Decision 22/2016. (XII. 5.) AB – Constitutional Self-identity of HungaryNóra Chronowski – Boldizsár Szentgáli-Tóth – Attila Vincze

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The HCC may examine whether Hungary's joint exercise of competences with the EU infringes human dignity, other fundamental rights, the sovereignty of the country, or the self-identity of Hungary based on its historical constitution.

Upon the motion of the Commissioner for Fundamental Rights (Ombudsman), the HCC reviewed the relationship between EU law and the FL in the context of the planned relocation quota system for refugees in the EU. The HCC relied upon an extensive international comparison and attempted to identify the constitutional limitations of the primacy of EU law. The HCC has established three main constraints on the supremacy of EU law: fundamental rights, the sovereignty of member states, and the constitutional self-identity of Hungary. As long as Hungary is a sovereign country, its sovereignty and constitutional self-identity is primarily safeguarded by the HCC; nonetheless, all other state bodies also have the duty to protect these values. The HCC declared its power to examine whether the exercise of powers transferred to the EU violates human dignity, Hungary's sovereignty or its constitutional identity. In doing so, the Body opened a new chapter in the relationship between EU law and Hungarian domestic constitutional law.[4]noindent

1. Background

The decision was handed down during the escalation of the migration crisis, which significantly divided the Member States. In 2015, in order to alleviate the migratory pressure on Italy and Greece, the European Commission called on Member States to voluntarily accept those refugees from the Mediterranean region who really needed international protection, as an expression of solidarity among Member States. The European Council enacted a resolution by consensus on 20 July 2015, then adopted a decision by qualified majority on 22 September 2015 on the distribution within two years of 40 000 asylum seekers according to quotas in the various Member States of the EU.[5] Hungary and Slovakia sought legal remedy at the CJEU

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[4] Mohay and Tóth, 'Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E)(2) of the Fundamental Law' (2017), 468.; Körtvélyesi and Majtényi, 'Game of Values' (2017), 1721.; Bakó, 'The Zauberlehrling Unchained?' (2018), 863.; Halmai, 'Abuse of Constitutional Identity' (2018), 23.; Kelemen and Pech, 'The Uses and Abuses of Constitutional Pluralism' (2019), 59.

[5] Council Decision (EU) no. 2015/1601 of 22 September 2015.

against the widely contested reallocation mechanism; this application was dismissed[6] and the Ombudsman raised almost the same questions in an internal constitutional context.

In this situation, an unsuccessful referendum was organised in Hungary about the quota-system on 2 October 2016,[7] but the government considered it as politically effective and a few days later, on 10 October 2016, a motion was submitted to amend the FL[8] with the aim of prohibiting 'resettlement of a foreign population in Hungary' and to protect 'our constitutional identity rooted in the historical constitution', and to restrict further the transfer of powers to the EU. According to this amendment, the joint exercise of powers 'must be in accordance with the fundamental rights and freedoms enshrined in the FL, it may not restrict the inalienable right of disposition on Hungary's territorial unit, population, form of government and state system'. During this period the government did not have a two-thirds parliamentary majority, and the amendment was not supported by Parliament. Nevertheless, the HCC used the essential elements of the considerations contained in the proposal in the interpretation of the Constitution, which can be assessed as an informal constitutional amendment. This was a dramatic change in comparison with the earlier case law which dealt with EU law only tangentially.

2. Petition

On 3 December 2015, the Ombudsman requested from the HCC an interpretation of Articles E) and XIV of the FL, on the question of whether the implementation of EU decisions regarding the distribution of migrants and refugees would violate the constitutional prohibition on the collective expulsion of certain groups.[9]

Although the demand for an interpretation of Article E) was indeed logical, it is doubtful to what extent this issue is the Ombudsman's duty. The interpretation of Article XIV, i.e. the problem of the prohibition on collective expulsions, is more interesting, and an answer was sought to the question of whether the 'unconditional prohibition on group expulsion of foreigners' extends to the 'the instrument of execution carried out by the Hungarian state, which is indispensable for the implementation of an illegal group expulsion carried out by another state'. According to the Ombudsman, the asylum seekers in Italy and Greece have a right to remain in these countries, and their relocation is essentially an expulsion, an indispensable instrument. Consequently, the reception of these asylum seekers in Hungary would constitute such an action, which would be in conflict with the prohibition on collective expulsion.

A further peculiarity of the case was that the HCC did not answer the question of expulsion, which represented a concrete constitutional problem for the Ombudsman from the point of view of his motion. This is not a completely irrelevant issue, because pursuant to Article 38 (1) of the HCC Act, following a motion of the Commissioner for Fundamental Rights, the HCC interprets a provision of the FL in connection with a concrete constitutional problem. However, the HCC in the given case did not interpret Article XIV, but only Article

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[6] C-643/15. *Council v. Slovakia*; C-647/15. *Council v. Hungary,* judgment of 6 September 2017, ECLI:EU:C:2017:631.

[7] Szente, 'The Controversial Anti-Migrant Referendum in Hungary is Invalid' https://bit.ly/3cs2Uca

[8] Document no. T/12458. Submitted: 10. October 2016. https://bit.ly/3qKHrA4

[9] The issue had already been raised in the context of the above-mentioned Council Decision of the EU.

E). Finding an adequate answer would not have been easy anyway, because the Council Decision EU, as the basis of the conflict, on the transfer of asylum procedures, is not a general rule, its implementation was faltering and its personal and temporal scope was limited: it was only valid until 26 September 2017, thus, without the interpretation from the CJEU, it would have been problematic if the HCC had taken a position on it.

3. Decision and its reasoning

Based upon the petition of the Ombudsman the HCC stated that it has competence to review the constitutionality of the joint exercise of powers with the European Union and posited the aspects of this review.

3.1. In exercising its powers, the HCC may examine whether the joint exercise of certain powers by the EU violates human dignity, other fundamental rights, Hungary's sovereignty or self-identity based on its historical constitution [Article E) (2) of the FL].

After having declared the motion as admissible, the Court pointed out that the enforcement of fundamental rights and their adequate protection takes precedence over all other duties of the state, including those following from the primacy of EU law. No Member State may justify violations of fundamental rights by evoking duties based upon EU law, and the exercise of the powers of the EU must not result in a violation of human dignity.

If an EU legal instrument is deemed to be *ultra vires*, the Parliament or the Government of Hungary must take the necessary steps, and may file an action of annulment with the CJEU, alleging infringement of the principle of subsidiarity. The powers of the EU may therefore only be exercised within the constitutional framework of Hungary, which particularly requires the observance of Hungary's sovereignty and constitutional identity. The protection of Hungary's sovereignty and constitutional identity is the constitutional duty of the Parliament and the Government; however, pursuant to Article 24 (1) of the FL its principal guardian is the HCC. The subject of sovereignty and identity review is not directly the act of the EU act or its interpretation, hence the HCC does not judicate upon its validity or invalidity.

According to Article B) of the FL, the source of public power shall be the people in Hungary, and the exercise of powers by the EU cannot override this provision. By allowing the joint exercise of powers with the other Member States by the EU, Hungary did not relinquish its sovereignty, therefore the source of any powers of the EU is the sovereignty of Hungary (the presumption of reserved sovereignty). In the FL the sovereignty is the ultimate source of powers, and is not a competence in itself, so the joint exercise of powers by the EU and its Member States must not result in the people losing ultimate control over the exercise of public power, whether at level of the EU or its Member States. The HCC assessed this as a confirmatory argument for the ratification[10] of the international treaty enabling the joint action, the transfer of powers to the EU which required a two-thirds parliamentary majority, and the possibility of holding a referendum.[11]

Regarding constitutional identity, the HCC relied on Article 4 (2) of the TEU, according to which the EU shall respect the equality of Member States before the Treaties, as well as their national constitutional identities, which form an integral part of their fundamental political and constitutional order, including regional and local authorities. The

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[10] Article E (4) of the FL.

[11] Article XXIII (7) of the FL.

protection of constitutional identity presupposes a cooperation between the CJEU and national constitutional courts based on the principles of equality and collegiality, as well as mutual respect. The constitutional identity of Hungary is not understood as a list of enumerated and static values, nonetheless several of its elements were highlighted by the HCC: the basic freedoms, the division of power, republicanism, respect for autonomy, freedom of religion, the exercise of legitimate power, parliamentarism, equality of rights, recognition of judicial power, and protection of nationalities. According to the reasoning of the HCC, Hungary's constitutional identity is a value that has not been established by the FL; the FL merely acknowledges its existence. Therefore Hungary cannot relinquish it as long as it has sovereignty, and up to this moment the HCC also remains obliged to protect this constitutional identity.

3.2. The HCC attributes great importance to the constitutional dialogue within the EU [Article E) (2) of the FL].

The reasoning outlines the aforementioned ambiguity of EU law as a legal source: the CJEU sees European law as an autonomous legal order, while the sovereignty-based interpretation describes the EU as a community based on the sovereign will of its member states, which can, in the final instance, decide on the limits of the supremacy of European legal instruments. However this should happen through a constitutional dialogue between national constitutional courts and the CJEU.

Regarding ultra vires acts and the reservations in favour of fundamental rights, the HCC considered the practice of other member states as well, (e.g. the Czech Republic, Denmark, the UK, Estonia, France, the Republic of Ireland, Poland, Latvia, Italy, Germany, Spain, and Wales). It is noteworthy, that only such rulings were considered which supported the limitations of the transfer of powers to the EU.

4. Doctrinal analysis

The decision mostly follows the German case law regarding ultra vires and the constitutional self-identity as limits of European integration,[12] which has also been imitated by several national constitutional courts. The HCC literally copied several passages of the OMT Decision of the GFCC.[13]

By enacting this decision, the HCC established a new ground for constitutional review and stated, that 'by exercising its powers, the HCC may examine, on the basis of a motion to that effect', whether the joint exercise of competences with other Member States of the EU infringes certain specific constitutional provisions (fundamental rights, sovereignty), and a so far not only not concretely elaborated, but also almost completely unknown constitutional value, constitutional self-identity. According to paragraph 46 of the reasoning, that power is

[12] An instructive analysis is offered by Wendel, 'The Fog of Identity and Judicial Contestation' (2021), 465. For a broader overview see for instance Berger, *Anwendungsvorrang und nationale Verfassungsgerichte* (2016).

[13] Some also suggest that the HCC misunderstood the German case-law, cf. Martinico, 'Taming National Identity' (2021), 447.

exercised by the HCC 'in exceptional cases and on an *ultima ratio* basis, i.e. while respecting constitutional dialogue between Member States'.

4.1. The new competence and the three tests

In a single sentence of the operative part, the HCC established at least three separate concepts: what does it mean to 'exercise its powers'; what is meant by 'joint exercise of powers' based on an EU empowering provision; and what exactly is the test it applies?

In the operative part of the ruling, the HCC stated, that 'in the exercise of its powers, the Constitutional Court may examine on the basis of a motion to that effect', whether the exercise of competences jointly with other Member States of the EU infringes certain specific constitutional provisions (fundamental rights, sovereignty), and a so far not only not concretely elaborated, but almost completely unknown constitutional value, identity. According to paragraph 46 of the reasoning, that power is exercised by the HCC 'in exceptional cases and on an *ultima ratio* basis, i.e. while respecting constitutional dialogue between Member States'.

The reasoning does not make clear exactly what kind of competence the HCC vested itself with in the operative part. In the context of EU law, starting from the current regulatory environment (the HCC Act), it would have a clear competence only for the preliminary constitutional review of the founding treaties.

For the time being, the consequence of stating this principle of the operative part, namely that 'it may examine […] in the exercise of its powers' may be that the Court will use it as a 'bridge' or 'springboard' in a subsequent procedure, and will concretize in that particular procedure, whether, for example, in the case of the EU decision challenged at that time, or the Hungarian legal act adopted on the basis thereof, the fundamental rights, sovereignty and identity of Hungary are affected, and whether the HCC has jurisdiction in the specific case.

The aforementioned limitation on the exercise of powers is the requirement of exceptionality, the *ultima ratio* character and the requirement for 'constitutional dialogue'. In the decision, the HCC authorized itself to examine whether the exercise of joint competence based on Article E (2) infringes fundamental rights, sovereignty or constitutional identity. The various possibilities of interpretation also relativize the subject matter of the newly established review competence. It is not at all clear to what extent it is possible to examine whether the joint exercise of competence infringes the FL and constitutional identity.

What does the HCC mean by the joint exercise of competence underpinning participation in the EU? The joint exercise of competence can be approached partly on the basis of the way in which it is carried out and partly on the basis of its 'product'.

The way it is carried out can include the participation of Member States, mainly governments, in the EU decision-making process, in which case the actual implementation of the procedure—compliance with procedural rules—can be measured by EU law, and the CJEU can judge whether procedural rules for EU decision-making have been violated. Member States' constitutional law typically includes cooperation between parliament and government in EU affairs, based on the requirement of democratic legitimacy and control.

The latter, i.e. the 'product', raises a wide range of response options, because the joint exercise of competence may result in (i) an amendment of primary EU law through an amendment of the Treaty, (ii) the adoption of a secondary EU legal instrument or individual decision, (iii) a further EU or Member State decision implementing this, (iv) an EU judicial

decision, or (v) ratification[14] of an international treaty concluded by the EU in the Council and before the national parliament, if necessary.

The HCC imposed two restrictions on the examination of EU legal acts. On the one hand, as mentioned several times above, the HCC explicitly stipulated, that 'the subject matter of sovereignty or identity control is not directly an EU act or its interpretation, thus, it does not declare its validity or invalidity or its priority in application' (Reasoning [56]). On the other hand, in the case of EU *ultra vires* acts, it referred the action based primarily on the founding treaty and the regulations of the Parliament to the responsibility of the Government and the Parliament (Reasoning [50]–[51]).

It follows that the HCC, in addition to the parliament and the government, may have an interest in the issue of exceeding its powers, and it does not wish to deal directly with EU legislation or its primacy. In this way, a conflict of competence with the CJEU can indeed be avoided. The question, however, is what the basis and legal consequences of a subsequent decision will be in a case such as *ultra vires* or identity violation. The optimistic scenario is that if such a motion arises in the future, the HCC will ask the CJEU for a preliminary ruling on the above issues, for otherwise it cannot justify a violation of the constitutionality of domestic law.

We face further problems when examining the 'joint exercise of competence', if we approach it from the point of view of what may be the subject of various constitutional court proceedings according to the Hungarian law in force. Exercising ex-post norm control—with the exception of the preliminary examination of compliance with the FL—the HCC may review legislation, normative decisions and orders or decisions on the uniform application of the law [see Articles 24–26, 32, 37 (2) of the HCC Act], and the standard may be the FL or an international treaty.[15] The individual German type constitutional complaint procedure (Article 27 of the HCC Act) examines whether the judicial decision violates the rights guaranteed in the FL.[16] In terms of reviewing other constitutional court proceedings, these—with the exception of the abstract interpretation—typically serve the powers of the HCC to give an opinion, review an individual decision, or establish public liability, i.e. they are not directly relevant from the aspect of the enforcement of EU law. Although German practice allows citizens themselves to lodge a constitutional complaint because of an alleged breach of competence or an alleged violation of their constitutional identity, as expressly permitted by the GFCC in the Maastricht decision (BVerfGE 89, 155.),[17] this results in an *actio popularis*, or at least a constitutional complaint that can be initiated without violating individual public

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[14] Grzeszick, 'Völkervertragsrecht in der parlamentarischen Demokratie' (2016), 1753.

[15] It is worth recalling here that in its practice prior to the introduction of the FL, the HCC expressly excluded the examination of a 'conflict with Community law' in the absence of jurisdiction, as it is a competence of the CJEU. Decision 61/B/2005. AB, ABH 2008, 2201.

[16] It follows from the notion of an individual case and a judge that the proceedings are a judicial decision to be understood in accordance with Hungarian law, which was made on the merits of the case or closes the court proceedings, and there was no final or no legal remedy against it. Articles 27 and 1 of the HCC Act.

[17] Subsequent practice also acknowledged this, cf. BVerfGE 97, 350 – Euro; 123, 267 – Lisbon; 129, 124 – EFS; 130, 318 – Stabilizerungsmechanismusgesetz. See, on the other hand, BVerfGE 1, 396 – Deutschlandvertrag.

law.[18] The recent case law of the HCC is precisely characterized by a miserliness against constitutional complaints, which would be difficult to reconcile with the intensive extension of the right to complain in a particular environment without the charge of constitutional court governance being dismissed.

The conflict of competence is only resolved (Article 36 of the HCC Act) in a procedure in which the HCC reveals to whom (which organ) the exercise or non-exercise of a given power can be attributed. This is the only procedure that directly deals with some kind of (negative or positive) 'exercise of power'. The decisions of the GFCC, which caused a great storm (Maastricht, Lisbon, OMT), also mentioned exactly the exercise of this kind of power, when the parliamentary minority, not necessarily the opposition, but representatives acting on behalf of the Bundestag as litigation commissioners (Prozessstandschaft), appealed to the HCC alleging that the current government or the Bundesbank had exceeded its powers.[19]

Pursuant to Article 36 (1) of the HCC Act, in the interpretation of conflicts of jurisdiction between public bodies the HCC must be significantly more innovative, almost activist, if it wishes to include the exercise of powers under Article E (2) in this scope too. In these and only in these proceedings, the legal consequence is that the HCC decides which body has jurisdiction and designates the body obliged to conduct the proceedings. We have already mentioned that, from the point of view of the exercise of the newly interpreted competence of the HCC, it would be an interesting legal issue, whether it is possible to force Member State bodies to resist EU acts that violate identity. Failing this, the newly designated limit on the competence to prevent identity violations will be very narrow. Although the decision attracted attention primarily by the institutionalization of the topos of 'identity based on a historic constitution', the operative part itself sets three control mechanisms: the HCC may examine whether the joint exercise of competences under Article E (2) of the FL violates human dignity and other fundamental rights, or Hungary's sovereignty, or self-identity based on its historical constitution.

At first glance, these three areas of control seem to be a narrowing down within the FL, creating a kind of untouchable essence, which the HCC had already moved, implicitly, very close to in the case law process of 'unconstitutional constitutional amendments', although at that time it did not identify a specific standard against the constitutional power.[20]

However, in contrast to EU power, the test(s) acquired a name, and on closer inspection, it seems to be not so much moving towards a narrowing within the FL, but rather towards an extension through identity protection: in principle, any violation of any norms which relate to the designated control areas, even those outside the FL, may be considered. However, this is contradicted by the fact that the HCC, exercising its powers, can only act in the case of a violation of a specific provision of the FL. Therefore, we take a closer look at what the standards outline, separately and in their contexts.

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[18] Vincze, *Unionsrecht und Verwaltungsrecht* (2016), 218–219.

[19] Disputes between constitutional bodies are, in German law, a subjective procedure for the protection of the powers or prerogatives of a constitutional body, which may be brought not only by the body itself but also, in practice, by an autonomous part (e.g. a parliamentary group, a Member), or a lawful litigant. See, in detail, Hillgruber and Goos, *Verfassungsprozessrecht* (2006); Lechner and Zuck, *Bundesverfassungsgerichtsgesetz* (2011); BVerfGG para. 63, mn. 12.

[20] Chronowski, 'The Fundamental Law Within the Network of Multilevel European Constitutionalism' in Szente, Mandák, and Fejes (eds), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development* (2015) 223.

Although *ultra vires* was also not given much emphasis in the decision, it is made clear by the HCC that *ultra vires* and identity control are two different standards, and are connected to each other, so 'the two controls relating to them must in some cases be carried out with respect to each other' (Reasoning [67]).

The appearance of the *ultra vires* standard is relatively easy to explain, as it is the core of the German decision that strongly inspired the HCC ruling, precisely in the context of how these two constitutional standards (*ultra vires* and identity) can be separated. The Hungarian decision is therefore a borrowed one, but this, like all legal transplants,[21] also has unintended consequences.

The third standard introduced by the HCC is Hungary's constitutional self-identity. The HCC stated that 'it is a fundamental value not established but merely acknowledged by the Fundamental Law. Consequently, constitutional self-identity cannot be waived by way of an international treaty—Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood' (Reasoning [67]).

In this form, self-identity is a somewhat alterable standard which, at the time of the decision, had not, unlike the German Fundamental Law, yet been provided for expressly in the text of the Constitution, as Judge András Zs. Varga also pointed out in his concurring opinion.[22] However, according to the decision, the text does not even have to assume or refer to this, because the FL simply acknowledges this self-identity. It therefore, *ab ovo,* exists as an absolute, or as formulated by the HCC: Hungary can only be deprived of its constitutional identity 'through the final termination of its independent statehood' (Reasoning [67]).

However, it also follows from this, as Judge István Stumpf's concurring opinion points out, that there is a kind of norm above the FL, which is 'a kind of invisible Fundamental Law',[23] and just as it strains against the transfer of powers 'sanctified' by a two-thirds parliamentary majority, it may equally stand in the way of the constitutional or legislative power of a two-thirds parliamentary majority. With this limitation, which is not included in the FL, the HCC gives itself a very wide authority with regard to—seceding from and independent of the text and content of the FL—deciding what is constitutional and what is not. 'The preference for starting from general formulas […] inevitably results in the more specific provisions of the Fundamental Law slowly being relegated to the background and losing their significance. This, in turn, may create, to a degree, the rewriting of the Fundamental Law by constitutional court judges, and this means they occupy the place of the constituent power',[24] which is nothing but 'the imperialism of the constitutional judiciary'.[25]

4.2. The weaknesses of comparative analyses: constitutional dialogue in action

On the ground of the decision's reasoning, constitutional dialogue means on the one hand, that the CC examines the approach and the constitutional practice of other EU member

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[21] Vincze, 'Ist die Rechtsübernahme gefährlich?' (2020), 193.; Teubner, 'Legal Irritants' (1998), 11.

[22] Concurring opinion of Judge András Zs. Varga: the decision 'did not explain the legal basis for this finding' (Reasoning [111]).

[23] Concurring opinion of Judge István Stumpf (Reasoning [109]).

[24] Decision 27/2015. (VII. 21.) AB. Concurring opinion of Judge Béla Pokol (Reasoning [64]).

[25] Decision 988/B/2009. AB, ABH 2011, 2037. Concurring opinion of Judge Béla Pokol.

states (Reasoning [33]–[43]); on the other hand, it implies cooperation with the CJEU based on collegiality, equality, and mutual respect. However, an exclusive institutional tool has been established for dialogue with the CJEU: the request for preliminary ruling.[26] Nevertheless, this procedure does not constitute a mechanism 'based on collegiality and equality'; instead of this, the CJEU provides a binding interpretation of the EU law, and the initiation of this proceeding is not only an option, or a form of politeness for national constitutional courts, but also a legal mandate. In contrast with other constitutional courts, the Hungarian Court has failed to comply with this duty in any of the cases heard so far.

The other interpretation—which may be also deduced from certain references provided by the ruling—is that the HCC shall conduct comparative legal analyses. According to Par. 43 of the reasoning: 'The Supreme Court of the United Kingdom in one of its decisions highlighted the significance of constitutional dialogue and called for a ruling of the GFCC. The question is whether the Hungarian decision has complied with this cited requirement. The comparative analysis shall not mean only the collection of case law and arguments in harmony with the already established outcome.'[27] The colourful European overview may be convincing and presupposes reading and thorough knowledge,[28] but it should not be considered as a methodologically well-founded comparison. The decision simply copied some paragraphs from the OMT ruling of the GFCC.[29] Par. 142 of the German reasoning, and par. 34 of the Hungarian ruling are literally identical. The HCC even cited the non-German (for instance the Italian) case law on the basis of their translations published in the Europarecht, a German law journal.

Apart from the many mistakes in citing the referred cases properly, what is even harder to explain is the deeply cited *Thoburn v. Sunderland City Council [2002] EWHC 195 (Admin) (18 February 2002)* case (Reasoning [42]), which did not show any significant novelty by declaring that the supremacy of EU law shall be grounded on British law itself. That had been already concluded implicitly by Lord Bridge in the Factortame case,[30] a case which, however, was not mentioned by the HCC. The main novelty of the *Thoburn* case was rather to introduce the term 'constitutional statute', which may be close to the Hungarian category of cardinal law, which should not be repealed implicitly, but explicitly. In the meantime—and this should be taken into account during the comparative argumentation—in the light of the stare decisis doctrine, the judgement of the High Court is not binding for the Supreme Court and for the Court of Appeal. Furthermore, if the HCC had read with sufficient

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[26] Kalbheim, *Über Reden und Überdenken* (2016) 52.

[27] A critical approach of this kind was provided by Justice Scalia in the case *Roper v. Simmons*, 543 U.S. 551, 627 (2005). See also Kahn-Freud, 'On Use and Misuse of Comparative Law' (1974), 1; Saunders 'The Use and Misuse of Comparative Constitutional Law' (2006), 37; Hirschl, 'The View from the Bench' in Hirschl, *Comparative Matters* (2016), 20.

[28] For researchers interested in the topic the names and reference numbers of at least supposedly relevant cases provided in par. 34 of the reasoning should be a valuable orientation, but this is really far from a real comparative interpretation.

[29] Here again the case of the GFCC on 21 June 2016 should be highlighted [BVerfG, 21.06.2016 – 2 BvR 2728/13; 2 BvR 2728/13; 2 BvR 2729/13; 2 BvR 2730/13; 2 BvR 2731/13; 2 BvE 13/13].

[30] *R v. Secretary of State for Transport ex p Factortame Ltd (Interim Relief Order)* [1990] UKHL 7 (26 July 1990).

care the also cited Pham case,[31] which, according to the best of our knowledge, is the sole Supreme Court ruling which referred to the *Thoburn* case, it might have been clear that the arguments of Thoburn are interesting rather than binding for the Supreme Court. These examples show that for the sake of constitutional dialogue, the HCC introduced an incautious and biased selection of the relevant case law that does not contribute much to the recognition of the importance of a substantial analysis of the indicative foreign case law in order to find the best constitutional solutions.

5. Aftermath of the Decision

It is a significant fact from the aftermath of the decision that the failed seventh amendment to the FL in 2016 was put back on the agenda in 2018, and this time its original goal was successfully achieved. The Seventh Amendment to the FL added the following to Article E (2) in 2018[32] in order to specify the necessary degree of the joint exercise of powers: 'The exercise of powers under this paragraph shall be in conformity with the fundamental rights and freedoms enshrined in the Fundamental Law, nor shall it restrict the inalienable right of disposition of the territorial unit, population, form of government and the form of the state of Hungary.'[33] With this, the duty of protecting fundamental rights and state sovereignty became part of the EU clause. Moreover, the protection of constitutional self-identity was included in Article R (4) as a general duty of all state bodies, while the *National Avowal* stated: 'We hold that the defence of our constitutional self-identity, which is rooted in our historical constitution, is the fundamental responsibility of the state.'

Despite the already clear authorisation in the FL, the HCC did not apply the control measures established in the decision analysed here against EU law until July 2021.

The topos of the 'European constitutional dialogue' has, however, become a recurring point of reference following this decision, making a number of cases more colourful. It was a reference, for example, in three suspension orders issued by the HCC on 4 June 2018.[34] The HCC suspended its proceedings in connection with the review of Act XXV of 2017 on the amendment of CCIV Act of 2011 on national higher education and Act LXXVI of 2017 on the transparency of organisations supported from abroad, i.e. in the Central European University (CEU) case and in the case of NGOs, because the European Commission initiated proceedings before the CJEU for the contested provisions. The reason for the suspension is

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[31] Pham v. Secretary of State for the Home Department [2015] UKSC 19 (25 March 2015), [2015] 3 All ER 1015, [2015] WLR(D) 166, [2015] UKSC 19, [2015] 2 CMLR 49, [2015] Imm AR 950, [2015] INLR 593, [2015] 1 WLR 1591, [2015] WLR 1591, paras. 207–208.

[32] Seventh Amendment to the FL (28 June 2018) Article 2.

[33] Explanatory memorandum to the proposal for a Seventh Amendment to the FL: 'The proposed addition to Article E would specify and fill with content the »as necessary« version of the current paragraph 2, which would essentially mean a clear clarification of the exercise of EU competence.' It is also clear from the explanatory memorandum that this is necessary in order to respect the national identity of the Member States as set out in Article 4 (2) TEU and to protect the constitutional self-identity.

[34] Order 3198/2018. (VI. 21.) AB – Act LXXVI of 2017 on the transparency of foreign-supported organizations, Act CLXXXI of 2011 on the court register of non-governmental organizations and related procedural rules, ex-post norm control; Orders 3199/2018. (VI. 21.) AB and 3200/2018. (VI. 21.) AB – Act CCIV of 2011 on the National Higher Education, Act XXV of 2017 on the amendment to Act on the National Higher Education, ex-post norm control and constitutional complaint procedure against the law as a whole (invalidity under public law, right to academic freedom).

the same in all three cases; it is sufficient to quote from one of the orders: in the decision relating to Hungary's self-identity the HCC stated, that: 'the European Union is able to ensure, through institutional reforms, the Charter of Fundamental Rights and the CJEU, that fundamental rights are largely or at least satisfactorily protected at the level guaranteed by national constitutions […]. Consequently, the possibility of review reserved for the Constitutional Court should be applied in the light of the duty to cooperate, with a view to enforcing European law as far as possible'. On the basis of the above, the HCC concluded that, in view of the fundamental rights context specifically raised by the case under consideration and the obligation to cooperate within the EU, it is necessary to await the completion of the proceedings pending before the CJEU.[35] In 2020, the CJEU ruled in both proceedings before it, and stated that EU law, as well as the Charter of Fundamental Rights, had been violated.[36] However, the 'dialogue' did not appear to continue on the side of the HCC until the Government pushed through an amending bill in the CEU case. When the bill was adopted, the HCC noticed that the regulation has substantively changed and the applicants did not submit any supplementary petition, thus the HCC terminated its proceedings, although without any further 'European judicial dialogue', because the subject matter had become obsolete and there was no need to adjudicate it.

Also in 2018, in a neutral area compared to the above, a HCC order[37] suspending proceedings in a tax case was also issued in the spirit of European judicial dialogue. The HCC suspended its procedure relating to the constitutional review of the Hungarian Supreme Court (Kúria) judgment, because it found that the Szeged Administrative and Labour Court had referred a question to the CJEU for a preliminary ruling, and it wished to await the result. The CJEU made a decision[38] in April 2020, which was then only formally referred to by the HCC in its February 2021 decision,[39] thus, instead of dialogue, parallel monologues took place.

Finally, it is worth mentioning the Decision 26/2020. (XII. 2.) AB which established that if the (ordinary) court initiates a preliminary ruling procedure, the CJEU is also a legitimate judge in terms of the procedure. This is a half-turn from the previous practice, as for a long time the position of the HCC was[40] that the initiation of a preliminary ruling procedure is a question of professional law or the interpretation of the law which the HCC has no jurisdiction to review. Subsequently, as a small shift, the HCC qualified it as constituting a grievance of the right to a fair trial, if the court rejects the party's request for a preliminary ruling without giving any substantive reasons. In the reasoning to its decision of December

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[35] Order 3199/2018. (VI. 21.) AB, Reasoning [5].

[36] C-78/18, *Commission v. Hungary*, judgment of 18 June 2020, ECLI:EU:C:2020:476 (foreign-supported NGOs); C-66/18, *Commission v. Hungary*, judgment of 18 June 2020; judgment of 6 October 2006, ECLI:EU:C:2020:792 (CEU case).

[37] Order 3220/2018. (VII. 2.) AB – Act XCII of 2003 on the order of taxation, and judgment of the Supreme Court (Kúria) Kfv.V.35.729/2016/8. Constitutional complaint and reference for a preliminary ruling against the judgment of the Court of First Instance (refund of VAT, default interest, Community law).

[38] C-13/18 and C-126/18, Sole-Mizo Zrt., and Dalmandi Mezőgazdasági Zrt. v. Appeals Directorate of the National Tax and Customs Administration (Reference for a preliminary ruling from the Szeged Administrative and Labor Court and Szekszárd Administrative and Labor Court), judgment of 23 April 2020, ECLI:EU:C:2020:292.

[39] Decision 3040/2021. (II. 19.) AB.

[40] Order 3110/2014. (IV. 17.) AB; Order 3165/2014. (V. 23.) AB; Order 3038/2015. (II. 20.) AB.

2020, the HCC also called for a decision on the joint exercise of EU competence and concluded that only the mutual judicial dialogue open to each other's arguments is capable and fit for the purpose of striking a balance between 'the core of Member States' constitutional law untouchable by integration and European law with priority for application, developed by the European Court of Justice, because without such a dialogue 'neither the constitutional law of the Member States nor the sui generis nature of European law can be guaranteed'.[41] The HCC has also stated that it cannot take a neutral position in this institutionalized cooperation either,[42] even noting that 'the Constitutional Court's right to initiate a preliminary ruling procedure may also be deduced from the Fundamental Law, thus, in particular, if in the case before it there would be a threat to compliance with fundamental rights and freedoms under Article E (2) of the Fundamental Law or to the restriction of Hungary's inalienable right to dispose of its territorial unit, population, form of state and state system.'[43] Although this is merely an *obiter dictum* remark in relation to the subject matter of the case, the HCC first referred as a matter of principle that it may itself initiate a preliminary ruling procedure too, within the framework of Article E (2), essentially to check that fundamental rights are upheld and to protect sovereignty.

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[41] Decision 26/2020. (XII. 2.) AB, Reasoning [23].

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