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336 SUMMARY



Hungary

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I. INTRODUCTION

In 2018, for the third time, the Fidesz-KDNP party coalition secured a two-thirds majority in the Hungarian Parliament in the general parliamentary elections. The old-new Government, led by Prime Minister Viktor Orbán, adopted the Seventh Amendment to the Fundamental Law that obstructs the accommodation of migrants, limits the freedom of assembly and establishes the High Administrative Court, outsourcing administrative justice from the ordinary judiciary to special courts administered partly by the Minister of Justice. These constitutional developments point towards creating a non-reversible political system based on authoritarian rule. The autonomy of the social subsystems is gradually being eliminated: media, culture, science, education, etc., are captured by the State. In 2018, the Government continued to reorganize education and science, the Central European University was forced to give up a part of its activities in Budapest and the Hungarian Academy of Sciences, which is an autonomous institution according to the Fundamental Law, is under forced restructuring. Some education programmes, such as the gender programmes, were prohibited at universities. Research activities will be influenced by centrally defined research projects. State capture extends to the principles of liberal constitutionalism, such as the separation of powers, the independence of the judiciary or legal certainty. Legislation is not introduced duly in advance, official negotiations do not influence the outcome of political decisions and implemented law is often not clear and consequent. Independent State institutions, such as the Constitutional

Court, are losing power and relevance. Due to the transformation of its competences and the lack of petitions from State authorities, as well as the appearance of loyalty regarding certain politically sensitive questions, the Constitutional Court is not the watchdog of constitutionalism any more. This report describes the Seventh Amendment to the Fundamental Law as the major constitutional change, and explains important cases from Constitutional Court jurisprudence to show the lack of outstanding decisions that would balance the Government's policy.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The Government, using its two-thirds majority in Parliament, adopted the Seventh Amendment to the Fundamental Law in 2018.

The original 2011 text of the Fundamental Law used the concept “historical constitution” as a reference point to constitutionalism in the National Avowal (Preamble) and also as a method of interpretation. However, as Hungary has a written constitution, the role of these provisions were still not clear, and many scholars attributed a purely symbolic force to this, although there were Government attempts to emphasize its central role. Finally, the Seventh Amendment declared that the original text, which says, “We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation,” shall be supplemented in the National Avowal with the following text: “We hold that it is a fundamental obligation of the

State to protect our self-identity, rooted in our historical constitution.” As explained in our 2016 report, the concept of constitutional identity was introduced by the Constitutional Court (CC) in its Decision 22/2016 (XII. 5). The CC primarily functions as a shield against the implementation of EU Law by protecting the fundamental rights laid down in the Fundamental Law as well as Hungary’s inalienable right of disposal related to its territorial integrity, form of government and governmental organisation. Furthermore, since the Amendment, all state organs shall protect the constitutional self-identity of Hungary. The Seventh Amendment, and also the new case law of the Constitutional Court, highlights that constitutional self-identity is to be protected through respect for the achievements of the historical constitution. This blurs the boundaries of the concept of the written constitution.

As to the development of fundamental rights, privacy received elevated protection by the Seventh Amendment by prescribing that the exercise of freedom of expression and the right of assembly shall not harm others’ private and family life and their homes. This provision, however, limited the freedom of assembly that also appeared in the codification of the new act on freedom of assembly. It is problematic that the original *raison d’être* of this new regulation might have been a personal demand of leading politicians not to be disturbed by assemblies in front of their homes. New case law has yet to be born, but this constitutional environment undoubtedly changes the attitudes of the people.

The Government also reacted to the most topical issue of migration by amending the Fundamental Law to declare that no alien population will be settled in Hungary, and that immigration will be based only on individual applications. A major human rights controversy is the challenge of migration. Hungary has decided to respond to it with a constitutional amendment that is contradictory at least to the spirit of European human rights standards by being clearly exclusive and paternalist towards Hungarian inhabitants.

Concerning the separation of powers, a great change has been introduced into the Hungarian legal system by the Seventh Amendment. This is the introduction of separate administrative courts. At the end of 2018, a new act was adopted by the two-thirds majority in Government. Separate administrative courts have their roots in Hungarian constitutional history, but the safeguards of independence are quite weak in the new system to be introduced in 2020. The administration of this branch of judiciary is, e.g., separate from ordinary administration and the Minister of Justice has competencies in the appointment and removal of judges.

Finally, the Seventh Amendment that provided for a new constitutional framework in 2018 introduced not only structural changes in matters of adjudication but also influenced matters of interpretation. It is quite rare that constitutions provide for specific clauses on the mandatory methods of interpretation. In Hungary, the Fundamental Law contained such provisions and these were supplemented with others in 2018.

According to the new rule, “In the course of the application of law, courts shall interpret the test of the legal regulations primarily in accordance with their purposes and with the Fundamental Law. Primarily, the preamble of the legal regulation, and the reasoning of the legal regulation or its amendment, shall be taken into account when the purposes of the legal regulations are established. When interpreting the Fundamental Law or legal regulations, it shall be presumed that they serve moral and economical purposes which are in accordance with common sense and the public good.” [Article 28]

In sum, the Seventh Amendment to the Fundamental Law adopted in 2018 by the two-thirds Government majority in Parliament changed the constitutional framework of human rights and the separation of powers and rule of law significantly. We will consider the case law of the Constitutional Court in this changing constitutional environment.

III. CONSTITUTIONAL CASES

1. 3199/2018. (VI. 21.) CC order and 3200/2018. (VI. 21.) CC order: postponing the decision-making on lex CEU

The Amendment of the National Tertiary Education Act, adopted in one week, introduced new conditions for the operation of universities accredited outside the European Economic Area (EEA) in Hungary and is applicable also to existing higher education institutions, including the Central European University (CEU). It has given rise to much criticism, both domestically and internationally, including by the Council of Europe Parliamentary Assembly and the Venice Commission. In our report of 2017, we explained that the constitutional complaint of the CEU and the ex-post review initiated by one-fourth of the MPs had been before the court for months and it applied procedural tools (otherwise very rare) to postpone the decision: it created an ad hoc committee consisting of the law clerks of the court to “prepare the decision-making procedure” of the case. On the proposal of the committee, the court asked further clarification from the claimants and several state institutions. We also predicted that the court would have to decide this case in 2018, even if it is politically sensitive. It has decided—but not in an expected way. In June 2018, the Constitutional Court suspended its procedure until the decision on the infringement procedure against Hungary at the Court of Justice of the European Union (CJEU). The court justified its decision by the obligation of the cooperation of courts within the European Union: as the fundamental rights in the Fundamental Law that were violated according to the motions are closely related to the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union, the court had to postpone its decision. This reasoning, which may otherwise be well founded, begs questions in that the practice of the Constitutional Court usually does not follow the practice of the CJEU, and did not find it necessary to make similar steps in previous cases when procedures before the CJEU were in progress. As Justice Stumpf stated in his concurring

opinion, the requirement of the suspension was not fulfilled, as the case did not depend on the decision of the CJEU, and it was not justified by legal certainty, a particularly important interest of the petitioner or any other particularly important reason, as the Act on Constitutional Court requires. Therefore, it seems that the court rather wanted to avoid political conflict with the Government, or at least postpone it again.

2. 23/2018. (XII. 28.) CC decision: constitutional complaint of a state institution

While this decision seems to deal with a mere bagatelle case, it shows that to favor a State institution, the Constitutional Court is ready to confront the ordinary courts, overcome its decades-long practice, internal rules, and even the logics of reasoning.

The topic of the 8:7 decision is a simple interpretation of a statutory provision that prescribes the decision on the board of directors of the Hungarian National Bank (HNB) in an investigation but makes it possible to delegate the “issuance”—the question is whether this issuance means only signing or also delegated decision-making (the vice president decided in this case). The ordinary courts, and in the end the Curia as the highest forum, decided that it was clear from systematic interpretation that it meant only signing, so it annulled the decision of the HNB and ordered a new procedure. The HNB submitted a constitutional complaint, stating that by not looking at the reasoning of the bill (which suggests the opposite interpretation of the statutory provision), the Curia did not follow Article 28 of the Fundamental Law that prescribes that courts shall interpret the acts primarily by their purposes.

The decision is problematic in many ways. As some of the dissenting opinions pointed out, the Constitutional Court set itself against its previous practice (and even its Rules of Procedure) by deciding in a case where the Curia annulled the judgment and ordered a new procedure. This not only made the CC decision premature but also interfered with the normal decision-making of the ordinary judicial system by excluding the possibility of changing its decision. The other aspect of the interference with the ordinary courts’ function is that

the court reviewed the decision based on the interpretative methods used by the judge. As Justice Czine concurred, this is contrary to the principle that the courts interpret the statutes independently, and the Constitutional Court has to limit itself to establishing the constitutional limits of the interpretation instead of deciding the case on its merits. Finally, the most problematic point is guaranteeing the right of initiating a constitutional complaint about State institutions. Previously, the decisions of the Constitutional Court, based on the dogmatical standpoints elaborated by the German Federal Constitutional Court, made it clear that State institutions do not have fundamental rights, as these rights are guaranteed to individuals against the State. This decision ignores this dogmatical clarity and opens a way for the Constitutional Court to become a guardian of the interest of State institutions instead of protecting the fundamental rights of individuals.

3. 13/2018. (IX. 4.) CC decision: real constitutional standards in a neutral case

The Constitutional Court declared unconstitutional the amendment to the “Act on Water” (Act LVII of 1995) based on the proposal for preliminary norm control of the President (the head of the State). The purpose of the challenged provisions was to facilitate private water well drilling up to 80 m in depth. In the case of private consumption, such works could be performed without State authorization—contrary to the previous regulation, which required an official permit. The new provisions of the act authorized the Government to enact a decree regulating this field and prescribing those activities which do not require State authorization. The court asked for the opinion of the Hungarian Academy of Sciences, the ombudsman for future generations (deputy commissioner for fundamental rights) and the minister of interior. The court also referred to the opinions of other professional organizations (university departments, associations, etc.).

The court accepted the arguments expressed by the President, finding the duty of the State to protect the environment follows from the provisions of the Fundamental Law. When interpreting these provisions, the

court referred to international standards of environmental protection (non-derogation, precautionary principle) and reached the conclusion that the proposed change of the regulation is in conflict with the right to a healthy environment, as the State intends to play a more limited role in the protection and conservation of groundwater. The court did not examine the second question expressed by the President, namely whether the bianco authorisation of the Government to regulate this field is in accordance with the rule of law principle. Five justices attached dissenting opinions to the decision.

Two comments should be added. First, the ex ante review initiated by the President (presidential veto on constitutional ground) always has special relevance in the Hungarian governmental system. As we emphasized in our reports on 2017 and 2016, there is a trend that shows that the President turns to the Constitutional Court in politically less-sensitive cases. This case is part of this trend as environmental protection is not part of the daily political agenda but rather a personal commitment of the President. Second, in this case, the court used, in an open manner, procedural techniques which can promote the deliberation of the concurring arguments of the debate (requesting opinions from the stakeholders and referring to the opinions of other professional organizations)—a practice which is not common in politically sensitive cases.

4. 3130/2018. (IV. 19.) CC decision: permissive approach towards the political majority

The Constitutional Court declared unconstitutional the Resolution of the Curia taken in an electoral dispute related to the 2018 parliamentary elections. The original case related the placement of a billboard during the electoral campaign that depicted the prime minister and contained the slogan, “For us Hungary is the first!” The billboard was published by the governing party (Fidesz), one of the electoral contestants. This fact was not evident, as it was indicated in extremely small letters that were visible only from a distance of one meter. Moreover, all the visual elements of the billboard were identical to those used by the Government in its commu-

nication. According to the objection filed by another party that took part in the electoral contest, the billboard was misleading and contrary to the procedural electoral principles of fairness and exercising rights in good faith, in accordance with their purpose. The Curia declared infringement in its decision, but only in the case of one billboard, placed near a highway. Identical billboards were placed at public spaces across the country.

The publisher of the billboard in question, the Fidesz party, filed a constitutional complaint against the decision of the Curia, claiming that the decision caused a disproportionate limitation of its freedom of speech in relation to the electoral campaign. The claimant also emphasized that the “visibility requirement” related to billboards and other electoral materials is not explicitly prescribed by law. The Constitutional Court did not include a detailed argumentation in the reasoning part of its decision. There is no substantive assessment of the proportionality requirement related to the possible limitation of freedom of speech and of the similarities between the Government’s and governing party’s messages. The Constitutional Court declared that the Act on Electoral Procedures contains limitations on the publication of posters and billboards during electoral campaigns based on timing and their physical placement. In the court’s argumentation, it is a decisive argument that the act does not explicitly prescribe the “visibility” requirement of the imprints on billboards. It declared that the visibility requirement does not follow from the principle of the fairness of elections, and neither does the placement of the imprint on billboards. According to the court, if voters are in a position to identify the political actor whose interests are supported by the billboard, the principle of fairness is respected. The latter statement was criticized by one of the six concurring opinions.

Based on the decision, one can question whether the Constitutional Court accords due significance to procedural electoral principles by maintaining a misleading communication practice which blurs the differences between the Government and the governing party. The latter is one of the electoral contestants, which therefore is in an overwhelm-

ingly advantageous position compared to other parties. The blurry dividing lines between the Government and the governing party also raise questions on the legal entities who are entitled to submit constitutional complaints. The decision can be evaluated also in the light of the debates between the Constitutional Court and the Curia, referred to in our report on 2017.

5. 3029/2018. (II. 6.) CC and 19/2018. (XI. 12.) CC decisions: protecting the interests of the State

In Decision 3029/2018. (II. 6.) CC, the Constitutional Court rejected a constitutional complaint claiming the limitation of the right to property and other related rights in a case in which the Hungarian National Bank refused to issue a permit for a natural person living outside Hungary to acquire a qualifying holding in a financial enterprise. The reason for the refusal was the interpretation of the act regulating this field, which prescribes that in the case of such acquisitions the source of the payment must be certified. Even though the claimant presented certifications issued by her personal bank and the tax authority indicating the sources of her income, the HNB (as the state organ responsible for financial supervision) required a continuous certification of all transactions from the previous years that indicated the utilization of the specific amount of money planned to be used as payment for the acquisition. The decision of the HNB was upheld by the Administrative and Employment Court of Budapest and later by the Curia.

The claimant based her petition on three arguments: the limitation of the right to fair trial in relation to the ambiguity of the regulation, the limitation of the freedom of enterprise and the limitation of the right to property. In her view, the law prescribes only a single certification of the source of the payment, while requiring the certification of all transactions beginning from the time of entry of the amount of money in question into one’s property until the proposed acquisition is a *contra legem* interpretation and impossible to comply with. The Constitutional Court did not accept these arguments. In the longest part of the reasoning, the court ex-

pressed that the right to property in private relations does not protect assets which are not acquired at present. The court accepted the interpretation of the law of the HNB and other judicial instances stating that these are in accordance with the possible purpose of the law (stable and prudent functioning of financial enterprises and lowering business risks). The court thus did not accept the arguments related to the limitation of fair trial in this case. In relation to the freedom of enterprise, the court stated that starting certain business activities is not limited by law in this case.

One of the justices attached a concurring opinion to the decision, arguing that the court should have examined the limitation of the affected fundamental rights in detail based on substantive standards.

In Decision 19/2018. (XI. 12.) CC, the Constitutional Court declared certain provisions of the Act on National Security unconstitutional based on the proposal for ex post review of the prosecutor general. Based on the challenged regulation, certain public professions and positions (including prosecutors) can only be held after the preliminary examination of national security risks. In this case, as was stated by the national security services, the given position can be occupied or sustained only with the individual approval of the leader of the State organ in question. According to the prosecutor general’s view, it is problematic that the leaders of State organs are not informed of this and of the facts that cause national security risk, and that the law does not contain any aspects to be considered when deciding on appointments or sustaining the appointments of those persons affected by such examination. These controversies could cause a conflict with the requirement of clarity of norms (as part of the rule of law principle) and the freedom of occupation as well as the separation of powers, as the regulation limits the sphere of action of the prosecution service as an independent state organ. Moreover, the prosecutor general claimed that the system of appeal against the statements of the national security service is not in accordance with the right to legal remedy.

In the last question (system of appeal), the Constitutional Court recalled the arguments expressed in a very similar former case (initiated by the president of the Curia), and based on these, annulled certain provisions of the examined act. In the given case, it is much more relevant that the court declared certain provisions of the examined act unconstitutional due to the fact that these contradicted the independence of the prosecution service, ensured in the Fundamental Law. However, the court did not refer to other provisions of the Fundamental Law and did not examine the position of the prosecution service within the system of the separation of powers.

As a result of both decisions described above (constitutional complaint regarding the decision of the Hungarian National Bank; posterior norm control initiated by the prosecutor general), the Constitutional Court played a significant role in protecting the interests of state organs—a controversial issue, taking into consideration the function of constitutional courts in protecting constitutional principles and individual rights.

IV. LOOKING AHEAD

Recently, the decisions of the Hungarian Constitutional Court have become quite unpredictable. Nevertheless, two interesting cases are foreseen in 2019. The court should decide on the initiatives of four judges who, suspending the cases before them, challenged the statutory amendments penalizing homelessness. One-fourth of the MPs initiated an ex post review of the amendment of the Labor Act because it was adopted among critical circumstances in the Parliament (MPs of the opposition managed to hinder the regular procedure).

While the politically relevant European parliamentary elections do not promise too much constitutional upheaval, an upcoming vacancy in the court may. Considering the high number of 8:7 decisions, the election of the new member will have a crucial impact. As the governmental coalition has the two-thirds majority in the Parliament to elect the justice without the opposition, we do not have many illusions.

V. FURTHER READING

Szente, Z. and Gárdos-Orosz, F. (eds.) (2018). *New Challenges to Constitutional Adjudication in Europe* (Routledge)

Halmai, G., “The Application of European Constitutional Values in EU Member States. The Case of the Fundamental Law of Hungary,” in Nagy, C. (2018). *The EU Bill of Rights’ Diagonal Application to Member States* (The Hague: Eleven Publishing)

Jakab, A., “What Is Wrong with the Hungarian Legal System and How to Fix It,” Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2018-13