

# **Sovereignty and Identity**

## **from the Perspective of the Constitutional Court of Hungary<sup>1</sup>**

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### **Introduction**

As the title of my paper indicates, this short paper will be dealing with the ideals of sovereignty and national identity. These two concepts have always been in the centre of heated debates between the member states and the EU. European lawmakers, law scholars, judges and legal professionals have also realized the necessity of elaborating these concepts. There have been several attempts to give a clear definition of sovereignty and national identity and, in particular, to interpret their meaning within a European context and on a national level. In my paper I would like to demonstrate and explain how the Hungarian Constitutional Court has dealt with these questions and how it transformed these scholarly abstractions into binding law in its landmark decision of 2016.

### **1. The Message**

I start by summarizing the central idea and main message of my paper which truly reflects the views of the HCC. In the current stage of the unification process within the European Union, only the sovereign member states can safeguard the individual's right to control decisions affecting his or her ethnical, religious or historical attributes (i.e. national identity). I think that first we have to start by raising an intriguing, but very important question: Where is the highest court of justice in the EU? In Luxembourg, Strasbourg, Karlsruhe or Budapest?

If we are looking for the right answer, we have to understand the complexity of the legal background. The protection of fundamental rights is no longer a purely national issue. The three cornerstones of fundamental rights are the following:

- Fundamental Law of Hungary
- European Convention on Human Rights (instrument of international law)
- EU Charter of Fundamental Rights (EU law)

As a result, there exist

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<sup>1</sup> Present paper is the written version of a lecture given in Saint Petersburg, Russia on the 15th May 2018.

- three similar catalogues of fundamental rights, and
- three different courts of justice claiming primacy (ECHR, CJEU, national constitutional courts)

## **2. New Challenges – New Answers**

In addition, we have to consider other important factors which we are faced with not only on European but also on a global level. Today, mass migration poses serious problems globally. When addressing these issues, the constitutional courts have to proceed with equal care both in respect of individual human rights and national identities. Let me continue by putting forward our conclusions and the concept developed by the HCC in its landmark ruling.

The challenges that we are facing nowadays in the context of fundamental rights cannot be addressed exclusively in Strasbourg, Luxembourg, Karlsruhe or Vienna. Therefore, we need a strong and well-functioning European network of constitutional courts (in German: *Verfassungsgerichtsverbund*). The Hungarian Constitutional Court transformed this scholarly abstraction into binding law.

What is the background of this groundbreaking declaration?

The legal grounds were already laid down in the Lisbon Treaty, Article 4 (2) first sentence of the (Lisbon) Treaty on European Union states:

*„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.”*

Article E (2) Fundamental Law of Hungary stipulates:

*„In order to participate in the European Union as a Member State, and on the basis of an international treaty, Hungary may, to the extent necessary, 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.”*

## **3. The Hungarian contribution to the dialogue**

And now, let's have a closer look at the landmark decision of the HCC. Our position is embodied in a decision [No. 22/2016. (XII. 5.)], in which the Hungarian Constitutional Court

provided an abstract interpretation of Article E) of the Fundamental Law (concerning the EU membership of Hungary). The HCC declared:

*„the Constitutional Court might examine upon a relevant motion [...] whether the joint exercise of powers through the institutions of the European Union would violate human dignity, or another fundamental right, the sovereignty of Hungary or its constitutional identity based on the country's historical constitution.”*

In the following part of my paper I will give you a summary of this decision.

#### **4. The decision of the Hungarian Constitutional Court**

First, I describe the background of the decision. The interpretation of the Fundamental Law was requested from the Constitutional Court by the ombudsman. The petition contained two relevant questions summarised as follows:

1. Are the authorities of the Hungarian State obliged to implement, on the basis of Article E) paragraph (2) of the Fundamental Law, EU measures that violate the fundamental rights?
2. Can Article E) paragraph (2) of the Fundamental Law restrict the implementation of a legal act of the Union which is not based on the competences transferred to the European Union in the Founding Treaties?

Upon examining the first question related to fundamental rights, the Hungarian Constitutional Court established that

- the European Union provides adequate protection for the fundamental rights through the Charter of Fundamental Rights and the Court of Justice of the EU, and
- the HCC must guarantee that the joint exercise of competences does not result in violating human dignity or the essential content of other fundamental rights.
- Now, let's see how the HCC formulated its response. In its answer to the question of the ultra vires legal acts of the EU, the Hungarian Constitutional Court held that
- the joint exercise of a competence shall not violate Hungary's sovereignty,
- the joint exercise of a competence shall not lead to the violation of its constitutional identity, and
- the protection of constitutional identity should take the form of a constitutional dialogue based on the principles of equality and collegiality, which must be

implemented with mutual respect in close cooperation with the Court of Justice of the European Union.

More importantly, the HCC also laid down the foundations of the concept of constitutional identity when in its decision the HCC defined Hungary's constitutional identity and stated that

- the HCC develops the content of this concept from case to case.
- Constitutional identity cannot be regarded as a list of static and closed values, e.g.: division of powers, freedom of religion, parliamentarism, equality of rights, acknowledgment of judicial power, and protection of nationalities.

These are, among others, the achievements of our historical constitution, upon which the Fundamental Law and the whole Hungarian legal system are based.

The HCC also addressed the issue of Hungary's sovereignty and held that

- „as long as 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 made ineffective by the Union-clause in Article E”, and
- „the joint exercising of competences shall not result in depriving the people of the possibility of possessing the ultimate chance to control the exercising of public power.”

## 5. Conclusions

I would like to conclude my paper by summarizing the cornerstone of the Concept formulated by the HCC. The new global social and political developments clearly demonstrate the following:

- each human being with equal dignity is bound by decisions affecting his or her ethnical, religious or historical attributes (i.e. national identity) which are partly independent from his or her own will or decision
- our priority and common aim should be the protection of national identity in order to defend the underlying human dignities,
- there is no effective protection of national identity without preserving some parts of sovereignty of Member States, and
- for this reason we need an ongoing dialogue to protect **both** the fundamental rights and our national identities.