridge University Press

The CCH's acknowledgment that it could not rule on the invalidity or the primacy of application (or lack thereof) of EU law is clearly correct as a matter of EU law. Given the possibility of a conflict, one must nonetheless ask, if the CCH can *examine* EU law in line with the fundamental rights reservation and the *ultra vires* control but cannot *rule* on the aforementioned questions, what would be the legal consequence of such an examination (apart from declaring the outcome)? Several possibilities come to mind based on the previous case law of the CCH.[17] As a first step, Hungary could try to amend the relevant international treaty. If it failed to do so, the relevant state bodies could terminate the treaty in question. If termination would be against the interests of Hungary, then the FL would have to be amended as an *ultima ratio*. However, as the constitutional identity of Hungary cannot itself be amended, the governing bodies would have to choose between the first two options in a relevant situation.

From the point of view of EU law, the CCH's decision is particularly significant because references to national constitutional identity by national courts (and the CJEU itself) have recently become more frequent. Even though the identity clause has not yet been addressed by the CJEU in a broader context, it has in fact been mentioned in nine preliminary rulings, an infringement procedure, and an action for annulment[18] before the General Court. The CJEU demonstrated its willingness to protect member states' national identity in the *Omega* case[19] and has effectively placed national identity before internal market in its judgment in the pre-Maastricht *Groener* case.[20]

It is apparent that until now, the majority of references to Article 4(2) have stemmed from preliminary ruling cases, supporting the idea that this "communication channel" between national courts and the CJEU has the potential to serve as a useful tool in clarifying the scope and meaning of the identity clause. However, the CJEU has mostly relied on the clause as a supporting or subsidiary argument, as in the recent judgment holding that the German prohibition on titles of nobility should be considered an element of Germany's national identity in the sense of TEU Article 4(2).[21] It would seem therefore that national constitutional identity serves as an underlying rationale of justified restrictions on the fundamental freedoms guaranteed by EU law based on public policy. From TEU Article 4(2) itself, however, it seems more likely that considerations of public policy should be viewed as an element of national identity as such, and not vice versa. The clause is construed as a legal obligation of the EU, not just as a statement of principle with a mere interpretative function.[22]

Interpreting national constitutional identity is a complicated issue in and of itself, and there is disagreement about what the concept means in this context. National constitutional courts

[17] Decision 4/1997 (I. 22), AB on the Review of International Treaties (Const. Ct. Hung. Feb. 22, 1997), *available* (in English) *at* hunconcourt.hu/letoltesek/en_0004_1997.pdf.

[18] Case T-529/13, Izsák & Dabis v. Comm'n, 2016 OJ (C222/12). The application was dismissed, the appeal by the applicant is pending before the Court of Justice (Case C-420/16 P).

[19] Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, 2004 ECR I-9609.

[20] Case C-379/87, Groener v. Minister for Education, 1989 ECR I-3967.

[21] Case C-438/14, von Wolffersdorff v. Standesamt der Stadt Karlsruhe, ECLI:EU:C:2016:401, para. 64 (note that the German prohibition on titles of nobility is non-absolute, not strict).

[22] Armin Von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy, Respect for National Identity Under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417 (2011).

https://doi.org/10.1017/ajil.2017.32 Published online by Cambridge University Press

are, however, taking an increasing interest in utilizing the concept, and it will be interesting to see how further case law unfolds and whether national courts and the CJEU engage in increased judicial dialogue on the question of the true meaning and relevance of national constitutional identity.

Ágoston Mohay
University of Pécs
Norbert Tóth
National University of Public Service
doi:10.1017/ajil.2017.32