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Central European Constitutional Courts in the face of EU membership : the influence of the German model of integration in Hungary and Poland

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CHAPTER FOUR

THE HUNGARIAN CONSTITUTIONAL COURT AND EUROPEAN LAW: A CASE OF “SLOW AND STEADY WINS THE RACE”?

BACKGROUND

The collapse of communism and the transformation of the systems of rule in Central Europe occurred at a seemingly rapid pace. Economic problems and systemic decay began to resurface in the centrally- (and politically-) controlled command economies during the 1980s. While reforms came early to Hungary in 1988, the process of change was longer drawn out.¹ It could be said that in the process of dismantling communism and creating a democratic, constitutional state, Hungary retraced its steps back to the 1956 October Revolution – only on this occasion it met with success. The transformation ironically was initiated by reformers within the Communist Party who sought to achieve their aim of effective parliamentary supremacy over arbitrary state power through a “constitutional revolution.”² Hungary thus helped pioneer the movement for institutional reform: the symbolic cutting of the Iron Curtain by Hungarian soldiers starting in May 1989 precipitated the collapse of communist government throughout Central Europe.

Hungary was in the *avant garde* of communist countries moving towards democratic and economic liberalisation in the 1980s, with its transition to democracy in Hungary taking place in unfettered electoral competition (unlike in Poland). Hungary remained at the vanguard of developments,³ becoming the first former state socialist country to sign a general Agreement with the EEC (December 1988)⁴ as well as one of the first to accede to the Council of Europe (1990).⁵ These were followed by a Europe Agreement

¹ J.F. Brown, *Surge to Freedom: The End of Communist Rule in Eastern Europe*, chap. 4, “Hungary: Toward the Civil Society,” Admantine Press, London (1991), at 92-123.

² See P. Paczolay, “The New Hungarian Constitutional State: Challenges and Perspectives,” in A.E. Dick Howard (ed.), *Constitution Making in Eastern Europe*, Woodrow Wilson Center Press, Washington (1993), chap. 2, 21, at 25.

³ A.F. Tatham, “European Community Law Harmonization in Hungary” (1997) 4 MJ 249, at 249-250; and generally, P. Balázs, *Az Európai Unió Külkapcsolatai és Magyarország [The External Relations of the European Union and Hungary]*, Közgazdasági és Jogi Könyvkiadó, Budapest (1996), at 120-145

⁴ Agreement between the EEC and the Hungarian People’s Republic on Trade and Commercial and Economic Cooperation: OJ 1988 L327/2. Signed on 26 September 1988, effective as of 1 December 1988. This trade agreement was concluded on the basis of Art. 207 TFEU (ex-Art. 113 EEC): Commission Decision 595/88, OJ 1988 L327/1; MK 1989/4, 54.

⁵ Hungary joined the Council of Europe on 6 November 1990 and, on the same day, signed the ECHR, ratifying it on 15 October 1992:

<<http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=HUN&MA=999&SI=2&CM=3&CL=ENG>>
. 12 January 2009.

(concluded in December 1991),⁶ a mixed agreement between Hungary and the EEC and its Member States.⁷

Having applied to join the Union on 31 March 1994, Hungary eventually began negotiations in earnest with other Central and Eastern European countries (“CEECs”) at the end of October 1998, concluding them in December 2002. Accession together with seven other CEECs as well as Cyprus and Malta, occurred on 1 May 2004.⁸

Following the coming to power of a conservative government in 2009 with a two-thirds majority in Parliament (necessary, *inter alia*, to amend the Constitution without the assistance of opposition parties⁹), it was announced that a new Constitution would be drafted and presented to the Parliament for a vote in 2011. The projected entry into force is 1 January 2012.

As already mentioned in relation to the preceding Chapter on Germany, this one on Hungary follows a similar pattern. The Chapter therefore starts by outlining the process of constitutional review, focusing on the main procedures by which European law issues might come before the Hungarian Constitutional Court (“HCC”) (A.). The research then examines the essential core of sovereignty, i.e., that part of a State’s existence without which it would cease to be: the HCC has in some way attempted to formulate an essential core through interpretation of the Constitution,¹⁰ inspired by the German model (B.). The Chapter continues by addressing the issue of transfers of sovereignty in the face of European integration, providing a constitutional matrix within which the courts examined have operated (C.).

The focus of this research work is the actual case-law of the HCC. Due to the fact that the HCC has considered European law in only a few cases and then not always being forthright in its approach, its acceptance of certain principles and matters regarding European law may (at the most) only be inferred from its decisions: supremacy or priority of application; direct effect; as well as references to the European Court of Justice (D.). However, as with the German Chapter, this Chapter similarly addresses the limits the HCC has put on its acceptance of European law, basically its defence of the essential core of sovereignty; its review of national legislation transposing European law into the

⁶ Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part: OJ 1993 L347/1. It came into force on 1 February 1994 after obtaining all the necessary ratifications. However an Interim Agreement applied the commercial and economic chapters of the Europe Agreement from 1 March 1992 (OJ 1992 L116/2): since this fell squarely within EC competence, the Commission alone was able to sign such an agreement with Hungary without needing the ratification of the then 12 Member States.

⁷ A.F. Tatham, “The Direct Effect of Europe Agreements: Recent Rulings of the European Court of Justice” 2002/6 *Mezinárodní a Srovnávací Právní Revue* 7. The EAs were a form of mixed agreement since they encompassed areas for which the then Community had exclusive competence, such as commercial policy, and areas that remained largely within the competence of the Member States, such as culture. The EAs therefore required ratification by the Member States’ parliaments as well as the European Parliament that proved to be a time consuming process and thus led the then Community eventually to enter into Interim Agreements with nearly all the CEECs in relation to certain topics falling exclusively within the Community’s competence.

⁸ A.F. Tatham, *Enlargement of the European Union*, Kluwer Law International, Alphen aan den Rijn (2009), chap. 5, 71, at 88, 93 and 111-112.

⁹ Constitution, Art. 24(3).

¹⁰ On the Constitution generally, see A Jakab, “The Republic of Hungary: Commentary,” in R. Wolfrum & R. Grote (eds.), *Constitutions of the Countries of the World*, Oceana (OUP), New York (2008).

domestic system; as well as refusals, if any, to refer questions to the ECJ (E.). The Conclusion, heavily influenced by the 2010 *Lisbon Treaty* case, seeks to discern the extent both to which the HCC has attempted to maintain a continuing judicial dialogue with the ECJ and to which the HCC has been influenced in following its German cousin.

A. CONSTITUTIONAL REVIEW

1. Introduction

When the 1989 Constitutional Court Act came into force, Hungary had already experienced several years of constitutional control within the domestic system¹¹ through the institution of a Constitutional Council (*Alkotmányjogi Tanács*) in the early 1980s.¹² With its competence limited mainly to administrative matters, the Constitutional Council did not amount to a constitutional court.¹³

With the onset of the political transformation process, the new Constitution Art. 32/A provided the constitutional basis for the establishment and operation of a constitutional court.¹⁴ The coming into force of the heavily-amended 1949 Constitution was accompanied by enactment of Act XXXII of 1989 on the Constitutional Court in October 1989, thus giving effect to Art. 32/A;¹⁵ the HCC itself started to function on 1 January 1990 and from that time onwards has maintained its central role in “the construction of a state founded upon the rule of law.”¹⁶

Having been generally modelled on the various continental constitutional courts – particularly the German, Spanish and Austrian – the HCC is essentially a vehicle for

¹¹ A. Holló, *Az Alkotmányvédelem kialakulása Magyarországon*, Bíbor Kiadó, Miskolc (1997), at 37-61.

¹² Introduced through amendment to the 1949 Constitution (MK 1983/60) and implemented by statutory enactment in Act I of 1984 on the Constitutional Council: MK 1984/18.

¹³ K.-J. Kuss, “New Institutions in Socialist Constitutional Law: the Polish Constitutional Tribunal and the Hungarian Constitutional Council” (1986) 12 *Review of Socialist Law* 343, at 366. According to the same commentator, the Council was initiated not to protect the civil rights of citizens but rather to safeguard the economic reform. This opinion was underlined by the Council’s first ruling in which it suspended a 1978 ministerial decree on liquidation of businesses on the ground that it had violated the independence granted to enterprises and co-operatives in the course of reform efforts.

¹⁴ Constitution, Art. 32/A now provides: “(1) The Constitutional Court shall review the constitutionality of laws and attend to the duties assigned to its jurisdiction by law.

(2) The Constitutional Court shall annul any laws and other statutes that it finds to be unconstitutional.

(3) Everyone has the right to initiate proceedings of the Constitutional Court in the cases specified by law.”

¹⁵ 30 October 1989, MK 1989/77. Hereinafter “the 1989 Act.” See Holló (1997), at 63-113; and P. Tilk, *Az Alkotmánybíróság hatásköre és működése*, PT ÁJK, Pécs (2002).

¹⁶ See Preamble to Act XXXII of 1989 on the Constitutional Court.

determining the constitutionality of laws and other legal norms and the protection of human rights.¹⁷

2. Types of constitutional review

The 1989 Act (as amended) provides under s.1 for the competence of the HCC.¹⁸ Of relevance to the present study is the abstract norm control under s. 1(a) for the *a priori* examination, *inter alia*, of the unconstitutionality of statutes passed but not yet promulgated, and international treaties. This abstract norm control¹⁹ was extended by the HCC in *Dec. 53/1993 (X.13) AB*²⁰ to cover constitutional review of an unpromulgated statute vis-à-vis an international treaty.

Next the possibility of concrete norm control under s. 1(b),²¹ for which anyone is entitled to initiate the *a posteriori* examination for the unconstitutionality of laws (the so-called “*actio popularis*”).²² In particular, according to s. 38(1), a judge must initiate an action before the HCC while suspending proceedings before him where, in the course of such proceedings, he considers as unconstitutional the legal rule (or other means of state control) which he needs to apply. Under s. 38(2), litigants in a similar situation may do likewise. Moreover, s. 1(b) permits anyone to challenge a domestic legal norm which was promulgated in order to transpose an international treaty into domestic law as discussed shortly below.

The HCC can also exercise an abstract norm control to examine any legal rule for its conformity with an international treaty under s.1(c), either *ex officio*²³ or on the motion of the Parliament, one of its standing committees or an MP; the President of the Republic; the Government or one of its Ministers; the President of the State Audit Office; the President of the Supreme Court; or the Chief Public Prosecutor.²⁴

Lastly, under s. 1(e), the HCC has a somewhat unique competence in the elimination of an unconstitutionality manifesting itself in an omission or failure to legislate.²⁵ The HCC is entitled to examine either *ex officio* or upon anyone’s motion whether the legislator has failed to comply with its duty to legislate and, as a result of the omission, whether an unconstitutional situation has been created. If such

¹⁷ Paczolay (1993) at 44; I. Pogány, “Constitutional Reform in Central and Eastern Europe: Hungary’s Transition to Democracy” (1993) 42 ICLQ 332, at 341.

¹⁸ The rules of standing are laid down principally in s. 21 of the 1989 Act, and are subject to further elaboration in ss. 33-51 of the same Act.

¹⁹ 1989 Act, ss. 1(a) and 33-37.

²⁰ ABH 1993, 323.

²¹ 1989 Act, ss. 1(b) and 37-44.

²² 1989 Act, ss. 37 and 21(2).

²³ 1989 Act, s.44.

²⁴ 1989 Act, ss. 44 and 21(3)(a)-(f).

²⁵ 1989 Act, ss. 1(e) and 49.

unconstitutionality is manifested in the omission, the organ in question is required to fulfil its legislative duty according to the terms set by the HCC. The HCC similarly has the jurisdiction²⁶ to establish that a legislative organ has failed to fulfil its legislative task issuing from an international treaty, then it requests the organ which committed the omission to fulfil its task within a set deadline.

On its face, then, s.1 of the 1989 Constitutional Court Act appears to limit the review jurisdiction of the HCC to an *a priori* examination of the constitutionality of international treaties, limiting the *locus standi* for such action to Parliament, the President of the Republic, and the Government.²⁷ In the late 1990s,²⁸ however, the HCC definitively ruled that its review of constitutionality with respect to international treaties extended to post-promulgation norm control, whereby it could consider the provisions of the statute which transformed the treaty into domestic law. The rules of standing under s. 1(b) of the 1989 Act consequently allow anyone to challenge the constitutionality of a treaty in this way and this was strongly reaffirmed in *Dec. 4/1997 (I.22) AB*,²⁹ in which the HCC ruled that it had jurisdiction to determine the constitutionality of the Hungarian statute that had promulgated the EC-Hungary Europe Agreement into domestic law, thereby allowing in principle the petitioner to seek his *a posteriori* review of the statute. This confirmed the use of the *actio popularis*, whereby individuals have the standing to challenge the constitutionality of statutes and other legal norms once they have been enacted.

3. Constitutional complaints (Fundamental rights protection)

Under s. 1(d) of the 1989 Constitutional Court Act,³⁰ the HCC has the jurisdiction to adjudicate constitutional complaints submitted because of alleged violations of rights guaranteed by the Constitution. Such complaints may be brought by anyone³¹ if the injury is consequential to the application of the unconstitutional legal rule and if the person has exhausted all other possible legal remedies or no further legal remedies are available to them.

The problem that the applicable legal rule is unconstitutional may also arise in the course of a case before an ordinary court. In such circumstances the judge, in addition to suspending the case, petitions the HCC if the case under consideration requires the application of a law or other legal instrument of state administration whose

²⁶ 1989 Act, s. 47.

²⁷ 1989 Act, s. 36(1).

²⁸ Originally, in *Dec. 30/1990 (XII.15) AB* (ABH 1990, 128, at 131-132), the HCC had stated that it could review the domestic norm promulgating an international treaty since, “as a law [it] is not an exception to the legal rules which could be examined by the Constitutional Court.” But in *Dec. 61/B/1992 AB* (ABH 1993, 831), it reversed its previous opinion and stated: “According to the provisions of s.1 of the Constitutional Court Act, the *a posteriori* review of the unconstitutionality of a ratified and promulgated international treaty does not belong to the jurisdiction of the Constitutional Court.”

²⁹ ABH 1997, 41.

³⁰ 1989 Act, ss. 1(d), 48 and 40-43.

³¹ 1989 Act, ss. 21(4) and 48(1).

unconstitutionality he has noted.³² Similarly, a person, according to whom the legal rule to be applied in their case is unconstitutional, may lodge a request that the judge suspend proceedings and petition the HCC.³³

B. ESSENTIAL CORE OF SOVEREIGNTY

1. Introduction

In Hungary, the Constitution is the supreme legal norm.³⁴ Every legal rule has to be in accordance with the provisions of the Constitution and derives its force from the Constitution.³⁵ However, the concept of the essential core of sovereignty, similar to the non-amendable provisions of the German Constitution, does not form an explicit part of the rubrics of Hungarian constitutional academic literature or practice.³⁶

Nevertheless, it may be said that the general contours of fundamental constitutional principles and, to some extent, their content have already been delineated.³⁷ Through a series of cases in the 1990s, the HCC commenced the process of determining these constitutional principles – including rule of law, democracy, and protection of fundamental human rights. Such principles already provide a certain definition to the borders of the essential core of sovereignty. Moreover, with the prospect of Hungarian accession to the EU, academic writers increasingly began to reflect on the effects of such accession on national sovereignty.³⁸

³² 1989 Act, s. 38(1).

³³ 1989 Act, s. 38(2).

³⁴ On hierarchy generally, see Zs. Balogh *et al.*, *Az Alkotmány magyarázata*, KJK-Kerszöv Jogi és Üzleti Kiadó (2003), at 102-109.

³⁵ L. Súlyom, *Az alkotmánybíráskodás kezdetei Magyarországon*, Osiris Kiadó, Budapest (2001), at 435-441; J. Petrétei, *Magyar alkotmányjog I*, Dialóg Campus Kiadó, Budapest & Pécs (2002), at 115-209.

³⁶ See, *e.g.*, generally I. Kukorelli, *Alkotmánytan [Constitutional Doctrine]*, Osiris Kiadó, Budapest (1998). But see A. Bragyova, *Az új alkotmány: egy koncepciója [The New Constitution: A Conception]*, Közgazdasági és Jogi Könyvkiadó, Budapest (1995), at 31-42.

³⁷ Petrétei (2002), at 85-94.

³⁸ See generally, J.L. Kiss (ed.), *Szuverenitás és integráció*, BIGIS Közlemények No. 2, 1994; G. Béla & I. Hülvely, “Szuverenitás – nemzetállam – integráció,” MTA Politikai Tudományok Intézete, Budapest (1995); L. Valki, “Az Európai Unióhoz csatlakozó Magyarország szuverenitás” 1999/8 *Magyar Tudomány* 1000; Cs. Törő, “A szuverenitás változása” [2000] *Pro Minoritate* 103; J. Szabadválvi, “Nemzetállam és szuverenitás [Nation-State and Sovereignty],” in P. Takács (ed.), *Államelmélet*, Bíbor Kiadó, Miskolc (1997), 125-140; V. Kóré, “Az állami szuverenitás egyes kérdései az európai integráció tükrében” 2004/1 *Magyar Közigazgatás* 21.

2. State based on the rule of law

The most important principle applied in the HCC's practice is the principle of the rule of law³⁹ embedded in Constitution, Art. 2(1) which states that – “the Republic of Hungary shall be an independent, democratic state under the rule of law.” It was within the frame of the rule of law concept that “the differences in nature and characteristics of the system change could find their expression.”⁴⁰

Through the rulings of the HCC, especially on the process of transition, the rule of law has brought within its train such concepts as legal certainty,⁴¹ legality,⁴² continuity of the law,⁴³ separation of powers,⁴⁴ and constitutionality.

*Decision 9/1992 (I.30) AB*⁴⁵ was the starting point for the HCC's new understanding of Art. 2(1) of the Constitution. Henceforth, any violation of this rule of law clause was a sufficient basis for unconstitutionality. This was rendered possible by the elaboration of the content and criteria of the rule of law, chief among these being legal certainty.⁴⁶ In the judgment, the HCC referred to Constitution Art. 2(1) as a general constitutional provision which declared the basic values of the Republic: independence, democracy and the rule of law. It continued:⁴⁷

The principle of the rule of law is expounded in further detail by other provisions of the Constitution, although these provisions do not comprise the whole content

³⁹ Sólyom (2001), at 404-405 and at 686-739; Petrétei (2002), at 98-103; Balogh (2003), at 34-82; A. Holló & Zs. Balogh, *Az értelmezett alkotmány*, Magyar Hivatalos Közlönykiadó, Budapest (2005), at 13-90; G.A. Tóth, *Túl a szövegen: Értekezés a Magyar alkotmányról*, Osiris, Budapest (2009), at 147-151; and J. Martonyi, “A köztársaságról, a demokráciáról és a jogállamról,” in L. Trócsányi (ed.), *A mi alkotmányunk*, Complex, Budapest (2006), 49, at 49-52.

⁴⁰ L. Sólyom & G. Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court*, University of Michigan Press, Ann Arbor (2000), at 38.

⁴¹ *Dec. 10/1992 (II.25) AB*: ABH 1992, 72.

⁴² *Dec. 9/1992 (I.30) AB*: ABH 1992, 59; and *Dec. 11/1992 (III.5) AB*: ABH 1992, 77.

⁴³ *Dec. 10/1992 (II.25) AB*: ABH 1992, 72.

⁴⁴ Sólyom (2001), at 734-739, at 749-753, and at 756-768ff; J. Petrétei, *Magyar alkotmányjog II: Államszervezet*, Dialóg Campus Kiadó, Budapest & Pécs (2001), especially at 11-25. In the course of its interpretation of the provision of the Constitution, the HCC pointed out that the principle of the separation of powers must be adhered to in every case: *Dec. 31/1990 (XII.18) AB*: ABH 1990, 136. In its case law, the HCC has ruled on a number of cases involving the separation of powers: the powers of the President of the Republic (*Dec. 48/1991 (IX.26) AB*: ABH 1991, 217; *Dec. 37/1992 (VI.10) AB*: ABH 1992, 227; *Dec. 36/1992 (VI.10) AB*: ABH 1992, 207) the independence of the judiciary (*Dec. 38/1993 (VI.11) AB*: ABH 1993, 256; *Dec. 28/1995 (V.19) AB*: ABH 1995, 138; *Dec. 45/1994 (X.21) AB*: ABH 1994, 254; *Dec. 17/1994 (III.29) AB*: ABH 1994, 84) and the autonomy of local governments (*Dec. 16/1991 (IV.20) AB*: ABH 1991, 58; *Dec. 4/1993 (II.12) AB*: ABH 1993, 48; *Dec. 64/1993 (XII.2) AB*: ABH 1993, 373; *Dec. 18/1993 (III.19) AB*: ABH 1993, 161).

⁴⁵ *Dec. 9/1992 (I.30) AB*: ABH 1992, 59.

⁴⁶ Sólyom (2001), at 706-721.

⁴⁷ ABH 1992, 59, at 65.

of this fundamental value, and hence the interpretation of the notion of the rule of law is one of the Constitutional Court's important tasks. The principles comprising the fundamental value of the rule of law are expounded by the Constitutional Court on a case-by-case basis.... *The violation of the fundamental value of the rule of law enumerated in the Constitution is in itself a ground for declaring a certain legal rule unconstitutional.* [Emphasis supplied.]

It then examined legal certainty which it considered as an indispensable component of the rule of law. Legal certainty compelled the State (primarily the legislature) to ensure that the law in its entirety, in its individual parts and in its specific legal rules were clear and unambiguous and that their operation was ascertainable and predictable for the persons to whom the norms were addressed. In this sense, then, legal certainty not only required the unambiguity of individual legal norms but also the predictability of the operation of the individual legal institutions. It was in that way, the HCC said, that procedural guarantees were fundamental for legal certainty. Only by following the formal rules of procedure could a valid rule be created, only by complying with the procedural norms did legal institutions operate in a constitutional manner.⁴⁸

If legal certainty formed one of the technical pillars of the rule of law, the other one is the need to maintain the principled coherence of the Constitution.⁴⁹ The HCC follows the principle of the unity of the Constitution and under this principle it seeks to develop a coherent system through interpretation.⁵⁰ This approach echoes that of the FCC which, in its first major decision, underlined the internal coherence and structural unity of the German Constitution as a whole, stating:⁵¹ "No single constitutional provision may be taken out of its context and interpreted by itself.... Every constitutional provision must always be interpreted in such a way as to render it compatible with the fundamental principles of the Constitution and the intentions of its authors."

The then President of the Court, Sólyom, elaborated upon the philosophical basis of constitutional interpretation when delivering his concurring Opinion in *Dec. 23/1990 (X.31) AB*⁵² where he said:⁵³

⁴⁸ Nevertheless, the principle of legal certainty left ample room for balancing and decision-making opportunities for the legislature since the rule of law also demanded the realisation of other principles, some of which might conflict with the requirement of legal certainty. In this case, the HCC referred to the doctrine of equity (enabling the rendering of a just decision in an individual case) or the requirement of substantive justice (finality of judgments, in its precise formal and substantive determination, was a constitutional requirement, part of the rule of law).

⁴⁹ Sólyom & Brunner (2000), at 41.

⁵⁰ Paczolay (1993), at 45.

⁵¹ *Southwest State Case*, 2 BvG 1/51, 23 Oktober 1951: BVerfGE 1, 14.

⁵² *Dec. 23/1990 (X.31) AB*: ABH 1990, 88.

⁵³ ABH 1990, 88, at 97-98. Cf. the FCC in *Prinzessin Soraya* (1 BvR 112/65, 14 Februar 1973: BVerfGE 34, 269, at 287): "Under certain circumstances law can exist beyond the positive norms which the state enacts – law which has its source in the constitutional legal order as a meaningful, all-embracing system, and which functions as a corrective to the written norms.... [The judge] may have to make a value judgment ... that is, bring to light and implement in his decisions those value concepts which are inherent in the constitutional legal order, but which are not, or not adequately, expressed in the language of the written laws."

The Constitutional Court must continue its effort to explain the theoretical bases of the Constitution and the rights included in it, and to form a coherent system with its judgments to provide a reliable standard of constitutionality – an invisible constitution – beyond the Constitution which is often amended nowadays by current political interests, and this “invisible constitution” probably will not conflict with the new Constitution to be established or with future constitutions.

Initially, its rather activist position⁵⁴ was pivotal in reshaping the legal system and in balancing the conflicts of the political powers.⁵⁵

Nevertheless, as Paczolay has noted,⁵⁶ the HCC gave an unconditional priority to the formalistic and procedural requirement of the rule of law as the only possible “objective” interpretative method in the midst of the change of regime. Indeed, this appears to be one of the main justifications for the HCC’s rather formalistic conception of the rule of law wherein it specifically refused to equate that principle with justice,⁵⁷ stressing that – consistent with constitutionalism – it was most important to consider the rule of law as requiring predictability and legal certainty. This approach is in contradistinction to that of the FCC which clearly links the rule of law to justice:⁵⁸ while both countries experienced a transition from authoritarianism to democracy, issues relating to the transition played no discernible role before the FCC unlike the HCC.

3. Democracy

Participatory democracy has numerous constitutional techniques and guarantees.⁵⁹ Under the terms of the Constitution, Art. 2(2) – “all power is vested in the people who exercise their sovereignty through elected representatives and directly.” The two constitutional

⁵⁴ Generally on how the HCC approached its role, A. Holló, “Aktivizmus és passzivizmus az Alkotmánybíróság gyakorlatában,” in B. Bitskey (ed.), *Tíz éves az alkotmánybíróság*, Alkotmánybíróság, Budapest (2000), at 167ff.

⁵⁵ P. Paczolay, “The Rate of Constitutional Adjudication in Legal Change,” in I. Grudzinska Gross (ed.), *Constitutionalism & Politics*, IV Bratislava Symposium 1993, Slovak Committee of the European Cultural Foundation, Bratislava (1994) 293, at 295. The HCC, within its first few years of operation, made a number of important rulings on such matters as capital punishment (*Dec. 23/1990 (X.31) AB*: ABH 1990, 88); abortion (*Dec. 64/1991 (XII.17) AB*: ABH 1991, 297); church/state relations (*Dec. 4/1993 (II.12) AB*: ABH 1993, 48); presidential powers (*Dec. 48/1991 (IX.26) AB*: ABH 1991, 217; *Dec. 36/1992 (VI.10) AB*: ABH 1992, 207); compensation for previous illegal seizure of property by the State (*Dec. 21/1990 (X.4) AB*: ABH 1990, 73; *Dec. 16/1991 (IV.20) AB*: ABH 1991, 58); media (*Dec. 37/1992 (VI.10) AB*: ABH 1992, 227); the environment (*Dec. 28/1994 (V.20) AB*: ABH 1994, 134); and on same sex partnerships (*Dec. 14/1995 (III.13) AB*: ABH 1995, 82). One commentator has also highlighted the HCC’s particular case-law in the interpretation of human dignity: C. Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity*, Hart Publishing, Oxford (2003).

⁵⁶ Paczolay (1993), at 35.

⁵⁷ *Dec. 11/1992 (III.5) AB*: ABH 1992, 77.

⁵⁸ *Prinzessin Soraya*, 1 BvR 112/65, 14 Februar 1973: BVerfGE 34, 269.

⁵⁹ Tóth (2009), at 151-156.

participatory legal principles are equal, their harmony being established by several HCC Decisions.⁶⁰

Nevertheless, although the Preamble to the Constitution lists among the goals of the transition “parliamentary democracy” and Art. 2(1) declares Hungary to be a democratic state under the rule of law, the HCC has never really dealt directly with the principle of democracy.⁶¹ Rather it has tended to deal with it within the context of parliamentarianism⁶² or of the rule of law.

In *Dec. 52/1997 (X.14) AB*,⁶³ the HCC was faced with the political problems surrounding two competing referenda on the same question, the first initiated by voters as an obligatory referendum which the Government tried to “overtake” with its own discretionary referendum.⁶⁴ In the relationship between direct exercise of power by the people and representative democracy, the obligatory referendum – as an exceptional form of the exercise of popular sovereignty – and left them in control of every element of this direct exercise of power. required Parliament to refrain from any act or omission which would influence or frustrate the realisation of such exercise, even to the point of preventing other state organs from committing like acts or omissions. The matter was entirely different as regards discretionary referendums where Parliament maintained complete control as to whether to proposed initiative should continue or that the wording could be altered. As an exercise of power through representation, discretionary referenda therefore ranked below obligatory ones.

In *Dec. 30/1998 (VI.25) AB*,⁶⁵ the HCC noted that one of the requirements of a democratic state under the rule of law, based on the sovereignty of the people,⁶⁶ was the fact

⁶⁰ See generally G. Halmai, “Népszavazás és képviselői demokrácia” (2008) 14 *Jura* 29-43; and C. Horváth, “Országos népszavazások Magyarországon” (2008) 14 *Jura* 54-63.

⁶¹ Martonyi (2006), at 49-52; Sólyom (2001), at 405-409 and at 739-753; Petrétei (2002), at 94-98.

⁶² L. Trócsányi, “Az 1-2. §-hoz,” in Trócsányi (2006), at 52-55; Sólyom (2001), at 749-753; Balogh (2003), at 30-31 and at 68-72; A. Körösnéyi, “A pártokról és a szakszervezetekről,” in Trócsányi (2006), 62, at 62-64.

⁶³ ABH 1997, 331.

⁶⁴ In a 1997 constitutional amendment, national referenda and popular initiatives became constitutional institutions. According to Constitution, Art. 28/B, any question falling within the competence of Parliament could be the subject of a referendum (the exceptions are listed in Constitution Art. 28/C(5)). In initiating an obligatory referendum the signature of 200,000 citizens eligible to vote is required (Constitution Art. 28/C(2)), while a number of political actors can initiate a discretionary referendum (Constitution Art. 28/C(4)) including the President of the Republic, the Government, or one third of MPs as well as 100,000 citizens’ signatures. However, in the latter case, it is then for Parliament to decide whether or not to hold such a referendum.

⁶⁵ ABH 1998, 220. See A.F. Tatham, “Constitutional Judiciary in Central Europe and the Europe Agreement: Decision 30/1998 (VI.25) AB of the Hungarian Constitutional Court” (1999) 48 *ICLQ* 913; J. Volkai, “The Application of the Europe Agreement and European Law in Hungary: The Judgement of an Activist Constitutional Court on Activist Notions,” No. 8/99 *Jean Monnet Working Paper*, Harvard Law School, Harvard (2000):

<<http://www.jeanmonnetprogram.org/papers/99/990801.html>>. Visited 21 August 2006; L. Keckés, *EU jog é jogharmonizáció*, HVG-ORAC Lap- és Könyvkiadó, Budapest (2003), at 579-587.

⁶⁶ Sólyom (2001), at 741-743; Petrétei (2002), at 85-86; Balogh (2003), at 298-311.

that state power might only be exercised on the basis of democratic legitimisation.⁶⁷ All norms of public law enforceable against subjects of domestic law were to be based on it. Exercise of power by the State was subject to such a requirement in respect of both internal and external activities.⁶⁸

4. Protection of fundamental human rights

The Constitution contains the fundamental provisions on civil and political rights⁶⁹ under Art. 8(1): “The Republic of Hungary recognizes inviolable and inalienable fundamental rights of man; to respect and protect these rights is a primary obligation of the State.” Under the Constitution, these rights are regulated in detail by appropriate laws. The next paragraph, Art. 8(2), states that “rules pertaining to fundamental rights and duties shall be determined by statute, which, however, may not limit the essential content of any fundamental right.”

The decisions of the HCC evidence a clear hierarchy of fundamental rights from the point of view of their relation to Art. 8(2). At the top are the rights to life and human dignity, the inviolability of which are considered absolute: “Human life and human dignity constitute an inseparable unit and the greatest value above all. The right to human life and dignity ... is an indivisible and unlimitable fundamental right which restricts the criminal jurisdiction of the state.”⁷⁰

After these, the next group consists of the fundamental rights of communication: freedom of expression, religion and conscience.⁷¹ The HCC considered the right to freedom of expression to be the “mother right” of all fundamental rights dealing with communication⁷² and referred to its characteristics in the subsequent rulings on the freedom of broadcasting⁷³ and the freedom of religion.⁷⁴ An increased protection of these rights is guaranteed by the fact that, in the view of the HCC, laws that restrict the freedom

⁶⁷ Balogh (2003), at 76-82.

⁶⁸ In view of the extensive transfer of powers inherent in EU accession, there was no doubt that such a fundamental change in the sovereignty of Hungary would require legitimisation through democratic processes: in the event, the HCC having rejected several petitions challenging the holding of a referendum on EU accession in *Dec. 14/2003 (IV.9) AB* (ABH 2003, 903), such accession was subsequently approved through popular referendum and parliamentary approval in 2003.

⁶⁹ G. Halmai & G.A. Tóth (eds.), *Emberi jogok*, Osiris Kiadó, Budapest (2003); J. Sári, *Alapjogok: Alkotmánytan II*, 3rd ed., Osiris Kiadó, Budapest (2004); Sólyom (2001), at 416-435 and at 442-685; N. Chronowski & E. Rózsás, *Alkotmányjog és közigazgatási jog*, Dialóg Campus Kiadó, Budapest & Pécs (2005), at 13-151; Balogh (2003), at 527-710.

⁷⁰ *Dec. 23/1990 (X.31) AB*: ABH 1990, 88.

⁷¹ Sólyom & Brunner (2000), at 11.

⁷² *Dec. 30/1992 (V.26) AB*: ABH 1992, 167.

⁷³ *Dec. 37/1992 (VI.10) AB*: ABH 1992, 227.

⁷⁴ *Dec. 4/1993 (II.12) AB*: ABH 1993, 48.

of expression are themselves to be strictly interpreted. The HCC has emphasised that the freedom of expression protects opinion without considering its value or truthfulness.⁷⁵

Other fundamental rights, when they conflict with these two groups of rights, are to be interpreted restrictively. The right to property, for example, was qualified not only through the recognition of the so-called burdens of property (*i.e.*, the possibility of its restriction in the interests of public welfare) but also through the problems surrounding compensation for previous Communist nationalisations.⁷⁶ In respect of these, the HCC established the so-called necessity and proportionality test, that is: the rights constituting the said group may only be restricted by necessity and proportional to the aim to be attained.⁷⁷

The HCC has for long used the ECHR⁷⁸ and its interpretations by the ECtHR in its case-law.⁷⁹ This is perhaps not coincidental since the contents of many of the Hungarian constitutional provisions on the protection of human rights are a direct, word-for-word translation of the ECHR.⁸⁰ One of the bases upon which the HCC abolished the death penalty in *Dec. 23/1990 (X.31) AB*⁸¹ was the Sixth Protocol to the ECHR – well before the Convention's coming into force domestically.⁸²

⁷⁵ *Dec. 36/1994 (VI.24) AB*: ABH 1994, 219.

⁷⁶ *Dec. 64/1993 (XII.22) AB*: ABH 1993, 373.

⁷⁷ *Dec. 30/1992 (V.26) AB*: ABH 1992, 167; *Dec. 37/1992 (VI.10) AB*: ABH 1992, 227.

⁷⁸ See generally, L. Sólyom, "The Interaction between the Case-Law of the European Court of Human Rights and the Protection of Freedom of Speech in Hungary," speech delivered at Conference, autumn 1996, Strasbourg [copy on file with the author of the present work]; and A. Ádám, *Alkotmányi értékek és alkotmánybírászkodás [Constitutional values and Constitutional jurisdiction]*, Osiris Kiadó, Budapest (1998), chap. 3, at 89-99.

⁷⁹ A. Drzemczewski, "Ensuring Compatibility of Domestic Law with the European Convention on Human Rights Prior to Ratification: The Hungarian Model" (1995) 16 HRLJ 241.

⁸⁰ There are a plethora of cases in this respect, e.g., *Dec. 39/1997 (VII.1) AB*: ABH 1997, 263 in which the HCC used a number of ECtHR decisions: *Le Compte, Van Leuven and De Meyere* (ECtHR, 23 June 1981, Series A, No. 43); *Albert and Le Compte* (ECtHR, 10 February 1983, Series A, No. 58); and *Obermeier* (ECtHR, Judgment of 28 June 1990, Series A, No. 179).

⁸¹ *Dec. 23/1990 (X.31) AB*: ABH 1990, 88.

⁸² Through Act XXXI of 1993: MK 1993/41. Hungary had signed the ECHR on 6 November 1990 and ratified it on 15 October 1992.

C. TRANSFERS OF SOVEREIGNTY AND EUROPEAN INTEGRATION

1. Introduction

The pre-2003 Hungarian Constitution did not provide a framework to deal with EU accession.⁸³ As a result, the Hungarian Government published a *Paper* in 2001 which attempted to set the agenda for national discussions on constitutional amendments as well as the main issues of EU accession. The *Paper* suggested⁸⁴ that an accession clause ought to specify the procedure for the ratification and promulgation of the Accession Treaty: a strict procedure would involve ratification by two thirds of MPs. It continued by recognising that although there was no constitutional requirement to hold any referendum on the issue of EU accession, the fact that accession “fundamentally affects people’s sovereignty” justified holding a binding referendum since that would provide the ultimate legitimisation for accession. It was clear then that accession to the EU could only be achieved by referendum coupled with amendment to the Constitution.

2. Transfer of the exercise of sovereignty

a. Constitution and HCC interpretations

The main provisions of the Constitution concerning sovereignty are set out in its first Chapter.⁸⁵ According to Constitution Art. 2(1), “Hungary shall be an independent, democratic state under the rule of law,” while under Constitution Art. 2(2), “all power is vested in the people, who exercise their sovereignty through elected representatives and directly.” This principle of popular sovereignty was considered in *Dec. 52/1997 (X.14) AB*⁸⁶ in which the HCC (as noted above) clearly regarded the sovereignty of the people as paramount in certain circumstances, to which Parliament must give way.

⁸³ Although this had already been suggested by Bragyova (1995), para. 37, at 34-35; and formed part of the proposals for a new Constitution in the 1990s: V. Lamm (ed.), *Constitution of the Republic of Hungary (Draft)*, Hungarian Academy of Sciences, Institute for Legal and Administrative Sciences, Working Paper No. 9, MTA Állam-és Jogtudományi Intézete, Budapest (1997), Art. 3; and I. Somogyvári, “Az uniós csatlakozás alkotmánymódosítást igénylő” 2001/1 *Európai Közigazgatási Szemle (A Magyar Jog melléklete)* 22-27.

⁸⁴ Ministry of Justice & Ministry of Foreign Affairs, *Az Európai Unióhoz való csatlakozásnak a magyar jogrendszerrel érintő egyes kérdései*, Joint Paper for the Hungarian Government, Budapest, January 2001, IM/EUR/2000/TERVEZET/228/8 (2001): <http://www.im.hu/adat/letoltes/vegleges_nyilatkozat.pdf>, at 18. 28 March 2001. This Paper will be referred to hereinafter as “the 2001 *Government Paper*.”

⁸⁵ Holló & Balogh (2005), at 94-126; Gy. Fóris, “A szuverenitásról és az európai integrációról,” in Trócsányi (2006), 56, at 56-59; A. Jakab, “A szuverenitás fogalmához kapcsolódó kompromisszumos stratégiák, különös tekintettel az európai integrációra” 2006/2 *Európai Jog* 3, at 5-6 and at 8; and Tóth (2009), at 156-163.

⁸⁶ *Dec. 52/1997 (X.14) AB*: ABH 1997, 331. This case concerned the priority between compulsory referenda under Art. 28/C(2) when petitioned for by at least 200,000 voters and discretionary referenda under Art. 28/C(4) when petitioned for by at least 100,000 voters (or certain political actors) and approved by Parliament: see above at Chapter Four, point B.3.

Further in *Dec. 5/2001 (II.28) AB*,⁸⁷ the HCC ruled that the definition of sovereignty could be linked to Constitution Art. 2(1) and (2), according to which popular sovereignty was in fact the basis for Hungary being an independent, democratic state under the rule of law. Sovereignty, according to the HCC,⁸⁸ was a conceptual criterion of international law and possessed two dimensions: first, the internal dimension expressed the independence of the state and the ability of its constitution and the legal system based on it to create its own institutional set-up and to maintain it through the exercise of power by the people living on its territory; and, secondly, the external dimension meant the state's independence and its capacity under international law, meaning that it could freely and independently decide in its relations with other states.

Nevertheless, there was implicit recognition of the existence of constitutional restrictions on the transfer of sovereignty, their focus being Constitution Art. 2(1) and (2) on democracy and popular sovereignty.⁸⁹ The HCC had considered such propositions in relation to the EU in its ruling on the constitutionality of the domestic law promulgating the Europe Agreement, *Dec. 30/1998 (VI.25) AB*,⁹⁰ in which it noted that, within its own jurisdiction, the State might dispose of its powers (related to national sovereignty) within the framework of its international relations. As a natural consequence of the conduct of such relations, limitations on sovereignty could be caused by undertaking international obligations.

According to the HCC in *Dec. 5/2001 (II.28) AB*,⁹¹ "sovereignty – although it means the state's supreme power and independence – cannot be unlimited. International law limits the independence of the state." Since international law secured the legal equality for states, the effect of the limitation of sovereignty occurred as the exercise of self-restraint by the state itself: such self-restraint was exemplified by the creation of international treaties and accession to them.⁹² However, this self-restraint did not eliminate sovereignty rather, especially in international relations, it was a fundamental precondition for co-operation as well as for signing international treaties. Consequently, state power exercised by Parliament, embodying sovereignty through representatives, was not an unlimited power and had to be exercised in accordance with the Constitution.⁹³ In *Dec. 30/1998 (VI.25) AB*, the HCC

⁸⁷ ABH 2001, 86.

⁸⁸ ABH 2001, 86, at 89.

⁸⁹ Ficsor had considered much earlier that the HCC could examine whether these principles would become devoid of substance because of the supranational nature of the EU. In view of Constitution Art. 2(1) and (2), the following assumption was maintained, *viz.* that such a level of restriction of sovereignty required for EU accession would infringe the then Constitution. (Such problem could, of course, be resolved by constitutional amendment.) The HCC would consider impermissible the impairment of the principle of democracy based on people's representation and the protection of fundamental rights, examples of and bound up with the principle of a state under the rule of law: M. Ficsor "Megjegyzések az európai közösségi jog és a nemzeti alkotmány viszonyáról [Comments on the relationship between EC law and the National Constitution]" (1997) XLIV *Magyar Jog*, Part I, 462; Part II, 526, at 529.

⁹⁰ ABH 1998, 220.

⁹¹ ABH 2001, 86, at 89.

⁹² In *Dec. 36/1999 (XI.26) AB* (ABH 1999, 320, at 322), the HCC had indicated that the sovereignty of states could be limited in international treaties through an adequate level of law.

⁹³ *Dec. 2/1993 (I.22) AB*: ABH 1993, 33, at 36.

further discussed the importance of Constitution Art. 2(1) and (2) in relation to sovereignty and stated that:⁹⁴

The constitutional requirements of a democratic state under the rule of law determine the framework and the limits of exercising sovereign authority, and in particular, the acts of the Parliament and the Government. One of the requirements of a democratic state under the rule of law based on popular sovereignty – in connection with the principle of popular sovereignty declared in Constitution, Art. 2(2) – is that public authority may only be exercised on the basis of democratic legitimacy. The exercise of public authority includes – among others – the determination of the institutional, procedural and substantial features of legislation and the enforcement of law. The democratic legitimacy of exercising public authority is a constitutional requirement for both internal and external acts of sovereign power aimed at the determination of international relations or resulting in international obligations.

According to the Constitution, as far as the legal norms to be applied in the Republic of Hungary are concerned, the requirement of democratic legitimacy based on popular sovereignty and on being a democratic state under the rule of law means that the adoption of such norms can be traced back to the absolute source of sovereignty. It is, therefore, a general principle to be followed on the basis of Constitution, Art. 2(1) and (2) that all legal norms of a public law nature to be applied in the domestic law to Hungarian subjects of law must be based on democratic legitimacy allowing to be traced back to popular sovereignty.

As a result, unless Parliament had a separate and express constitutional authorisation, it could not constitutionally infringe a legal field falling within the exclusive competence of the State. In other words such authorisation was a *sine qua non* to permit limitations on Hungarian sovereignty. Here one can definitely understand the almost unique precedence Art. 2 enjoyed in the Hungarian Constitution. Any restriction on sovereignty, as understood by interpretation of Art. 2, needed a specific, explicit and distinct constitutional authorisation and Parliament could not amend the Constitution in a disguised manner by adopting or promulgating an international treaty:⁹⁵

According to Constitution, Art. 2(2), popular sovereignty is in principle exercised by the Parliament: the general form of exercising power is through acts of the Parliament. It is emphasised by the Constitutional Court that ... the Parliament must not violate Constitution, Art. 2(1) and (2) by the adoption or promulgation of international treaties. As provided for by Constitution, Art. 19(3)(a), the adoption and the amendment of the Constitution are within the powers of the Parliament. In this respect, the Parliament must act in a constitutional way, in compliance with the procedural and decision-making requirements regulating the amendment of the Constitution, upon a direct and expressed order of the legislative power aimed at amending the Constitution, in accordance with *Dec. 1260/B/1997 AB* (ABK February 1998, 82).

⁹⁴ ABH 1998, 220, at 233-234.

⁹⁵ *Dec. 30/1998 (VI.25) AB*: ABH 1998, 220, at 234.

The democratic legitimisation of a transfer of sovereign power to the EU therefore needed a constitutional amendment and probably the expression of the sovereignty of the people through a popular referendum.⁹⁶ Any purported transfer made by parliamentary vote alone could easily be deemed insufficient, and thus inherently unconstitutional.

b. Europe clause

Consequently, in the face of pending EU accession, the focus in Hungary was almost exclusively on the wording of an accession clause, through which all other issues were considered.⁹⁷ The process for adopting the necessary constitutional amendment to allow for accession took several months to complete⁹⁸ which eventually led to amendment of the Constitution by addition, through Act LXI of 2002,⁹⁹ of Art. 2/A as the EU clause:¹⁰⁰

(1) By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as “European Union”); these powers may be exercised independently and by way of the institutions of the European Union.

(2) The ratification and promulgation of the treaty referred to in para. (1) shall be subject to a two-thirds majority vote of the Parliament.

The 2002 Act also provided that the Constitution would be altered in various respects. Of importance for the present discussion is s. 2 of the Act which provided for the adding of a fourth paragraph to Constitution Art. 6 to read: “The Republic of Hungary shall take an active part in establishing a European unity in order to achieve freedom, well-being and

⁹⁶ L. Blutman & N. Chronowski, “Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában (I.)” 2007/2 *Európai Jog* 3, at 12-13.

⁹⁷ 2001 *Government Paper*, at 10; and L. Kecskés, “Indító tézisek a Magyar Köztársaság Alkotmánya EU-vonatkozású szabályainak továbbfejlesztéséhez” 2004/3 *Európai Jog* 3, at 6-10.

⁹⁸ See the detailed explanation in L. Kecskés, *EU Jog és Jogharmonizáció*, HVG-Orac, Budapest (2003), at 593-603; N. Chronowski & J. Petrétei, “EU-csatlakozás és alkotmánymódosítás: minimális konszenzus helyett politikai kompromisszum” (2003) *L Magyar Jog* 449-466.

⁹⁹ MK 2002/161.

¹⁰⁰ On the European clause, see Balogh (2003), at 127-131; Holló & Balogh (2005), at 129; P. Sonnevend, “Magyar Alkotmány és EU-csatlakozás,” in A. Jakab & P. Takács, *A Magyar jogrendszer átalakulása: 1985/1990-2005. Jog, rendszerváltozás, EU-csatlakozás*, Gondolat Kiadó and ELTE ÁJK, Budapest (2007), Vol. II, 964, at 964-967; and L. Trócsányi, “A 2/A. §-hoz,” in Trócsányi (2006), 60, at 60-61. A further (unsuccessful) bill – Bill No. T/4486, proposed in July 2003 – would have allowed for a clause amounting to a general authorisation for transfer of exercise of powers to an international organisation; a separate clause would have referred exclusively to the EU.

security for the peoples of Europe.” This wording is evidently inspired by the wording of the German Constitution, Preamble and Art. 23.¹⁰¹

In addition, the 2002 Act provided that the electorate would be asked to vote in a referendum on 12 April 2003¹⁰² – after the conclusion of the accession negotiations but some eleven days before the signing of the Treaty of Accession in Athens at the European Council meeting.

The 2003 EU accession referendum was the first to be held generally in accordance with Constitution Arts. 28/B-28/D as well as the 1997 Electoral Procedure Act¹⁰³ and the 1998 Referendum Act.¹⁰⁴ However, because of the overwhelming importance of the accession, the binding referendum and its date were actually ordered by the Constitution through a new – temporary¹⁰⁵ – provision, Art. 79:¹⁰⁶ “A binding referendum shall be held on the accession of the Republic of Hungary to the European Union pursuant to the Accession Treaty. The date of this referendum shall be 12 April 2003. The question to be put in the referendum shall be: ‘Do you agree that the Republic of Hungary should become a Member of the European Union?’”

Post referendum, the Treaty of Accession, in accordance with Constitution Art. 30/A(1)(b) was signed by the President of the Republic, and countersigned by the Prime Minister as responsible Minister within the terms of Constitution Art. 30/A(2). Since Hungary operates a dualist system,¹⁰⁷ the Treaty of Accession was then brought into the domestic system by means of a two-thirds majority statute, Act XXX of 2004¹⁰⁸ – as required under new Constitution Art. 2/A(2) and the same as a constitutional amendment – and entered into force on 1 May 2004, the date of EU accession for Hungary and the other CEECs, together with Cyprus and Malta.

The “Europe clause” of the Constitution thus represents a more modest version of the separate European integration chapters contained in the constitutions of Austria, Germany and France.¹⁰⁹

¹⁰¹ See above at Chapter Three, point C.2.

¹⁰² The procedural terms and deadlines of the referendum called for 12 April 2003 calculated according to calendar days were set forth in Minister of the Interior Decree 33/2002 (XII.23) BM r.

¹⁰³ Act C of 1997 on Electoral Procedure: MK 1997/96.

¹⁰⁴ Act III of 1998 on Referendums and Popular Initiatives: MK 1998/13. The previous referendum on NATO membership, 16 November 1998, had been held under the terms of the Act XVII of 1989 on Referendums and Popular Initiatives: MK 1989/39.

¹⁰⁵ Act LXI of 2002 on the Amendment to the Constitution, s. 11(3) provided that it was to lose force on EU accession.

¹⁰⁶ As inserted into the Constitution by Act LXI of 2002 on the Amendment to the Constitution, s. 10.

¹⁰⁷ It has done so for the best part of its history since the late 19th century: I. Arató, “Hungarian Jurisprudence relating to the Application of International Law by National Courts” (1949) 43 AJIL 536.

¹⁰⁸ Act XXX of 2004 on the promulgation of the 2003 Accession Treaty: MK 2004/60.

¹⁰⁹ A. Tatham, “The European Clause of the Hungarian Constitution: a Comparative Perspective” (2005) *Collectio Iuridica Universitatis Debreceniensis*, Volume V, 255. While Kecskés accepted the Europe clause (L. Kecskés, “Magyarország EU-csatlakozásának alkotmányossági problémái és a szükségessé vált alkotmánymódosítás folyamat. II. Rész [The Constitutional Problems concerning Hungary’s EU Accession and the Process of the Necessary Amendment of the Constitution. Part II],” (2003) III/2 *Európai jog* 24),

D. NATIONAL CONSTITUTIONAL COURT ACCEPTANCE

1. Introduction

There has been a relative paucity of case-law from the HCC since accession in 2004¹¹⁰ compared to that of the Polish CT and for that reason reference is guardedly made – where appropriate – to two main pre-accession cases (*Dec. 4/1997 (I.22) AB*¹¹¹ and *Dec. 30/1998 (VI.25) AB*¹¹²) from which it is possible to glean some indications of the HCC's perception of certain aspects of the position and effectiveness of European law in the domestic constitutional system after EU entry.¹¹³

2. Supremacy/Priority of application

The issue of supremacy or priority of application of European law was raised in its decision determining its jurisdiction to review *a posteriori* international treaties. In *Dec. 4/1997 (I.22) AB*, the HCC indicated its own understanding of the nature of European law and its effect in the internal systems of the Member States. The petitioner in that case had sought *a posteriori* review of certain provisions of Act XXXII of 1989 on the Constitutional Court which, in part, allegedly prevented constitutional consideration of international treaties promulgated into domestic law.

The HCC ruled that, according to s. 1(b) of the 1989 Act, it did have jurisdiction to review the constitutionality of a statute promulgating an international treaty, and this included examination of such treaty. The constitutional requirement for this examination derived from Constitution Arts. 7(1) and 32/A. In fact, there was no constitutional basis to deal with a law promulgating a treaty differently from any other legal rule when it came to constitutional review. Since it was derived from the Constitution that *a posteriori* review was to cover all kinds of legal rule, this universality could not be restricted even by statute. In this way the examination of international treaties, after they became part of domestic law, fitted into the logic of constitutional review.

The important point was the fact that the treaty concerned was the 1991 EC-Hungary Europe Agreement (“EA”),¹¹⁴ promulgated into domestic law by Act I of 1994.¹¹⁵

other academics were not convinced: I. Vörös, “The Legal Doctrine and Legal Policy Aspects of the EU-Accession” (2003) 44/3-4 *Acta Juridica Hungarica* 141, at 162-163; and N. Chronowski, *Constitution and Constitutional Principles in the EU*, Dialóg Campus Kiadó, Budapest and Pécs (2005), chap. V, 123, at 129-130.

¹¹⁰ M. Varju, “On the Constitutional Issues of EU Membership and the Interplay between the ECHR and Domestic Constitutional Law Concerning the Right of Assembly and Freedom of Expression” (2009) 15 *EPL* 295, at 297-301; and L. Blutman & N. Chronowski, “Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában (I.) és (II.)” 2007/2 *Európai Jog* 3 and 2007/4 *Európai Jog* 14, respectively.

¹¹¹ ABH, 1997, 41.

¹¹² ABH 1998, 220.

¹¹³ N. Chronowski & Z. Nemessányi, “Európai Bíróság – Alkotmánybíróság: területi feszültség” 2004/3 *Európai Jog* 19, at 25-28.

¹¹⁴ Europe Agreement establishing an association between the European Communities and their Member

In its ruling, the HCC made a number of observations that were in fact *obiter dictum* since they were not strictly necessary for its decision. It thus set out its understanding of the position of European law in the following terms:¹¹⁶

... the Constitutional Court refers to the fact that, concerning the relationship between domestic and international law, in the development of European law, there is a tendency that the dualist-transformation system is replaced by the monist system. According to the monist-adoption concept, the concluded international treaty constitutes a component of national law without further transformation that is it is applicable directly and enjoys supremacy over domestic law. This system is required by European integration and, for this reason, even those members of the EU which still follow the transformation system (e.g., Germany, one of the founding members, Italy, and the Scandinavian countries which subsequently joined the European Union) apply the law of the European Union directly, without transformation, and they ensure superiority over national law *with the exception of the Constitution*. As a result of this, the constitutional courts exercise their right to constitutional examination of international treaties (international law) and the decisions of international organisations – due to the adoption system – automatically becoming part of the domestic law. [Emphasis supplied.]

In support of its arguments, the HCC relied¹¹⁷ on the case-law of its German counterpart (including the FCC's cases on the *EEC Treaty*¹¹⁸ and the *Maastricht Treaty*¹¹⁹) which, at the time, caused a measure of surprise and consternation. The mention of the FCC's *cause célèbre* in *Maastricht* was regarded with particular concern, given what may be considered as the distinctly Euro-sceptic flavour of that judgment.¹²⁰

Ficsor noted¹²¹ that the HCC had felt it necessary to summarise (clearly as an example to be followed) how the national constitutional courts addressed the question of the

States, of the one part, and the Republic of Hungary, of the other part: OJ 1993 L347/1. It came into force on 1 February 1994 after obtaining all the necessary ratifications.

¹¹⁵ Act I of 1994 on the promulgation of the Europe Agreement between the Republic of Hungary and the EC and its Member States: MK 1994/1.

¹¹⁶ ABH 1997, 41, at 51.

¹¹⁷ ABH 1997, 41, at 52.

¹¹⁸ *Steinike & Weinlig*, 25 Juli 1979, 2 BvL 6/77: BVerfGE 52, 187, at 199.

¹¹⁹ *Maastricht*, 12 Oktober 1993, 2 BvR 2134 und 2159/92: BVerfGE 89, 155; [1994] 1 CMLR 57.

¹²⁰ I. Vörös, "Az Európai Megállapodás alkalmazása a magyar jogrendszerben" ["The application of the Europe Agreement in the Hungarian legal system"] (1997) LII *Jogtudományi Közlöny* 229-237; B. Berke, "A Nemzetközi szerződések alkotmányossági vizsgálatának megalapozásához [On the basis of constitutional review of international treaties]" (1997) XLIV *Magyar Jog* 449-461; M. Ficsor "Megjegyzések az európai közösségi jog és a nemzeti alkotmány viszonyáról I., II. ["Comments on the relationship between EC law and the National Constitution: Parts I and II]" (1997) XLIV *Magyar Jog* 462-473; and 526-536, respectively.

¹²¹ Ficsor (1997), at 462-464; and at 527-529. Cf. Berke who regarded *Dec. 4/1997 (I.22) AB* and its Reasoning as providing no real indication of the future characteristics of the relationship of the HCC with the EC legal system: this would be a question left until after accession. He considered it as inexpedient to interpret other statements as domestic doctrine related to this issue, particularly if such statements arose as a summary of the

evolution of the EU's legal order. Considering the prevalent past influence, it was not at all surprising that *Dec. 4/1997 (I.22) AB* referred mainly to the FCC case-law. It was apparent from this Part of the Decision that the HCC considered European law as international law: it became part of the national legal system without separately incorporating it into domestic law (“monist-adoptionist”), it was directly applicable and had priority over domestic law.

Kukorelli & Papp subsequently maintained that the basis of supremacy of European law would have to be based on the Hungarian Constitution itself.¹²² Ultimately, then, the extent of supremacy of European law over the Constitution thus depended on the content of the accession clause which was not drafted to allow for the express supremacy of European law.¹²³ In its previous judgement on the constitutionality of the EA, *Dec. 30/1998 (VI.25) AB*,¹²⁴ the HCC had not ruled out the supremacy/priority of European law after accession but had merely stated that:¹²⁵ “Therefore ... without an express authorisation by the Constitution, the Parliament may not, in an international treaty, constitutionally extend beyond the principle of territoriality in a field of law covered by the exclusive jurisdiction of the sovereign state.”¹²⁶ However, it did recognise the implications for priority of application of European law by expressly referring to the principle of direct applicability as understood in the Union:¹²⁷

In relations between the [Union] and its Member States, the rules of European law as adopted become a part of the law to be enforced in the Member States without the need to transform European law into domestic law (by way of confirmation, incorporation, transformation or promulgation by the Member States). Direct applicability is a feature characteristic of the presentation of European law within the Member States as compared to the way international treaties become a part of domestic law in general (through confirmation and promulgation, or confirmation and incorporation, transformation, promulgation, etc.).

practice of other constitutional courts and in relation to the examination of another subject, namely the possibility of a *posteriori* examination for constitutionality of international treaties: Berke (1997), at 457-458.

¹²² Kukorelli & Papp (2002), at 4.

¹²³ Ficsor (2002).

¹²⁴ ABH 1998, 220.

¹²⁵ ABH 1998, 220, at 232.

¹²⁶ Sajó had argued that the Europe clause read with the EC and EU Treaties as well as the 2003 Accession Treaty was such an express provision of constitutional authorisation although the wording of Constitution Art. 2/A was not particularly clear. But when read with the 2003 Accession Treaty, Art. 1(3), matters became clearer since this paragraph expressly recognised the provisions concerning the rights and obligations of the Member States and the powers and jurisdictions of the EU institutions as set out in the founding Treaties. Nevertheless, he warned, the Accession Treaty would remain subject to domestic constitutional review under the Constitution and the 1989 Constitutional Court Act: A. Sajó, “Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy?” 2004 ZSE 351, at 354-355.

¹²⁷ ABH 1998, 220, at 226-227.

Post-accession, the HCC recognised the autonomous character of the EU legal order and its laws in *Dec. 1053/E/2005*¹²⁸ in which it indicated (Bihari, P., dissenting) that – despite their treaty origins – the founding and amending Treaties of the EU were not to be treated as international treaties, an implicit acceptance of their *sui generis* nature. Moreover, since the 2003 Accession Treaty was an amending treaty, it was itself unlikely to be the subject of constitutional review. In Kovács, J.’s concurring Opinion¹²⁹ (Bagi, J., concurring), he noted that:¹³⁰

Also taking into account the *sui generis* nature of European law, the founding and amending European Treaties (“[primary] or] original law”) and the Regulations, Directives, other norms and acts (“secondary or derived law”) form part of the uniform (therefore to be treated in a uniform manner) European law. Despite their treaty origins, the norms of European law are much closer to domestic law than to international law; this can be demonstrated especially as regards their enforcement based on primacy and direct effect.

Kovács, J.’s words read like a textbook reiteration of ECJ constitutional thinking and practice over the past 50 years. The position of the HCC in *Dec. 1053/E/2005 AB* was expressly repeated by the HCC in *Dec. 72/2006 (XII.15) AB*¹³¹ when it stated:¹³²

The Constitutional Court has established in *Decision 1053/E/2005 AB* that the founding and amending treaties of the European [Union] are not considered treaties under international law in respect of establishing the competence of the Constitutional Court (ABK 2006, 498, at 500), and these treaties – being primary sources of the law – and the Directive – being a secondary source of the law – are as European law part of internal law, as Hungary has been a Member State of the European Union since 1 May 2004. With regard to the competence of the Constitutional Court, European law is not considered international law as specified in Art. 7(1) of the Constitution.

As regards the position of European law in Hungary, the HCC also ruled in *Dec. 1053/E/2005 AB* that:¹³³ “the so-called accession clause in Art. 2/A of the Constitution

¹²⁸ *Dec. 1053/E/2005 AB*: ABH 2006, 1824. See E. Várnay, “Az Alkotmánybíróság és az Európai Unió joga” (2007) LXII *Jogtudományi Közlöny* 423, at 434-434; E. Várnay & A.F. Tatham, “A New Step on the Long Way – How to Find the Proper Place for Community Law in the Hungarian Legal Order?” (2006) 3 *Miskolc Jo. Intl. L* 76, at 80-84; and F. Fazekas, “A közösségi jog elsőbbségét érintő magyar alkotmánybírósági határozatok” (2007) XI *Collega* 207, at 210-212.

¹²⁹ L. Trócsányi & L. Csink, “Alkotmány v. közösségi jog: az Alkotmánybíróság helye az Európai Unióban” (2008) LXIII *Jogtudományi Közlöny* 63, at 65.

¹³⁰ *Dec. 1053/E/2005 AB*: ABH 2006, 1824, at 1828.

¹³¹ *Dec. 72/2006 (XII.15) AB*: ABH 2006, 819. Várnay (2007), at 434-436; Fazekas (2007), at 210-212; and A. Raisz, “Confronted with direct applicability of a directive: the Hungarian Constitutional Court before challenges” (2007) 4 *Miskolc Jo. Intl. L* 113-127.

¹³² ABH 2006, 819, at 861.

¹³³ *Dec. 1053/E/2005 AB*: ABH 2006, 1824, at 1829.

determines the conditions and the framework of the Republic of Hungary participating in the European Union as a Member State, as well as the structural position of European law in the Hungarian hierarchy of the sources of law.” In his concurring Opinion¹³⁴ to *Dec. 72/2006 (XII.15) AB*, Kovács, J. (Kiss, J., concurring) noted that the context of the case in hand reflected the complexity of the interrelation between the Hungarian and European legal systems and showed the reasonable practical consequences primarily for the Hungarian courts as they formed an integral part of the judicial system applying European law.¹³⁵ Kovács, J. subsequently appeared to adhere to the priority of application thesis as expounded by the German Court and endorsed by the Polish Constitutional Tribunal. Referring back to *Dec. 1053/E/2005 AB*, he observed that the HCC interpreted the “structural position in the hierarchy of sources of law” concretising it in respect of the given EC/EU norm and stated:¹³⁶

It is not about the announcement of a doctrinal definition; the Constitutional Court only draws consequences in the case under review. A Directive – when it falls into the exceptional category of direct effect – enjoys finally the same position as a decree directly applicable *ex lege*, i.e. it is a source of law of statutory level under the level of the Constitution, but as *lex specialis* it has primacy over domestic law in case of conflicts. As a causal consequence of this position, there can be no normative conflict with the domestic decrees (government and departmental decrees) as the Directive (if it possesses the features of direct effect) enjoys priority over government and departmental decrees based on the hierarchy of norms.

A recognition of the priority of application, it can be strongly argued, has accordingly been afforded by Kovács, J.

Turning to another point, the use of European law as a yardstick for the constitutionality (or absence thereof) of executive/legislative (in)action has been almost excluded by the HCC. In *Dec. 1053/E/2005 AB*,¹³⁷ it determined that the accession clause in Constitution Art. 2/A defined the conditions and framework in the participation of Hungary in the Union as well as the position of European law in the Hungarian legal order but stressed that no specific legislative duty flowed from this provision. Thus an applicant could not claim before the HCC that the Hungarian State had breached Constitution Art. 2/A by having failed to pass the relevant implementing statute/legal norm under Hungarian law to incorporate a European Directive into the national system.

Such was the position followed by the HCC in *Dec. 66/2006 (XI.29) AB*¹³⁸ where the petitioners claimed that a provision of Act LIX of 2006 on Supertaxes and Contributions for the Improvement of the Balance of Public Finances violated Directive 77/388/EEC (“the Sixth VAT Directive”)¹³⁹ which, they contended, prohibited the

¹³⁴ Trócsányi & Csink (2008), at 65.

¹³⁵ *Dec. 72/2006 (XII.15) AB*: ABH 2006, 819, at 863.

¹³⁶ ABH 2006, 819, at 865-866.

¹³⁷ *Dec. 1053/E/2005 AB*: ABH 2006, 1824, at 1827.

¹³⁸ ABH 2006, 725; and also *Dec. 9/2007 (III.7) AB*: ABH 2007, 177. Trócsányi & Csink (2008), at 67.

¹³⁹ Sixth Council Directive 77/388/EEC on the harmonization of the laws of the Member States relating to

introduction of new turnover-type taxes. While tersely observing that it was beyond its competence whether or not the Act infringed the Directive, the HCC effectively rendered European law a non-constitutional standard on which to base a review of internal law: as a result, breach of European law was to be resolved by the ordinary courts as the proper fora with the HCC enjoying only limited review competence.¹⁴⁰ It reiterated this point in *Dec. 61/B/2005 AB*¹⁴¹ when the HCC was again asked to examine a petition according to which certain provisions of national law were claimed as contrary to European law and thus violated Constitution Art. 2/A. The HCC observed:¹⁴²

The powers of the Constitutional Court are determined by the s. 1 of the Constitutional Court Act. This provision does not contain any powers that could give authority to the Constitutional Court to assess whether a legal provision does or does not comply with European legislation. It is up to the European [Union's] institutions and ultimately to the ECJ to decide this. On the basis of Art. 2/A of the Constitution, European law should be applied equally to law created by the Hungarian legislature. On this basis, the Constitutional Court refused the motion in this regard.

In turning the emphasis away from its constitutional jurisdiction, the HCC was implicitly recognising the ECJ's requirements in *Simmenthal*.¹⁴³ By “de-constitutionalising” the conflict between European and national (statutory) law, the HCC was pushing responsibility back onto the shoulders of the ordinary courts to disapply national law where it came into conflict with European law, and not to burden it with references for constitutional review. The HCC thus does not countenance the attempts of petitioners to “constitutionalise” the conflict between European and national law, by means of Constitution Art. 2/A, thereby interpreting the scope of its jurisdiction strictly in accordance with the letter of the Constitutional Court Act.

In this way, the HCC appears not to follow the FCC but rather to echo the approach of the Austrian Constitutional Court and the Spanish Constitutional Tribunal in this area. The latter institution, through its decision-making, declines to review European law vis-à-vis national law on the grounds that European law is, in its own words, “infra-constitutional”¹⁴⁴ and thus beyond its jurisdiction. The Austrian Court has held¹⁴⁵ that

turnover taxes – Common system of value added tax: uniform basis of assessment: OJ 1977 L145/1.

¹⁴⁰ Kovács, J. in *Dec. 1053/E/2005 AB*: ABH 2006, 1824, at 1829-1830.

¹⁴¹ ABH 2008, 2201.

¹⁴² ABH 2008, 2201, at 2207.

¹⁴³ Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

¹⁴⁴ The Spanish Constitutional Tribunal ruled (Trib. Const. 14 febrero 1991, STC n. 28/1991: BOE n. 64, 15 marzo 1991; REDI 1991, 172) that a possible violation of EC law by subsequently enacted national or regional legislation or norms could not convert into a constitutional dispute something that was essentially a conflict of “infra-constitutional” norms, which was to be resolved by the ordinary courts. The conflict between a European norm and a domestic norm lacked constitutional relevance and therefore the Tribunal lacked jurisdiction to decide the petition before it. The principle of supremacy required national courts to be solely concerned with securing the effectiveness of European law. This ruling has been subject to criticism both from the viewpoint of constitutional and of European law: P. Pérez Tremps, *Constitución española y*

violations of European law in general do not constitute infringements of constitutionally guaranteed rights and that therefore, generally speaking, it is not required to decide on the question as to whether or not an administrative act is in line with European law. Consequently, the Austrian Court does not rule on the conformity of a national law with European law.¹⁴⁶

3. Direct effect

Already in the previous section, it has been noted that the HCC stated in *Dec. 4/1997 (I.22) AB*¹⁴⁷ that European law was to be applied directly over inconsistent national law (*except* the Constitution). In *Dec. 30/1998 (VI.28) AB*,¹⁴⁸ the HCC set out and clarified the concepts of direct effect and direct applicability,¹⁴⁹ broadly in line with the distinction made in European law (particularly, though nowadays not exclusively, among legal academics).¹⁵⁰ The HCC noted, again making its statement *obiter* since it was not necessary for its decision in that case:¹⁵¹ “Under direct effect ... it is to be understood that a concrete provision of the international treaty generates a substantive right or obligation for [a natural or legal person] enforceable before the court or some other law-applying authority.”

The reference to this term, before accession, opportunely provided constitutional recognition of the principle of direct effect. Such express reference has not, however, been made by the HCC since accession.

Implied acceptance of direct effect might be argued to be found in *Dec. 942/B/2001 AB*¹⁵² which concerned the issue of freedom of establishment and freedom to provide services for lawyers. The HCC referred to the relevant reasoning of a 2003 Act allowing for lawyers of other EU Member States to practise in Hungary from accession:¹⁵³ “EC Articles 49 and 50 and the two Directives based on it dealing with the freedom to provide services and establishment of lawyers, by facilitating the effective exercise of these rights gives the basis for non-discriminatory treatment of Member State

Comunidad europea, Civitas, Madrid (1994), at 145-146; D.J. Liñán Noguerras & J. Roldán Barbero, “The Judicial Application of Community Law in Spain” (1993) 30 CML Rev. 1135, at 1140.

¹⁴⁵ VfGH B 877/96, 26 Juni 1997, VfSlg. 14886.

¹⁴⁶ VfGH G 2/97, 24 Juni 1998, VfSlg. 15215.

¹⁴⁷ ABH 1997, 41.

¹⁴⁸ ABH 1998, 220.

¹⁴⁹ ABH 1998, 220, at 226-227.

¹⁵⁰ T. Winter, “Direct Applicability and Direct Effects” (1972) 9 CML Rev. 425; P. Pescatore, “The doctrine of ‘Direct Effect’: An Infant Disease of Community Law” (1983) 8 EL Rev. 155; S. Prechal, “Does Direct Effect Still Matter?” (2000) 37 CML Rev. 1047; and J. Steiner, “Direct Applicability in EEC law – A Chameleon Concept” (1982) 98 LQR 229.

¹⁵¹ ABH 1998, 220, at 226.

¹⁵² ABH 2004, 1561.

¹⁵³ ABH 2004, 1561, at 1573.

citizens; ‘the European [Union] lawyers’ once they fulfil other conditions can practise as lawyers.” Since these Articles enjoyed direct effect and were expressly recognised by the HCC to provide rights for EU lawyers, it came as no surprise that a few lines later (in the context of considering the exercise of legal profession as not being one of the nature of a public body activity) that the HCC also made express reference to *Reyners*,¹⁵⁴ the case in which the ECJ had decided that the right to establishment under then Art. 52 EEC (now Art. 49 TFEU) enjoyed direct effect. Nevertheless, the HCC did not make any express statement on direct effect in this case.

In *Dec. 72/2006 (XII.15) AB*,¹⁵⁵ the matter of direct effect was however extensively discussed by Kovács, J. (Kiss, J. concurring) in his own concurring Opinion but was not touched upon the rest of the bench in the actual Decision. The case concerned a number of petitions before the HCC related to the employment and the remuneration of employees in healthcare, in particular on working time. One of the petitioners claimed that the legislature had failed to ensure that the relevant national rules had complied with the terms of the Working Time Directive, Directive 93/104/EC:¹⁵⁶ this therefore amounted to an unconstitutional omission of the duty to legislate. However, since the petitioner had made the claim on the basis of Constitution Art. 2(1) alone, the petition was rejected since the HCC had previously ruled in *Dec. 1053/E/2005 AB*¹⁵⁷ that, in the absence of any unconstitutionality of substantive law, no unconstitutional omission of legislative duty could be established merely on the basis of Art. 2(1).

Kovács, J. attempted to explain further the HCC’s Decision in his concurring Opinion. He noted¹⁵⁸ that the case represented aspects of direct effect of certain European norms and later indicated¹⁵⁹ that the ECJ had declared certain provisions of the relevant Directive to be of direct effect.¹⁶⁰ He then turned to determine “the structural position in the hierarchy of sources of law” of such a Directive and stated:¹⁶¹

A directive – when it falls into the exceptional category of direct effect – enjoys finally the same position as a decree directly applicable *ex lege*, i.e. it is a source of law of statutory level under the level of the Constitution, but as *lex specialis* it has primacy over domestic law in case of conflicts. As a causal consequence of

¹⁵⁴ Case 2/74 *Reyners v. Belgian State* [1974] ECR 631.

¹⁵⁵ *Dec. 72/2006 (XII.15) AB*: ABH 2006, 819. P. Kovács, “Vol (communautaire) au-dessus d’un nid de coucou (ou le calcul du temps de travail des médecins et la jurisprudence de la Cour constitutionnelle de Hongrie” RFDC 2007/3 (n° 71), 667-671.

¹⁵⁶ Directive 93/104/EC concerning certain aspects of the organisation of working time: OJ 1993 L307/18.

¹⁵⁷ *Dec. 1053/E/2005 AB*: ABH 2006, 1824, at 1827-1828.

¹⁵⁸ *Dec. 72/2006 (XII.15) AB*: ABH 2006, 819, at 863.

¹⁵⁹ ABH 2006, 819, at 864-865.

¹⁶⁰ Case C-14/04 *Abdelkader Dellas v. Premier ministre* [2005] ECR I-10253; Case C-484/04 *Commission v. United Kingdom* [2006] ECR I-7471; Joined Cases C-131/04 and C-257/04 *C.D. Robinson-Steele v. R.D. Retail Services Ltd.* [2006] ECR I-2531; and Joined Cases C-397-403/01 *Pfeiffer v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835.

¹⁶¹ ABH 2006, 819, at 865.

this position, there can be no normative conflict with the domestic decrees (government and departmental decrees) as the European Directive (if it possesses the features of direct effect) enjoys priority over government and departmental decrees based on the hierarchy of norms.

In his Opinion,¹⁶² the problematic elements of the challenged national rules were not applicable at all in accordance with Article 2/A of the Constitution, and thus the problem to be solved by the HCC was simplified. Consequently, the HCC could even by-pass the review on the merits of the unconstitutionality of the challenged national rules, since according to the rules of direct effect consistently followed, those national provisions could not exercise any legal effect on the directly effective norms of European law, with even their mere existence being questionable. The constitutional review was only to be exercised in respect of the parts not affected by the directly effective norms of European law. This way, Kovács, J. held that the constitutional review of the relevant national decree could have been spared, as it was in fact not applicable – without the violation of the obligations under European law – due to the clearly stated direct effect of provisions of the Directive. In other words, Kovács, J. enjoined the HCC (and other judicial organs) to follow the ECJ case-law on direct effect and disapply any national provisions (except the Constitution) in conflict with a directly effective provision of European law.

The HCC's hitherto oblique references to direct effect are in marked contrast to the approach of the FCC in *Kloppenburg*¹⁶³ in which direct effect was expressly recognised.¹⁶⁴ The need for the HCC explicitly to recognise the principle of direct effect of European law, post accession, may be less compelling than at first considered. If one takes the previous section as the fundamental basis of the HCC's *general* approach to EU law matters, then "deconstitutionalising" these matters pushes the burden of the enforcement of European law rights onto the ordinary courts. Since the latter remain the main forum for exercising European law rights at the national level, then the same courts must not only recognise the priority of application of European law but also its direct effect. Such proposition is actually underlined by the practice, e.g., of the Supreme Court of Hungary which (perhaps taking its cue from the HCC's avoidance or deconstitutionalisation of the issues involved) has expressly recognised the direct effect of European law in its rulings and has accordingly acted to protect before it rights derived from European law.¹⁶⁵ Consequently, the ultimate result of the HCC's post-accession

¹⁶² ABH 2006, 819, at 866.

¹⁶³ *Kloppenburg*, 8 April 1987, 2 BvR 687/85: BVerfGE 75, 223; [1988] 3 CMLR 1.

¹⁶⁴ See above at Chapter 3, point D.3.

¹⁶⁵ Case number: Kfv.III.37.043/2007/4. In that case, the Supreme Court found that the provisions of section 17(2)(a) of Act XXV of 2000 on Chemical Safety were contrary to the provisions of Article 10, paragraph 2.3.4 of Directive 1999/45/EC concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations (OJ 1999 L200/1). According to the Supreme Court, the case-law of the ECJ entitled the citizens of EU Member States to invoke directly Directives against their own countries in cases when the Directive in question was not or not completely implemented into national legislation. The Directive applicable in the present case met the required conditions, according to which it had to be clear, precise and unconditional; in addition the Directive did not give any further discretion to the national legislature in the matter. As a result, the Supreme Court found that the implementation of the Directive into domestic law had been incorrect and its provisions were directly effective.

prevarication on direct effect and its singular resolve *not* to advance a *Kloppenburg*-style formulation of the recognition of such principle in Hungarian law has, strangely enough, not led to a legal lacuna. In fact, *de facto*, the *Kloppenburg* approach has been followed since the Supreme Court and other Hungarian courts apply the direct effect principle in cases before them without any seeming difficulty.

4. References to the European Court of Justice

So far, the HCC has given little indication of its position in making references to the ECJ¹⁶⁶ and it has been argued that the HCC is not a “national court or tribunal” within the meaning of Art. 267 TFEU (ex- Art. 234 EC).¹⁶⁷

In *Dec. 61/B/2005 AB*,¹⁶⁸ the HCC proceeded to examine the nature of the preliminary ruling procedure. It noted that the adoption of detailed rules regarding the preliminary decision-making procedures under Art. 267 TFEU (ex-Art. 234 EC) were left to each Member State, with one caveat, viz. that:¹⁶⁹ “national legislation cannot restrict the Article 234 EC procedure, as it had been provided for by the European Court of Justice in Case 166/73 *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33.” The HCC recognised the independence of the national judge in deciding on the need to make a reference:¹⁷⁰

It is at the discretion of the national courts to determine whether the preliminary ruling procedure is necessary or not; the national court should consider whether it is essential to refer an issue to the European Court of Justice in order to resolve a particular case [see e.g., Case 13/68 *Salgoil v. Ministero del Commercio con l’Estero* [1968] ECR 661], and also, how relevant is the question to be posed to the case. This process is designed to promote uniform interpretation of European law.

The HCC then noted its powers of review under s. 1 of the 1989 Constitutional Court Act¹⁷¹ and observed that this provision did not contain any powers that could give it competence to assess whether or not a national legal provision complied with European legislation:¹⁷² “It is up to the EU’s institutions and ultimately to the European Court to

¹⁶⁶ For the possibility of the HCC making such references to the ECJ, see A. Grád, “A hazai igazságszolgáltatás felkészülése az európai uniós tagságra – avagy rövidesen kiderül: amit hallunk vészharang-e, vagy csak az utolsó kört jelző csengő” 2003/4 *Európai Jog* 37, at 39-40. On references to the ECJ from Hungarian courts, see K. Gombos, *Bírói jogvédelem az Európai Unióban [Judicial legal protection in the European Union]*, CompLex, Budapest (2009), at 145-151 and at 155-157.

¹⁶⁷ L. Blutman, *Az előzetes döntéshozatal [The Preliminary Ruling]*, KJK-KERSZÖV, Budapest (2003), point 6.7.3.2, at 233.

¹⁶⁸ ABH 2008, 2201.

¹⁶⁹ ABH 2008, 2201, at 2206.

¹⁷⁰ ABH 2008, 2201, at 2206.

¹⁷¹ See above at Chapter Four, points A.1.-2.

¹⁷² ABH 2008, 2201, at 2207.

decide this.” This wording appears to be rather strange, even from the EU law perspective, according to which under Art. 19(1) and (3) TEU the ECJ is charged with interpreting and assessing the validity of European law and not assessing the validity of national law, which remains within the domain of the national judiciary.

Granted – as seen in the previous sections – this statement must be viewed in the context of the HCC’s “deconstitutionalising” approach to EU law, its wording is nevertheless unfortunate. Clearly it intends to emphasise the HCC’s own (partial) understanding of the relationship of co-operation between national (constitutional) courts and the ECJ; the HCC was not challenging or undermining the ECJ’s pivotal role in the EU legal system and was thus taking the FCC’s approach in *Maastricht*¹⁷³ and later in *Lisbon*¹⁷⁴ seriously, by recognising the function of the preliminary ruling procedure and the need to maintain an openness to European law. It is evident then that the HCC should have used clearer wording in its statement and clear support for this contention can be found within the case as a whole, when the HCC unambiguously recognises the respective roles of national courts and the ECJ in the use of the Art. 267 TFEU procedure:¹⁷⁵

[T]he role of the ECJ in preliminary ruling procedures is to interpret European law and to decide about its applicability but it is not its task to apply European law to the actual facts of the case. This falls within the jurisdiction of the referring national court. The Court has stated several times that it has no jurisdiction in cases giving rise to interpretational issues concerning exclusively national law [see e.g., Case 93/75 *Adlerblum v. Caisse nationale d’assurance vieillesse des travailleurs salariés* [1975] ECR 2147; Case 97/83 *CMC Melkunie BV* [1984] ECR 2367]. The ECJ decides, therefore, neither about the questions of fact emerging in the legal dispute leading to the reference for preliminary ruling, nor about the legal dispute concerning the application of national laws. It gives a ruling solely on the interpretation of European law and on the applicability of the invoked European law provision to the actual case. This ruling is binding on the national court and it delivers a judgement itself in the actual case on the basis thereof.

Consequently, taking the case in its entirety, the HCC has accepted the idea of co-operation between the domestic courts and the ECJ, in order to determine together whether or not a national legal act infringed European law, within the reference procedure.

In an earlier ruling, *Dec. 1053/E/2005 AB*, Kovács, J. (Bagi, J. concurring) had provided some subtle remarks which implied a preparedness to consider the appropriate use of preliminary rulings:¹⁷⁶ “As in the European integration, it is for the ECJ to give

¹⁷³ *Maastricht*, 12 Oktober 1993, 2 BvR 2134 und 2159/92: BVerfGE 89, 155; [1994] 1 CMLR 57: see above at Chapter Three, point D.4.

¹⁷⁴ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712: see above at Chapter Three, point D.4.

¹⁷⁵ *Dec. 61/B/2005 AB*: ABH 2008, 2201, at 2210.

¹⁷⁶ *Dec. 1053/E/2005 AB*: ABH 2006, 1824, at 1830.

authoritative interpretation to European rules, the HCC would exceed its natural competences if it examined whether it was possible to give such interpretation to European law obligations that a decision over a breach of European law committed by the State should fall within the competence of the Constitutional Court.”

This approach has been voiced more recently in *Dec. 142/2010 (VII.14) AB*¹⁷⁷ by Kiss, J. in his dissent. In that case, the HCC had declared itself able to review the provisions of a national statute which had introduced a new regime of agricultural subsidies based on the relevant EU Regulation. According to the HCC, the Regulation had left it to the Member States to decide on the criteria for granting subsidies and for determining the base year to be used.

In relation to Art. 267 TFEU, Kiss, J. noted that the HCC had engaged itself in the interpretation of EU law and indirectly had declared its jurisdiction to review EU secondary legislation that contained unambiguous rules (and not merely legislation that contained vague rules). In its interpretation, the HCC had not referred a question to the ECJ in order to determine whether or not the base year ought to be a year “in the past.” In his view, the HCC had thereby implicitly accepted the status of “a court or tribunal” under Art. 267 TFEU and had applied the *acte clair* doctrine from *CILFIT*.¹⁷⁸ The HCC, he contended, could only have applied this doctrine after having reviewed the practice of the ECJ and national courts of the Member States on this issue: however, the HCC had clearly failed to do so in this case. It might be arguable from the preceding paragraphs that, for Kovács and Kiss, JJ., it is at least open for the HCC to consider making a reference to the ECJ. Were, however, the HCC to follow the lead of its German counterpart, the jurisdiction to make a reference would be accepted but would ultimately not be exercised for a variety of reasons.¹⁷⁹

a. Lawful judge

One of the issues that has also not been properly addressed so far¹⁸⁰ is whether a decision of a Hungarian court refusing to make a reference to the ECJ would amount – according to Hungarian (constitutional) law – to a breach of a fundamental right (right to a remedy) and, if so, whether anyone, whose rights had therefore been breached, could subsequently bring proceedings before the HCC (right to a lawful judge).

In the Hungarian constitutional system, the right to a lawful judge (*törvényes bíróhoz való jog*) is derived from the requirement of equality before the law (Constitution Art. 70/A(1)¹⁸¹) and it guarantees that a case before the national courts will be dealt with

¹⁷⁷ *Dec. 142/2010 (VII.14) AB*: MK 2010/119.

¹⁷⁸ Case 283/81 *Srl CILFIT v. Ministero della Sanità* [1982] ECR 3415.

¹⁷⁹ See above at Chapter Three, point D.4.

¹⁸⁰ 2001 *Government Paper* (at 38) only deals with it to a certain extent: “Whenever a court applies European law, and all possibilities of appeal are over, the interested party could turn to the HCC on the basis of a violation of his constitutional rights. The HCC here could retroactively prohibit the application of that rule in the instant case, but it should abstain from invalidating that rule for the future. But under the Constitution, that is precisely what it ought to do.”

¹⁸¹ As interpreted in *Dec. 9/1990 (IV.25) AB*: ABH 1990, 46; and *Dec. 61/1991 (XI.20) AB*: ABH 1992, 280.

according to previously prescribed procedural rules (concerning competence of courts, judges, *etc.*).¹⁸² By way of contrast, the right to a remedy is more substantial in character. Constitution Art. 57(5) provides:

In the Republic of Hungary everyone shall be entitled to seek a legal remedy, as provided for by statute, against decisions of the courts, the public administration or other authorities, which infringe his rights or justified interests. The right to a remedy may be restricted by a statute passed with the majority of two-thirds of the votes of the Members of Parliament present and in the interest of adjudicating disputes in a reasonable time as well as being proportional thereto.

The right to a remedy thus includes not only judicial remedies but also administrative remedies against decisions of the administration or other authorities.

But the Hungarian legal system lacks a coherent constitutional model for judicial remedies, so the realisation of the constitutional requirements remains a task for the procedural rules. As these latter are often amended, the system of remedies is very complicated and is currently in need of urgent reform. In short, the definition of the substantive character of the right to a (judicial) remedy is assisted not by the Constitution but rather by procedural rules.

It will be recalled that, under the 1989 Constitutional Court Act, s. 48, an individual can bring a constitutional complaint to protect her/his rights. This is not a “real” constitutional complaint as the mere *infringement of a fundamental right* does not serve as a basis for proceedings before the HCC: the breach must be the result of the *application of an unconstitutional legal rule*; consequently the protection of fundamental rights is linked to the norm control. The constitutional complaint is a concrete norm control as the current case is taken into account, and it is also a remedy of last resort.¹⁸³ Its result can be the annulment of the norm or a decision about its inapplicability in the current case.¹⁸⁴

The situation after accession remains unsettled but it is not beyond the realms of possibility for the HCC to interpret the Constitution through which it could adopt the German practice on the lawful judge or, turning once again to the legislature, seeking the necessary amendments to the 1989 Constitutional Court Act and introduce the German model of constitutional complaint.

b. ECJ ruling priority

As the background to the HCC’s understanding of the priority of ECJ rulings, it has been argued¹⁸⁵ that since Constitution Art. 2/A provides that Hungary may exercise certain

¹⁸² J. Sári & B. Somody, *Alapjogok: Alkotmány II*, Osiris Kiadó Budapest (2008), at 370-375; and G. Halmai, “Az alkotmány mint norma a bírói jogalkalmazásban” 1998/3 *Fundamentum* 77-81.

¹⁸³ *Dec. 57/1991 (XI.8) AB*: ABH 1991, 272.

¹⁸⁴ While in Germany a citizen can go to the Constitutional Court if the final decision of an authority infringes his fundamental rights and this breach cannot be solved otherwise, this is not possible in Hungary (though many urge the introduction of the German model).

¹⁸⁵ Á. Tóth, “A Magyar Alkotmány helyzete az EU-csatlakozás után,” in A. Jakab & P. Takács, *A Magyar jogrendszer átalakulása: 1985/1990-2005. Jog, rendszerváltozás, EU-csatlakozás*, Gondolat Kiadó and

sovereign powers through European institutions and that the ECJ is such an institution, this transfer of powers extends to decisions of the ECJ in the same way as it extends to acts of the European legislative bodies. As a result since the Constitution has expressly approved or allowed such transfer, ECJ decisions cannot be regarded as being incompatible with the Constitution. While this latter contention may certainly be challenged – even the academic in question notes that there are limitations¹⁸⁶ – nevertheless it does support the present author’s argument that interpretation of European law by the ECJ will be recognised as enjoying priority, even by the HCC.

So far the HCC has not made a definite statement on this issue but, in view of the previous contentions in this Chapter, it is likely to follow the example set by its German counterpart. Initially, the implications of *Dec. 17/2004 (V.25) AB*¹⁸⁷ were not so positive. This case concerned the constitutionality of the 2004 Surplus Act, implementing certain Commission Regulations into the domestic legal system in the lead up to accession. The aim of both the Regulations and the Act was to prevent the accumulation of surplus stocks of agricultural products. The Surplus Act was challenged as being unconstitutional due to its retroactive effect as it would have entered into force on 25 May 2004 while the obligations set out in it came into effect on the date of accession, 1 May 2004.

In its Decision – discussed extensively below¹⁸⁸ – the HCC made reference to similar situations in previous enlargements and to decisions of the ECJ including the *Weidacher* case,¹⁸⁹ the facts of which centred on the Austrian accession on 1 January 1995. The ECJ in that case evaluated a similar scheme to the one in the 2004 Surplus Act and Regulations and found that there was no retroactivity regarding surplus stock generating activities that had occurred *before* entry into force of the relevant Regulation in Austria but which had happened *after* the entry into force of that Regulation. The ECJ noted:¹⁹⁰

[T]he Commission was specifically empowered to adopt transitional measures in order to bring the rules existing in the new Member States into line with the common organisation of the markets, and that such measures might, in some circumstances, have repercussions on surplus stocks already built up when Regulation No 3108/94 was published, that is, on 20 December 1994.

Clearly, the HCC was cognisant of the ECJ’s ruling in *Weidacher* but through some judicial “sleight of hand” was able to ignore this ruling in coming to its judgment in *Dec. 17/2004 (V.25) AB*. Such attitude is necessarily in line with the HCC’s approach to ECJ case-law before accession and should therefore come as no surprise. Nevertheless, this is a post-accession case and the HCC was unable to accept the *acte clair* doctrine – it did

ELTE ÁJK, Budapest (2007), Vol. II, 953, at 957.

¹⁸⁶ Tóth (2007), at 957-958.

¹⁸⁷ *Dec. 17/2004 (V.25) AB*: ABH 2004, 291. Várnay (2007), at 430.

¹⁸⁸ See below at Chapter Four, point E.3.

¹⁸⁹ Case C-179/00 *Weidacher v. Bundesminister für Land- und Forstwirtschaft* [2002] ECR I-501.

¹⁹⁰ Case C-179/00 *Weidacher v. Bundesminister für Land- und Forstwirtschaft* [2002] ECR I-501, at para. 33.

not even try to distinguish itself from the ECJ and merely referred to the fact that it was reviewing Hungarian implementing rules rather than the Regulation itself. Its express acceptance of the *acte clair* doctrine had to wait until its ruling in the *Lisbon* case¹⁹¹ which is discussed in the next section.¹⁹²

More recently, however, it is to the concurring Opinions of Kovács, J. that reference must be had. In *Dec. 1053/E/2005 AB*,¹⁹³ the applicant sought constitutional review of certain provisions of the Gambling Act and the Business Advertising Act¹⁹⁴ as breaching Arts. 10 and 49 EC (now Art. 4(3) TEU and Art. 56 TFEU, respectively) as well as Constitution Arts. 2(1) and (2) and 2/A(1). The applicant claimed unconstitutionality primarily due to the failure of the legislator to enact legislation since the relevant statutory provisions, as to their content, did not comply with the then EC Treaty. Having rejected the petition, Kovács, J. was moved to provide some further guidance with respect to European law and the jurisdiction of the ECJ. He stated:¹⁹⁵

In the present case, the applicant claimed omission in relation to a *sui generis* international treaty, the EC Treaty, many elements of which have direct effect in Hungary. Given that the authoritative interpretation and application of European law is the competence of the ECJ, it can be theoretically stated that only the direct endangerment of a constitutional right can establish a right to examine whether the legislator breached its duties deriving from [primary] or secondary law. As in European integration, it is for the ECJ to give authoritative interpretation to European rules, the Constitutional Court would exceed its natural competences if it examined whether it was possible to give such interpretation to European law obligations that a decision over a breach of European law committed by the State should fall within the competence of the Constitutional Court.

Kovács, J. clearly understood not only the unique ultimate interpretative authority of the ECJ but also the priority of its rulings. Again, in *Dec. 72/2006 (XII.15) AB*,¹⁹⁶ Kovács, J. (Kiss, J. concurring) expanded on his previous position in his own concurring Opinion. The case, it will be recalled, concerned certain questions related to the employment, remuneration and working time/overtime of healthcare employees. The HCC rejected the petition seeking to examine the conflict with an international treaty of certain domestic legal provisions since, as previously decided, European law was not international law. Kovács, J. stated:¹⁹⁷

¹⁹¹ *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872.

¹⁹² See below at Chapter Four, point E.4.

¹⁹³ *Dec. 1053/E/2005 AB*: ABH 2006, 1824.

¹⁹⁴ Act XXXIV of 1991 on Gambling: MK 1991/91; and Act LVIII of 1997 on Business Advertising: MK 1997/59.

¹⁹⁵ *Dec. 1053/E/2005 AB*: ABH 2006, 1824, at 1830.

¹⁹⁶ *Dec. 72/2006 (XII.15) AB*: ABH 2006, 819.

¹⁹⁷ *Dec. 72/2006 (XII.15) AB*: ABH 2006, 819, at 863.

In my opinion, the contexts of the present case clearly show the reasonable practical consequences primarily for the Hungarian courts as they form an integral part of the judicial system applying the European law. All the above are to be interpreted with due account to the fact that the final forum of settling the debates about the implementation of obligations under the European integration is the institutional system of the European Union, and in respect of legal debates ECJ rather than the Constitutional Court is to be addressed.

He then continued by expounding a series of ECJ cases¹⁹⁸ which had already interpreted the relevant Directive in the present case (Directive 93/104/EC¹⁹⁹) and had latterly declared certain provisions to be of direct effect.²⁰⁰ Evidently, if Kovács, J. were to represent a majority of his colleagues on the bench then his espoused views are redolent of acceptance of the priority of ECJ rulings.

Once again, the HCC has not expressly followed the FCC model as exemplified in *Kloppenburg*²⁰¹ as regards national constitutional judicial recognition of the priority of ECJ rulings but in two further cases, *Dec. 61/B/2005 AB*²⁰² and *Dec. 485/E/2003 AB*,²⁰³ the HCC as a bench has essentially accepted such priority by implication.

In *Dec. 61/B/2005*, discussed earlier,²⁰⁴ the HCC clearly accepted the ECJ's interpretation of Art. 267 TFEU (ex-Art. 234 EC) viz. that: (i) national legislation could not restrict the preliminary reference procedure as determined in *Rheinmühlen Düsseldorf*²⁰⁵; and (ii) in considering whether or not to make a reference, the national court has to consider whether it was essential to refer an issue in order to resolve a particular case, as set out in *Salgoil*.²⁰⁶ Moreover, it subsequently added:²⁰⁷

When submitting a reference for preliminary ruling, it is for the national court to inform the ECJ about every fact and national legislation which are of relevance to the interpretation of European law during the preliminary ruling procedure. According to the settled case-law of the ECJ, it falls within the competence of the

¹⁹⁸ Case C-14/04 *Abdelkader Dellas v. Premier ministre* [2005] ECR I-10253; Case C-484/04 *Commission v. United Kingdom* [2006] ECR I-7471; and Joined Cases C-131/04 and C-257/04 *C.D. Robinson-Steele v. R.D. Retail Services Ltd.* [2006] ECR I-2531.

¹⁹⁹ Directive 93/104/EC concerning certain aspects of the organisation of working time: OJ 1993 L307/18.

²⁰⁰ Joined Cases C-397-403/01 *Pfeiffer v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835.

²⁰¹ *Kloppenburg*, 8 April 1987, 2 BvR 687/85: BVerfGE 75, 223; [1988] 3 CMLR 1.

²⁰² ABH 2008, 2201.

²⁰³ ABH 2008, 1963.

²⁰⁴ See above at Chapter Four, point D.4.

²⁰⁵ Case 6/71 *Rheinmühlen Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1971] ECR 823.

²⁰⁶ Case 13/68 *Salgoil (SpA) v. Italian Ministry for Foreign Trade* [1968] ECR 453.

²⁰⁷ ABH 2008, 2201, at 2209.

referring court how the national court collects the necessary facts and national laws which are important for answering the question (see, e.g., Case 244/78 *Union Laitière Normande v. French Dairy Farmers Ltd.* [1979] ECR 2663; Joined Cases 36 and 71/80 *Irish Creamery Milk Suppliers Assn. v. Ireland* [1981] ECR 735). In cases referred to the ECJ, the knowledge of the relevant facts and related national laws is necessary for the interpretation of European law giving a genuine answer which is of use to the national court's decision on the case (see Case C-83/91 *Meilicke v. ADV/ORGA F.A. Meyer AG* [1992] ECR I-4871).

*Dec. 485/E/2003 AB*²⁰⁸ concerned the issue of whether or not under EU law protection afforded to wild birds meant that greatly different rules should be applied in the case of farmed species or species born in captivity. The HCC referred²⁰⁹ to the ECJ in *Hugo Clemens*²¹⁰ (the latter itself, as the HCC noted, citing to its earlier rulings in *Vergy*²¹¹ and *Tridon*²¹²) in which the ECJ decided: "Council Directive 79/409/EEC of 2 April on the conservation of wild birds is to be interpreted as not being applicable to species born and reared in captivity and, accordingly, Member States remain competent, as European law now stands, to regulate the matter, subject to Articles 28 to 30 EC [now Articles 34-36 TFEU]."

The approach of the ECJ in 2004 thus clearly favoured a distinction in treatment. However, the HCC, implicitly accepting the ECJ ruling priority, sought to distinguish *Hugo Clemens* from the case before it.²¹³ It first noted that the wording of the ECJ quoted above did not preclude the use of analogous application of rules on wild species to captive-born ones but rather recognised that this was left to the discretion of the national legislator. However, the HCC went on to deal with the phrase "as European law now stands" which it regarded as highly important. Since the rulings of the ECJ referred to above, particularly *Hugo Clemens* interpreting Directive 79/409/EC on Wild Birds,²¹⁴ the European legislative environment had subsequently changed: Regulation 865/2006/EC²¹⁵ (which implemented a Council Regulation on the protection of the trade in wild animals

²⁰⁸ ABH 2008, 1963.

²⁰⁹ ABH 2008, 1963, at 1982.

²¹⁰ Case C-480/03 *Hugo Clemens, b.v.b.a. Valkaniersgilde v. Walloon region, Council of Ministers*, Order of ECJ: OJ 2005 C6/22.

²¹¹ Case C-149/94 *Criminal proceedings against Vergy* [1996] ECR I-299.

²¹² Case C-510/99 *Criminal proceedings against Tridon* [2001] ECR I-7777.

²¹³ ABH 2008, 1963, at 1982.

²¹⁴ Directive 79/409/EEC on the conservation of wild birds: OJ 1979 L103/1. This Directive was variously amended; these amendments were subsequently codified in (and repealed by) Directive 2009/147/EC on the conservation of wild birds: OJ 2010 L20/7.

²¹⁵ Commission Regulation 865/2006/EC laying down detailed rules concerning the implementation of Council Regulation 338/97/EC on the protection of species of wild fauna and flora by regulating trade therein: OJ 2006 L166/1. This Regulation was necessary to ensure full EU compliance with the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").

and plants²¹⁶) while preserving the former wording “wild” in its title, referred in Recital 3 of its Preamble to its being necessary “to lay down detailed provisions relating to the conditions and criteria for the treatment of specimens of animal species that are born and bred in captivity ... in order to ensure the common implementation of the derogations applicable to such specimens.” Chapter XIII was devoted to the rules on animals born and bred in captivity and artificially propagated species, stressing that they should come from a “controlled environment”²¹⁷; and Chapter XVI on marking of specimens for the purpose of imports and commercial activities within the Union²¹⁸ dealt with the similarity in marking wild species and those born and bred in captivity or from a controlled environment.

In this way, the HCC (whose argumentation does not appear to be particularly convincing) concluded²¹⁹ that – contrary to the petitioner’s submissions – when dealing with restrictions on trade the European legislature had aimed at minimising the difference between rules that applied to birds living in the wild and those that were relevant to species born and bred in captivity. The HCC’s determination to distinguish the prior ECJ ruling in *Hugo Clemens* is quite apparent, despite its relatively weak arguments and to avoid any mention of a reference to the ECJ to resolve the “new situation” post Regulation 865/2006/EC. The HCC has accordingly acknowledged the priority of the ECJ’s interpretation in *Hugo Clemens* by seeking to prove its non-applicability to the present case and by preventing the ECJ from being given the opportunity for itself to reconsider that ruling in view of the allegedly new legal context.

²¹⁶ Council Regulation 338/97/EC on the protection of species of wild fauna and flora by regulating trade therein: OJ 1997 L61/1.

²¹⁷ Commission Regulation 865/2006/EC, Art. 54.

²¹⁸ Commission Regulation 865/2006/EC, Arts. 64-68.

²¹⁹ ABH 2008, 1963, at 1982-1983.

E. LIMITS TO NATIONAL CONSTITUTIONAL COURT ACCEPTANCE

1. Introduction

The HCC – unlike its German and Polish counterparts²²⁰ – has been less than forthcoming in explaining its understanding of the vital national limits to further constitutionalisation of the European legal order by the ECJ. The sparse case-law on the subject nevertheless indicates the existence of powers to supervise the process of continuing integration so as not to permit a surrender of sovereignty (at any stage) to the Union, at least without compliance with the necessary constitutional procedures. The absence of an unalterable core of sovereignty – as provided for under the German Constitution²²¹ – or the establishment in the Constitution that it is the supreme law of the State – as in Poland²²² – may explain in some way why the HCC has not taken such an active role in the pursuit of setting the acceptable constitutional limits to integration.

2. Essential core as limitation to integration

a. Pre-accession

In the lead up to accession, as was examined above, the issue of limitations of the transfer of the exercise of sovereignty were considered in some detail. During this process of consideration, it was necessary to have regard to the HCC's previous case-law according to which it retained its review jurisdiction to ensure that the essential elements of sovereignty could not be infringed: *e.g.*, the principles of democracy based on the representation of the people and a state based on the rule of law could not be violated (*Dec. 30/1998 (VI.28) AB*²²³) and the previously-existing level of protection of fundamental rights could not be reduced (*Dec. 28/1994 (V.20) AB*²²⁴). Moreover, the maintenance of the HCC's jurisdiction in the face of European integration was justified by reference to the case-law of the FCC which had a great impact on the HCC's approach in *Dec. 4/1997 (I.22) AB* where it ruled:²²⁵

According to the monist-adoption concept, the concluded international treaty constitutes a component of national law without further transformation that is it is applicable directly and enjoys supremacy over domestic law. This system is required

²²⁰ See in respect of Germany, above, at Chapter Three, point E.; and in respect of Poland, see below, at Chapter Five, point E.

²²¹ 1949 German Constitution, Art. 79(3) together with Arts. 1 and 20: Chapter Three, point B.1.

²²² 1997 Polish Constitution, Art. 9: see below at Chapter Five, point B.1.

²²³ ABH 1998, 220.

²²⁴ ABH 1994, 134.

²²⁵ ABH 1997, 41, at 52.

by European integration and, for this reason, even those members of the EU which still follow the transformation system (e.g., Germany, one of the founding members, Italy, and the Scandinavian countries which subsequently joined the European Union) apply the law of the European Union directly, without transformation, and they ensure superiority over national law *with the exception of the Constitution*. As a result of this, *the constitutional courts exercise their right to constitutional examination of international treaties ... and the decisions of international organisations ... automatically becoming part of the domestic law*.

The HCC then concentrated on the FCC and some of its major rulings in this field, particularly the *Maastricht* decision which preceded the present ruling by a few years:²²⁶

The German FCC, despite the fact that it does not have the competence for preliminary review, extended its practice to examine international treaties prior to their ratification. The German FCC first examined a law ratifying an international treaty (prior to its promulgation) in 1952.^[227] Later the FCC established its practice according to which the law promulgating a treaty may be the subject of a *posteriori* review as well as of constitutional complaint, thus the international treaty becomes an indirect subject of the procedure. On the basis thereof, the FCC examined, for instance, the constitutionality of the Basic Agreement between the Federal Republic of Germany and the German Democratic Republic^[228]; the European Community Treaty^[229] . . . regarding the Act promulgating the Maastricht Treaty, the FCC examined the question whether the legal meaning of the direct election of the Members of the *Bundestag* under the *Grundgesetz* [“GG”], as well as democracy, and the sovereignty of the people became redundant due to the supranational nature of the EU.^[230]

From these decisions, the following position becomes clear: the German FCC besides exercising its constitutional power concerning a *posteriori* review “naturally” – especially with regards to European Union treaties – must not give up any part of its task to protect the Constitution; this function, then, extends to every way of exercising sovereignty under the GG. On the basis of this, the FCC – besides examining the law promulgating a treaty – retains the submission to European law under constant control.

The HCC did not mince its words: European law would apply with priority except with respect to the Constitution and it would itself retain its review jurisdiction *a posteriori* over European treaties as well as Regulations and Directives through, e.g., the *actio popularis* under Constitution Art. 32/A and 1989 Constitutional Court Act, s. 1(b).²³¹

²²⁶ ABH 1997, 41, at 52.

²²⁷ *European Defence Community*, 15 Mai 1952, 1 BvQ 6/52: BVerfGE 1, 281; *Germany Treaty*, 30 Juli 1952, 1 BvF 1/52: BVerfGE 1, 396, at 413.

²²⁸ *Basic Treaty between FRG and GDR*, 31 Juli 1973, BvF 1/73: BVerfGE 36, 1.

²²⁹ *Steinike & Weinlig*, 25 Juli 1979, 2 BvL 6/77: BVerfGE 52, 187, at 199.

²³⁰ *Maastricht*, 12 Oktober 1993, 2 BvR 2134 und 2159/92: BVerfGE 89, 155; [1994] 1 CMLR 57.

²³¹ See above at Chapter Four, point A.2.

In respect of *Dec. 4/1997 (I.22) AB*, Ficsor regarded citation to further decisions from the German practice, particularly the *Maastricht* case, in itself as an important sign.²³² The HCC emphatically recalled certain elements of the German decision, *e.g.* the question of whether or not the legal content of the direct election of the *Bundestag* (that is, the democracy and the sovereignty of the people) would become devoid of content because of the supranational nature of the EU. The HCC drew the conclusion based on the quoted decisions that the German Court would not surrender some of its tasks for the preservation of the Constitution (especially with reference to EU treaties), in addition to maintaining its natural right to exercise its jurisdiction for *a posteriori* norm control. Ficsor then referred to the HCC's statement in respect of the task of preserving the Constitution that "applies to the practice of all types of sovereignty which rely exclusively on the Constitution/*Grundgesetz*. On this basis, the Constitutional Court does not only examine the acts, but also continuously monitors their subjection to European law." Concluding on this point, he stated:²³³

The inclusion of this statement in the decision was obviously not induced by the fact that the Hungarian Constitutional Court will not be able to identify itself with this point of view in the future. On the contrary: the statement that the Constitutional Court continuously controls the subjection to European law, as a general statement, may later be applied distinctly from the analysis of the situation of German constitutionality, and, in a different context, it may prevail in the practice of the Constitutional Court in so far as the relationship between the Hungarian Constitution and European law is concerned.

His previous observations have actually been reinforced by the FCC's recent ruling in *Lisbon*²³⁴ which would accordingly strengthen the HCC's position, even in respect of EU primary law.

b. Conferral of powers under Constitution Art. 2/A

With the entry into force of the integration clause, Constitution Art. 2/A, the limits to integration permitted as constitutional became more clearly defined. Article 2/A(1) provides:

By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as "European Union"); these

²³² Ficsor (1997), at 464.

²³³ Ficsor (1997), at 464.

²³⁴ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712.

powers may be exercised independently and by way of the institutions of the European Union.

Csuhány & Sonnevend²³⁵ argue cogently that this integration clause expressly permits such an extensive national constitutional limitation on the exercise of sovereignty vis-à-vis EU membership, broader than that usually allowed under international treaty as well as usually permitted under Constitution Art. 2(1) and (2) (as interpreted by the HCC²³⁶), that Art. 2/A amounts to an exception to the constitutional principle of democratic legitimation thereby rendering it a *lex specialis* compared to Art. 2. Article 2/A is worded not as a “once-and-for-all” clause to allow Hungary to accede to the EU and to furnish it with a legal basis for a transfer of the exercise of sovereignty on that accession only, but rather as the continuing legal basis for the exercise of public power by the EU in Hungary: consequently, any limits placed on Article 2/A would impede the implementation of EU law in Hungary.

The HCC has itself referred to the effect of Constitution Art. 2/A in *Dec. 61/B/2005 AB*²³⁷ in which it noted that the aim of that provision was to define the premises and framework of Hungary’s participation in the EU. It identified how the authorisation in that Article operated together with its limitations:²³⁸

The above mentioned provision of the Constitution provides authorisation for the Republic of Hungary on the one hand to conclude international treaties under which it would exercise certain powers jointly with other Member States, and on the other to exercise joint powers through the European Union’s institutions. There are, however two limitations: (1) The joint exercise of powers should only take place as far as it is necessary in order to exercise rights and fulfil duties laid down by the European Union’s founding treaties; (2) Only certain specific powers that are authorised by the Constitution may be exercised jointly, in other words the scope of powers that can be exercised jointly are limited.

Thus following on from the justification to the Act which introduced Constitution Art. 2/A²³⁹ (and referred to by Harmathy, J. in *Dec. 57/2004 (XII.14) AB*²⁴⁰), Csuhány & Sonnevend²⁴¹ have set out five limitations on the common exercise of competences under that Article. Thus the common exercise is constitutional if it is: (i) in the interest of participating in the EU; (ii) in the interest of being an EU Member State; (iii) according to an international treaty; (iv) only certain competences (and thus not all competences); (v)

²³⁵ P. Csuhány & P. Sonnevend, “2/A. § [Európai Unió],” in A. Jakab (ed.), *Az alkotmány kommentárja*, Vol. I, *Általános rendelkezések*, 2nd ed., Századvég Kiadó, Budapest (2009), 238, at 252-253.

²³⁶ See above at Chapter Four, points B.2. and C.2.

²³⁷ ABH 2008, 2201.

²³⁸ ABH 2008, 2201, at 2206-2207.

²³⁹ Act LXI of 2002: MK 2002/161.

²⁴⁰ ABH 2004, 809, at 819.

²⁴¹ Csuhány & Sonnevend (2009), at 253.

justified with other Member States based on the need to fulfil rights and obligations deriving from the founding Treaties; and (vi) with respect to a competence derived from the Constitution.

Through Art. 2/A, the Constitution thus provides according to the HCC not only a clear, constitutional conferral of powers on the EU (as also determined by the FCC in *Maastricht*²⁴² and later confirmed and expanded on in *Lisbon*²⁴³) but also a limitation to such conferral and common exercise of powers, i.e., the recognition by the HCC of an *ultra vires* limit similar to that of the FCC in *Maastricht* and more strongly articulated as basis for constitutional review in *Lisbon*. Thus none of the competences can be transferred from Hungary, unilaterally and without its consent.²⁴⁴ With the limits referred to in Constitution Art. 2/A, that clause emphasizes the requirement that the common exercise of competences cannot be made beyond the areas established in the founding Treaties. Consequently, through incorporating the *ultra vires* limit, Art. 2/A renders it a domestic constitutional question as to whether or not such competences have been exceeded.²⁴⁵

Nevertheless, it is evident that this question – as regards EU law – is also subject to the Art. 267 TFEU reference procedure and the power of the ECJ to annul an EU act for lack of competence.²⁴⁶ The *ultra vires* limit would not render such Union acts automatically unconstitutional because of the fact that they were made without the necessary competence – rather, from a Hungarian point of view, Constitution Art. 2/A would not provide the legal basis for such (non-competent) EU act under the Constitution.

A further limitation on the transfer of the exercise of sovereign power is that such transfer does not extend to Union acts which infringe fundamental rights.²⁴⁷ According to Constitution Art. 8(2), “rules pertaining to fundamental rights and duties shall be determined by statute which, however, may not limit the essential content of any fundamental right.” By analogy, then, if a Hungarian statute cannot do so then – in exercising competences transferred to the EU under the Constitution – such essential content cannot be infringed by a Union act either. In its case-law the HCC has provided a relative interpretation to the notion of essential content and its guarantee enjoys a general importance beyond the possibility of proportional restriction in individual cases.²⁴⁸ Consequently, the objective absolute dimension of the essential content of a right may play a role when fundamental rights restriction is based on EU law.

Arguably, the fundamental rights restriction based on EU law would not have to meet the stricter requirements of the Constitution and thus avoid the “actual core” of the essential content of such a right, especially in view of the fact that human rights are protected at the European level through the ECJ case-law²⁴⁹ and more recently the EU

²⁴² See above at Chapter Three, point E.2.b.

²⁴³ See above at Chapter Three, point E.2.d.

²⁴⁴ Csuhány & Sonnevend (2009), at 257.

²⁴⁵ Blutman & Chronowski (2007), at 20-23.

²⁴⁶ Article 263 TFEU (ex-Art. 230 EC).

²⁴⁷ See generally, P. Sonnevend, “Alapvető jogaink a csatlakozás után” 2003/2 *Fundamentum* 27-37.

²⁴⁸ See, e.g., *Dec. 23/1990 (X.31) AB*: ABH 1990, 88; *Dec. 64/1991 (XII.17) AB*: ABH 1991, 297; *Dec. 64/1993 (XII.22) AB*: ABH 1993, 373; and *Dec. 60/1994 (XII.24) AB*: ABH 1994, 342.

²⁴⁹ See, e.g., *Case 26/69 Stauder v. City of Ulm* [1969] ECR 419; *Case 11/70 Internationale*

Charter on Fundamental Rights, post Lisbon.²⁵⁰ Thus it would appear, when interpreting any constitutional provision, necessary to have recourse to Constitution Art. 6(4) which states that Hungary “contributes to achieving European unity in order to realise the liberty, the well-being and the security of the European people.” In this way, the HCC would be able to follow the FCC in *Wünsche*²⁵¹ and *Banana Market II*²⁵² and refrain from exercising any review jurisdiction over EU law, e.g., Regulations, unless they infringed the core of the essential content of a fundamental right.

The issue of European secondary legislation – particularly Regulations²⁵³ – infringing a constitutional provision has also been considered. Constitution Art. 32/A(2) states that the HCC shall annul “the statutes and *other legal norms* that it finds unconstitutional.”²⁵⁴ At first glance, this might appear to exclude the possibility of reviewing general acts of European law, such as Regulations.²⁵⁵ However, a contrary argument might be justified by the wording of the HCC in *Dec. 4/1997 (I.22) AB*²⁵⁶ (as detailed above²⁵⁷) when it approves, *inter alia*, the FCC practice of exercising its right to constitutional review of decisions of international organisations that automatically became part of the domestic law, e.g., Regulations, and the fact that the FCC did not surrender its task of protecting the Constitution but kept the submission to European law under constant control.

However, since accession, the HCC has been at pains to indicate that it does not possess the jurisdiction to review the constitutionality of EU secondary legislation. In this way, as discussed above,²⁵⁸ it has sought to “deconstitutionalise” the issue and return the responsibility *Simmenthal*-style to the ordinary courts which would need to refer the issue to the ECJ to determine the validity of the Regulation.

Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getriede und Futtermittel [1970] ECR 1125; *Case 25/70 EVGF v. Köster* [1970] ECR 1161; *Case 4/73 Nold v. Commission* [1974] ECR 491; *Case 44/79 Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727; *Case 63/83 R. v. Kent Kirk* [1984] ECR 2689; *Case 5/88 Wachauf v. Germany* [1989] ECR 2609. See generally, P. Alston, M. Bustelo & J. Heenan (eds.), *The EU and Human Rights*, Oxford University Press, Oxford (2001).

²⁵⁰ OJ 2010 C83/389. According to Art. 6(1) TEU: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

²⁵¹ *Wünsche Handelsgesellschaft*, 22 Oktober 1986, 2 BvR 197/83: BVerfGE 73, 339; [1987] 3 CMLR 225.

²⁵² *Banana Market II*, 7 June 2000, 2 BvL 1/97: BVerfGE 102, 147; (2000) 21 HRLJ 251.

²⁵³ Blutman & Chronowski (2007), at 19-20.

²⁵⁴ Emphasis supplied.

²⁵⁵ 2001 *Government Paper*, at 37.

²⁵⁶ ABH, 1997, 41.

²⁵⁷ See above at Chapter Three, points D.2. and E.2.a.

²⁵⁸ See above at Chapter Three, point D.2.

c. Exercise of constitutional review

After accession,²⁵⁹ the HCC as a bench initially tended to evade any confrontation on the point: in *Dec. 17/2004 (V.25) AB*, it avoided any attempt at goading it into constitutional review of a Regulation.²⁶⁰ Nevertheless it would appear that it remained mindful of the remaining constitutional jurisdiction it had, in line with its *Dec. 4/1997 (I.22) AB* and expressly voiced by Kovács, J. (Bagi, J., concurring) in *Dec. 1053/E/2005 AB*. He noted, in that case, the serious constitutional and European law debates of previous decades²⁶¹ as to “whether constitutional courts ... could exercise their constitutional protectionist function.” Through a “significant metamorphosis of European law,” based partly on the relationship of co-operation between the ECJ and national courts, Kovács, J. stated:²⁶²

Following all this, the European constitutional courts adopted a very similar approach, and out of them the practice of the German constitutional court and the French constitutional council are the most referred to. As regards the present request, we might come to the same conclusion by using another path already followed by many other European constitutional courts. This means that the very narrow scope of application – in which the theoretical possibility of a constitutional court decision regarding European law matters exists – is determined theoretically and in the spirit of self-restraint.

It was apparent then that the HCC retained a limited but vital jurisdiction – which in practice it would almost always refuse to exercise – that continued to protect the essential core of Hungarian sovereignty and put the power to decide upon the rate of integration into its hands.

This is in fact what occurred: in *Dec. 57/2004 (XII.14) AB*²⁶³ and *Dec. 58/2004 (XII.14) AB*,²⁶⁴ the HCC regarded the 2004 EU Constitutional Treaty as an international treaty which was subject to its *a priori* (pre-ratification) review. Similarly in *Dec. 61/2008 (IV.29) AB*,²⁶⁵ the HCC also regarded the 2007 Lisbon Treaty as an international treaty before ratification by Hungary. It stated²⁶⁶ that “as long as the required conditions included in the treaty – which are needed to enter into force – are not fulfilled, the Constitutional Court can only appraise the founding and amending [EU] treaties as sources of international law.”

²⁵⁹ F. Fazekas, “La Cour constitutionnelle et la Cour suprême hongroise face au principe de la primauté du droit de l’Union européenne” *Actes du VIIIe Séminaire Doctoral International et Européen*, Université de Nice-Sophia Antipolis, Nice (2008), 139, at 141-146.

²⁶⁰ See below at Chapter Four, point E.3.

²⁶¹ *Dec. 1053/E/2005 AB*: ABH 2006, 1824, at 1829-1830.

²⁶² *Dec. 1053/E/2005 AB*: ABH 2006, 1824, at 1830.

²⁶³ ABH 2004, 809.

²⁶⁴ ABH 2004, 822.

²⁶⁵ ABH 2008, 546.

²⁶⁶ *Dec. 61/2008 (IV.29) AB*: ABH 2008, 546, at 550.

In all three cases, then, the HCC clearly viewed treaties amending the basic EU Treaties as susceptible to review under Constitution Art. 7 and the 1989 Constitutional Court Act, s. 1(a) because they amounted to international treaties, decided on by the Member States unanimously. This exercise of its *a priori* jurisdiction might be regarded as a more acceptable form of review power to be exercised in relation to amending the Treaties, thereby allowing the HCC some residual control, if called upon, to examine whether or not an amending Treaty were constitutional. In fact, in the *Lisbon* case, *Dec. 143/2010 (VII.14) AB*,²⁶⁷ the HCC exhorted the relevant political institutions with standing, under 1989 Constitutional Court Act s. 1(a), to use the *a priori* review in respect of treaties, like the 2007 Lisbon Treaty, which enjoyed such a high level of constitutional importance.²⁶⁸

In view of the foregoing, it would accordingly come as no surprise when the HCC was asked to rule in *Dec. 32/2008 (III.12) AB*²⁶⁹ on the constitutionality of certain provisions of the Act transposing into Hungarian law the Agreement between the EU and Iceland and Norway on the surrender procedure between the parties: this Agreement²⁷⁰ effectively extended the European Arrest Warrant procedure to these two Scandinavian States. The President of the Republic commenced an *a priori* review of the Hungarian Act implementing the Agreement on the ground that certain provisions of the Agreement infringed the principles of “*nullum crimen sine lege*” and “*nulla poena sine lege*” in Constitution Art. 57(4) which then provided: “No one shall be declared guilty and subjected to punishment for an act which did not constitute a criminal offence under Hungarian law at the time it was committed.”

The HCC first ruled that it enjoyed jurisdiction in the case since the Agreement, as an external Union Treaty, was an international treaty for the purposes of s. 36(1) of the 1989 Act on the Constitutional Court: under Constitution Art. 2/A, the Agreement did not amount to a European law measure because it did not aim to amend or modify Union competences as defined in the founding Treaties. It continued by observing that the expression in Constitution Art. 57(4) “under Hungarian law” referred first of all to the Hungarian legislation and especially to the provisions of the Criminal Code. However, it also referred to the generally recognised rules of international law²⁷¹ and to the primary and secondary sources of the European law.²⁷²

²⁶⁷ *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872.

²⁶⁸ However, in *Dec. 143/2010 (VII.14) AB*, the HCC clearly did not, by implication, exclude an *a posteriori* review using the *actio popularis*. Although the requirement of legal certainty and the exclusion of the HCC from participating in foreign policy areas reserved for the executive and legislature, post ratification, would have tended to militate against any potential consequential disruption in external relations through review of the Hungarian statute promulgating the relevant European treaty, this is indeed what happened in that case.

²⁶⁹ ABH 2008, 334. N. Balogh-Békesi, “‘Közös európai alkotmányjog’ vagy szuverenitás-transzfer esetről- esetre (A magyar Alkotmánybíróság döntéséről az EU valamint Izland és Norvégia közötti átadási eljárásról szóló megállapodás tárgyában)” (2008) LXIII *Jogtudományi Közlöny* 310-315; N. Chronowski, “Nullum crimen sine EU?” 2008/4 *Rendészeti Szemle* 39-60; and P. Kovács, “Az EUIN-megállapodás és az alkotmányosság” (2008) LV *Magyar Jog* 409-413.

²⁷⁰ Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway: OJ 2006 L292/2.

²⁷¹ Constitution Art. 7.

²⁷² Constitution Art. 2/A.

In fact, the HCC went to great pains to underline the fact that the subject-matter of the case concerned the constitutionality of the Hungarian statute implementing the Agreement in the national system rather than the Agreement itself which was being reviewed against the principles in Constitution Art. 57(4). However the result was that, when the HCC found certain provisions of the Act unconstitutional, the Agreement could not be ratified until Parliament had eliminated the unconstitutionality or the new Constitution Art. 57(4) had entered into force (which it duly did, at the same time as the 2007 Lisbon Treaty²⁷³). This new provision states: “No one shall be declared guilty and subjected to punishment for an offense that was not considered – at the time it was committed – a criminal offence under Hungarian law, or the laws of any country participating in the progressive establishment of an area of freedom, security and justice, and to the extent prescribed in the relevant European legislation with a view to the mutual recognition of decisions, without any restrictions in terms of major fundamental rights.”

d. Constitutional identity

The HCC was further able to explain its understanding of the limits to the transfer of the exercise of sovereignty in its own *Lisbon* case, *Dec. 143/2010 (VII.14) AB*.²⁷⁴ In that case, a petitioner, using the *actio popularis* procedure for *a posteriori* review under s. 1(b) of the 1989 Constitutional Court Act, sought review of Act CLXVII of 2007²⁷⁵ which had promulgated the Lisbon Treaty. His petition underlined the fact that various new rules and mechanisms of the Treaty jeopardised the existence of the Republic of Hungary as an independent, sovereign state governed by the rule of law as provided for under Constitution Art. 2(1) and (2).

At the outset of its ruling, the HCC indicated that the reasoning and the examples of the petition were more or less similar to those examined by other constitutional courts in the framework of their *a priori* review of the Lisbon Treaty where they had concluded either that that Treaty was compatible with their constitution or that its ratification could be achieved with a constitutional amendment. Of particular interest for the present study was the following statement by the HCC.²⁷⁶

Several constitutional court decisions [on the Lisbon Treaty] (FCC: 2 BvE 2/08, delivered on 30.06.2009; the Czech Constitutional Court: Pl. ÚS 19/08, delivered on 28.11.2008; and Pl. ÚS 29/09, delivered on 03.11.2009) referred to the importance of protecting state “constitutional identity” in the European Union, even after the Lisbon Treaty had entered into force. The Constitutional Court studied these decisions.... The Constitutional Court notes that *a posteriori* constitutional review was also initiated before the Polish Constitutional Tribunal (Case Nos. K 32/09 and K 37/09) but no decision has yet been made.

²⁷³ Act CLXVII of 1997: MK 2007/182.

²⁷⁴ *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872. See, e.g., L. Blutman, “A Magyar Lisszabon-határozat: Befejezetlen szimfónia Luxemburgi hangnembem” 2010/2 *Alkotmánybírósági Szemle* 90-99.

²⁷⁵ Act CLXVIII of 2007: MK 2007/182.

²⁷⁶ *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872, at 873-874.

From the outset of the decision, then, the HCC had acknowledged that it had taken account the deliberations of the FCC and the Czech Court on the issue of constitutional identity as well as the arguments raised before the Polish Tribunal. This theme is pursued implicitly by the HCC in its reasoning as it discusses, at some length, the relationship between Constitution Arts. 2 and 2/A. It noted²⁷⁷ that Art. 2/A contained the constitutional power – “transfer of sovereignty” or “transfer of power” – through which the Constitution established a clear constitutional basis and framework to enable Hungary to accede to the EU. Under Art. 2/A(1), “international treaty” was to be interpreted not only as being the so-called 2003 Accession Treaty²⁷⁸ but it logically included a new international treaty according to which, through the development of the EU, further powers of the Constitution would need to be exercised “jointly” or “through the institutions of the EU,” with the transfer of these powers being to the “extent necessary.”

Were the HCC to be seised of a petition under 1989 Constitutional Court Act 1989, s. 1(a) from the Government or the President for an *a priori* review of such international treaty:²⁷⁹

In this case the Constitutional Court – with other domestic or EU bodies – independently determines whether or not the proposed reform goes beyond Constitution Art. 2/A(1) regarding the common exercise of competences (coming from the founding Treaties) with other Member States or through the institutions of the EU and if it is considered as a “necessary measure.”

Therefore, in such far-reaching reforms, it is desirable for *a priori* norm control when a treaty is supposed to be signed.

The Constitutional Court – taking the general role of protection of the Constitution into account – points out that in respect of the Act promulgating the Lisbon Treaty the reconsideration of constitutional issues raised *a posteriori* happened without an initiative of *a priori* norm control.

The HCC clearly called on the Government and/or the President to use their powers under the 1989 Act, s. 1(a) so that it may conduct a constitutional identity review of the proposed European treaty before promulgation. The HCC continued by re-examining its previous case-law on state sovereignty and the limitations on it, as discussed above,²⁸⁰ in *Dec. 36/1999 (XI.26) AB*,²⁸¹ *Dec. 5/2001 (II.28) AB*,²⁸² *Dec. 1154/B/1995 AB*²⁸³ and *Dec. 30/1998 (VI.25) AB*.²⁸⁴ In latter case, the HCC noted that it had already examined the

²⁷⁷ *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872, at 876.

²⁷⁸ ABK 2010. 7-8, 872, at 876.

²⁷⁹ ABK 2010. 7-8, 872, at 876.

²⁸⁰ See above at Chapter Four, point C.2.

²⁸¹ ABH 1999, 320, at 322.

²⁸² ABH 2001, 86, at 89.

²⁸³ ABH 2001, 823, at 826 and 828.

²⁸⁴ ABH 1998, 220.

relationship between European law and state sovereignty in Constitution Art. 2(1) and (2) before EU accession: this previous case-law on sovereignty was to be followed in the *Lisbon* case.

The HCC referred extensively to its discussion of Constitution Art. 2(1) in *Dec. 30/1998 (VI.25) AB*²⁸⁵ and Art. 2(2) in *Dec. 2/1993 (I.22) AB*.²⁸⁶ The extensive quotation from *Dec. 30/1998 (VI.25) AB* concluded:²⁸⁷ “It is, therefore, a general principle to be followed on the basis of Constitution Art. 2(1) and (2) that all legal norms of a public law nature to be applied in the domestic law to Hungarian subjects of law must be based on democratic legitimacy allowing to be traced back to popular sovereignty.” The HCC then noted in *Lisbon*:²⁸⁸

The requirement of the traceability of popular sovereignty, according to this Decision, was complied with in the preparation for EU accession by placing [this requirement] into Constitution Art. 2/A.... *The prevalence of Art. 2/A may not however deprive Art. 2(1)-(2) of its substance.* [Emphasis supplied.]

Consequently, although Constitution Art. 2/A is the domestic constitutional basis for continuing EU membership and amendments to the founding (now TEU and TFEU) Treaties, Art. 2(1) and (2) on sovereignty and the rule of law arguably constitute the “constitutional identity” of Hungary. To this mix must be added Constitution Art. 6(4) according to which participation in European integration is a state goal. As the HCC pointed out: “Participation is not a goal in itself but has to serve human rights, prosperity and security.” An EU law which does not serve these aims either could be regarded as infringing the constitutional identity of Hungary.

In conclusion, Hungary remained an independent state and the EU’s gaining legal personality had not altered that fact. The HCC observed that the necessary two-thirds majority in the Hungarian Parliament had been garnered to ratify the Lisbon Treaty according to the Constitution:²⁸⁹ such exercise of power was still done jointly with other Member States or through EU institutions. Having earlier referred to Art. 50 TEU on withdrawal from the EU as underlining the continuing independence of the state in European integration, thereby following the example of the FCC in respect of the same TEU Article in its *Lisbon* ruling,²⁹⁰ the HCC found the petition unfounded since the independence, the rule of law and the existence of a separate state had not disappeared.

²⁸⁵ ABH 1998, 220, at 233-234.

²⁸⁶ ABH 1993, 33, at 36.

²⁸⁷ ABH 1998, 220, at 233.

²⁸⁸ *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872, at 877.

²⁸⁹ The Hungarian Government had considered that neither the proposed EU Constitutional Treaty or nor the Lisbon Treaty would require a national referendum to enter into force. Consequently it ratified both instruments with the necessary two-thirds majority of the 385 MPs: (1) the EU Constitutional Treaty on 20 December 2004, with 323 votes in favour and 12 against (with 8 abstentions); and (2) the Lisbon Treaty on 17 December 2007, with 325 votes in favour and only 5 against (with 14 abstentions).

²⁹⁰ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 233 and 329-330.

While certainly more compact than the ruling of the Lisbon Treaty by the FCC, the HCC has enunciated its own understanding of constitutional identity, possibly laying down the foundation stones for the development of an essential core of sovereignty which cannot be limited or touched by deepening European integration. The plea to the Government and/or President to petition the HCC *before* a treaty as highly important as the Lisbon Treaty is promulgated, is directly linked to its understanding of a Hungarian constitutional identity review as well as a possible *ultra vires* review. By rendering its decision at such a time, the HCC would be able to avoid much of the negative implication of the same types of review proposed by the FCC in its *Lisbon* ruling²⁹¹ and so considerably reduce the political tensions that would surround the threat of an *a posteriori* review of the same treaty.

3. Review of national transposing law

The examination of EC-law transforming domestic legal norms falls much deeper within the competence of the HCC under Constitution Art. 32/A(2), as read with *Dec. 4/1997(I.22) AB*²⁹² and *Dec. 30/1998 (VI.25) AB*.²⁹³ In these rulings, the HCC affirmed its competence to review international treaties before promulgation (as provided for in Act XXXII of 1989, ss. 1(a) and 36) as well as *a posteriori* by examining the national norm which had “domesticated” the treaty or the relevant secondary legislation created by organs established under that treaty. It was possible therefore for the HCC to annul such national law, e.g., implementing a Directive, on the ground of its unconstitutionality.²⁹⁴ However, Kukorelli & Papp opposed this position and argued that this be expressly excluded.²⁹⁵

The possibility of the Constitutional Court examining constitutionality of European law has to be excluded because this would impair powers of the ECJ. To avoid this, Article 32/A of the Constitution has to be amended to the effect that powers of the Constitutional Court do not include examination of European [Union] measures binding on the Republic of Hungary or the examination of conformity to the law of the European [Union] of their executive measures.

As it turned out, these powers and their exercise were not expressly amended with respect to EU accession. From this, it may be possible to deduce that such explicit circumscription of the HCC’s powers, particularly after its clear reasoning in *Dec. 4/1997 (I.22) AB*, was not up for reconsideration where it stated:²⁹⁶

²⁹¹ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 237-241.

²⁹² ABH 1997, 41.

²⁹³ ABH 1998, 220.

²⁹⁴ This position was expressly acknowledged by the Hungarian Government in its 2001 *Paper*, with the reservation that a ruling by the ECJ on the particular EC provision’s direct effect could prevent constitutional review: 2001 *Government Paper*, at 36.

²⁹⁵ Kukorelli & Papp (2002), at 5.

²⁹⁶ ABH 1997, 41, at 52.

From [its] decisions, the following position becomes clear: the German FCC besides exercising its constitutional power concerning *a posteriori* review “naturally” – especially with regards to European Union treaties – *must not give up any part of its task to protect the Constitution; this function, then, extends to every way of exercising sovereignty under the Constitution.* On the basis of this, *the Constitutional Court* – besides examining the law promulgating a treaty – *retains the submission to European law under constant control.* [Emphasis supplied]

Thus before accession, the HCC had evidently accepted the approach of the FCC vis-à-vis European law (whether primary or secondary) and would retain its ultimate review control over the latter if it became necessary to exercise it. Nevertheless, it has already been seen that the HCC has tended, in practice, to avoid constitutionalisation of EU law. The practice post accession, before the HCC, has in fact concentrated on the review of transposing national legislation and its previous acknowledgement of the potential influence of German constitutional practice has arguably been affirmed.²⁹⁷

For example, in *Dec. 17/2004 (V.25) AB*²⁹⁸ the HCC was confronted with the constitutionality of national rules passed to implement a number of Regulations in the agricultural sector (and not the review of the Regulations themselves).

According to the 2003 Accession Treaty, Art. 2(3), EU institutions were given the power – before accession – to adopt measures referred to in specific Articles of the Act of Accession. Article 41(1) of the Act of Accession provided that transitional measures could be adopted by the Commission if they were necessary to facilitate the transition from the regulatory systems existing in the new Member States to that resulting from the application of the Common Agricultural Policy under the conditions set out in the Act of Accession. (The Accession Treaty (and the Act of Accession) entered into domestic force on 1 May 2004 by dint of Act XXX of 2004²⁹⁹).

Based on these two provisions, the Commission adopted: (a) Regulation 1972/2003/EC³⁰⁰ to prevent agricultural products – in respect of which export refunds had been paid before 1 May 2004 – from benefiting from a second refund if exported to third countries after 30 April 2004; and (b) Regulation 60/2004/EC³⁰¹ that provided similar rules for the sugar sector. The Regulations – although directly applicable – nevertheless still required national implementing rules in respect of the necessary inventory system by which to identify market players for speculative trade movements before the CEECs entered the EU and taxing those surplus stocks.

Hungary attempted to fulfil its obligations through the adoption on 5 April 2004 by Parliament of an Act on Measures related to the Accumulation of Commercial Surplus Stocks of Agricultural Products” (“the Surplus Act”). The Surplus Act and the relevant Commission Regulations were intended to prevent the accumulation of surplus stocks of

²⁹⁷ Blutman & Chronowski (2007), at 23-24.

²⁹⁸ ABH 2004, 291. Trócsányi & Csink (2008), at 66-67; Fazekas (2007), at 208-209.

²⁹⁹ The 2003 Accession Treaty (OJ 2003 L236/33) was published as Annex I to Act XXX of 2004.

³⁰⁰ OJ 2003 L293/3, as amended by Reg. 230/2004/EC (OJ 2004 L39/13) and Reg. 735/2004/EC (OJ 2004 L114/13).

³⁰¹ OJ 2004 L9/8.

certain agricultural products. Both the EU and the new Member States were concerned that there was a considerable risk of disruption on the markets in various agricultural sectors by products introduced for speculative purposes into the new Member States before accession. Accordingly, the quantities of surplus stocks of products had to be eliminated from the market at the expense of the new Member States. These new Members were therefore required to take an inventory of stocks as at 1 May 2004 (accession date) and, on that basis, notify the Commission about the quantity of products in surplus by 31 July 2004, at the latest. The legislative intent was to identify the operators or individuals involved in major speculative trade movements before the new Member States entered the European Union. The core concern was to ensure that the new Member States had a system in place on 1 May 2004 that would enable them to identify those responsible for such speculative transactions and to tax the owners of such surplus stocks of agricultural products.

The President of the Republic submitted the Surplus Act for constitutional review. Had he signed the Act, it would have entered into force only on 25 May 2004, while the obligations set out in the Act were to have come into effect on 1 May, the date of entry into force of the Accession Treaty. The Regulations stipulated that their entry into force would be on 1 May 2004 and required the new Member States to develop and implement the relevant measures so that they would be applicable as of 1 May. The President claimed that the Surplus Act, with its entry into force on 25 May, would have been, at best, retroactive and accordingly unconstitutional. Moreover, the Act delegated to executive decrees the definition of the subjects who were deemed to pay the necessary tax (charges) and the method as to their determination which breached Constitution Art. 8 since only a statute could limit the essential contents of a fundamental right – here the right to property.

The HCC held the Act unconstitutional. According to the HCC, the Surplus Act provided for an inventory to be taken to establish stock as of and on 1 May, while the earliest possible entry into force of the Act was three weeks later, contradicted the requirements of legal certainty for failing to provide for the requisite (constitutional) fair adjustment period.³⁰² Such legal rule was unconstitutional as it could not be known in due time and for that reason did not enable persons to avoid the negative consequences of such a rule upon its entry into force.

In particular, the Surplus Act was retroactive because (i) the surplus stock was to be determined on the basis of the difference of the inventory on 1 May and the daily average of the product in 2002-2003; and (ii) transactions that had occurred after 1 January 2004 were not to be considered for the reduction of stock.³⁰³

The HCC noted in its reasoning that the Commission Regulations followed an established practice. In order to protect the stability of the market of agricultural products and to prevent speculative transactions, similar Regulations had been issued in 1985 for the Iberian accessions, and in 1994 at the time of accession of Austria, Finland and

³⁰² According to settled case-law: *Dec. 34/1991 (VI.15) AB*: ABH 1991, 170, at 173; *Dec. 7/1992 (I.30) AB*: ABH 1992, 45, at 48; *Dec. 25/1992 (IV.30) AB*: ABH 1992, 131, at 132; *Dec. 28/1992 (IV.30) AB*: ABH 1992, 155, at 156-158; *Dec. 723/B/1998 AB*: ABH 1999, 795, at 798-800; and *Dec. 10/2001 (IV.12) AB*: ABH 2001, 123, at 130.

³⁰³ The HCC also took into account the provision of the Budget Act, under which tax obligations could not come into effect before 45 days from promulgation. The Regulations in question required that holders of surplus stock pay taxes on goods in free circulation. The taxes collected by national authorities were to be assigned to the national budget of the new Member State. The 45-day period was therefore not respected by the operation of the Regulations.

Sweden. The ECJ had received references for a preliminary ruling under Art. 267 TFEU (ex-Art. 234 EC) on request by the Member States' courts with regard to the validity of these Regulations as well as to the interpretation of European law.³⁰⁴ In *Weidacher*, the ECJ had established, *inter alia*, that the Regulation in question had been adopted by the Commission within the scope of its competence, the measure on surplus stocks was not considered a disproportionate restriction of rights, and market players had been informed in time on the expected measures concerning the stocks through the published text of the Accession Treaties. On the basis of the above, the HCC then went on to explain the connection between the Surplus Act and the EU Regulations as follows:³⁰⁵

- [The Regulations] specify obligations for the new Member States rather than for their citizens,
- the [Surplus Act] serves the purpose of implementing the Regulations of the European Union,
- there are several references in the [Surplus Act] to the rules in the Regulations of the Union,
- the provisions of the [Surplus Act] challenged in the petition do not qualify as a translation or publication of the Regulations of the Union, as they implement the aims of the Regulations by using the tools of Hungarian law.

In view of the above, the question about the provisions challenged in the petition *concerns the constitutionality of the Hungarian legislation applied for the implementation of the EU regulations rather than the validity or the interpretation of these rules.* [Emphasis supplied.]

Thus the HCC was to review the provisions of Hungarian law and not those of the relevant Commission Regulations. This decision has been met with criticism, mainly because the HCC appears to have “side-stepped” the issue of the constitutionality of the Regulations – thereby avoiding a “constitutional moment” too early on in Hungary’s membership of the Union on the issue of supremacy/priority of application of European law.

Uitz³⁰⁶ based her argument on the HCC’s rigid adherence to *Dec. 30/1998 (VI.25) AB*³⁰⁷ and a strict temporal divide between the pre- and post-accession period: as will be recalled in that Decision before accession, the rules of European law were regarded by the HCC as internal norms of another subject of international law and of an independent public law system. In *Dec. 17/2004 (V.25) AB*, then, the HCC emphasised that the Regulations in question had been issued by the Commission before accession and thus pushed the constitutional issue to a time *before* which a Regulation could have been directly applicable (or possibly enjoy direct effect in some provisions). Accordingly, at

³⁰⁴ Case C-30/00 *William Hinton & Sons Lda v. Fazenda Pública* [2001] ECR I-7511; and Case C-179/00 *Weidacher v. Bundesminister für Land- und Forstwirtschaft* [2002] ECR I-501.

³⁰⁵ ABH 2004, 291, at 297.

³⁰⁶ R. Uitz, “EU Law and the Hungarian Constitutional Court: Lessons from the First Postaccession Encounter,” in W. Sadurski, J. Ziller & K. Zurek (eds.), *Après Enlargement: Legal and Political Responses in Central and Eastern Europe*, Robert Schuman Centre, Florence (2006), 41, at 48-50.

³⁰⁷ ABH 1998, 220.

the time of their adoption, in order for the Regulations to have any legal consequences in the Hungarian legal system, parallel domestic rules had to be passed.³⁰⁸ She continued:³⁰⁹

It was precisely this formalistic line-drawing that helped the Constitutional Court purposefully avoid an open confrontation with the supremacy of EU law in the case. By insisting on the pre-accession origins of the material facts, the Court placed transitional measures concerning agricultural surplus stocks passed by the European Commission within its own exclusive jurisdiction. The Constitutional Court's decision concerned the validity of a Hungarian bill, and not of an EC regulation.

Uitz further highlighted the point that the formalistic reasoning in *Dec. 17/2004 (V.25) AB* went against ECJ case-law not only on the relevant transitional measures adopted by the Commission in relation to enlargement but also on the inter-temporal effects of European law.³¹⁰

Sajó³¹¹ was even more forthright in his criticism. Basing his arguments on Art. 288 TFEU (ex-Art. 249 EC) – the direct applicability of Regulations – and the ECJ in *Commission v. Italy*,³¹² he contended that the Regulations were part of Hungarian law irrespective of what the Surplus Act might have contained, and as to the inventory creation and surplus charge obligations, these existed as of 1 May 2004 though arguably not immediately enforceable. In order to support his contention, he referred to the ECJ in *Arcosu*³¹³ which seemed to indicate that provisions of a Regulation having immediate effect might be separated from those that require national measures of application. Sajó continues:³¹⁴ “Contrary to the position of the Hungarian Constitutional Court, the allegedly unconstitutional provisions are either identical with the regulations, or are within the mandate of the regulation (a matter that is anyway within the competence of

³⁰⁸ Such a position is evident from Harmathy, J. speaking extrajudicially when, commenting on the Decision, he described the function of the Hungarian bill as implementing the EC Regulations: A. Harmathy, “The Presentation of Hungarian Experience,” in A. M. Mavcic (ed.), *The Position of Constitutional Courts following Integration into the EU*, Proceedings of an International Conference 30 September – 2 October 2004, Bled, Slovenia (2004), 219, at 225: <<http://www.us-rs.si/media/zbornik.pdf>>. 30 January 2009.

³⁰⁹ Uitz (2006), at 50.

³¹⁰ S.L. Kaleda, “Immediate Effect of Community Law in the New Member States: Is there a Place for a Consistent Doctrine?” (2004) 10 ELJ 102-122 discusses the ECJ case-law confirming applicability of European law in legal conflicts where certain material facts occurred well before the Member State's accession to the Union.

³¹¹ Sajó (2004), at 358.

³¹² Case 39/72 *Commission v. Italy* [1973] ECR 101, at para. 17: “Regulations are, as such, directly applicable in all Member States and come into force solely by virtue of their publication in the *Official Journal of the Communities*, as from the date specified in them, or in the absence thereof, as from the date provided in the Treaty.”

³¹³ Case C-403/98 *Azienda Agricola Monte Arcosu Srl v. Regione Autonoma della Sardegna* [2001] ECR I-103.

³¹⁴ Sajó (2004), at 358.

the ECJ), or are to be judged in light of the existence of the regulations as binding Hungarian law as of 1 May.”

Moreover, to the extent that the law contained in the Surplus Act was European law, it would probably not have been retroactive in view of the previous practice of the European Courts. He referred to *Kirk*³¹⁵ in which the 24-day retroactivity of a Regulation was not in itself found to be void and argued, based on *Unifruit Hellas*,³¹⁶ that the contested measure should have been foreseen in light of previous enlargements and the clear policy of the Union. In addition, he noted that as the measure intended to close a gap that enabled traders to make unjustified profits and if the matter were clearly one of European law, then the *acte clair* doctrine should have been applied: himself referring to the *Weidacher* case,³¹⁷ the retroactivity argument would have failed.

The issue of actual “reviewing” a Regulation was effectively avoided by the HCC although the case raised the issue of the notion of a Regulation in the Hungarian system.³¹⁸

Further, as indicated previously,³¹⁹ the essential contents of a fundamental right can only be limited by statute – in *Dec. 17/2004 (V.25) AB* the HCC understood that the charge under the Surplus Act was a tax and taxation was to be considered as part of the fundamental right to property. In essence, the HCC did not wish to address the complicated question of whether or not a Regulation was a statute within the terms of Constitution Art. 8. Its temporal demarcation of interest for the review allowed it to skirt around the issue with alacrity, leaving this point open: however, the pull of the FCC on the HCC (as seen in *Dec. 4/1997 (I.22) AB*³²⁰ and *Dec. 30/1998 (VI.25) AB*³²¹) is likely to see the latter one day confirming its jurisdiction in principle to review a Regulation which might infringe a fundamental right of the Constitution but doing its utmost to avoid exercising such jurisdiction.³²²

Nevertheless, *Dec. 17/2004 (V.25) AB* continues to influence the development of the HCC’s case-law as evidenced by *Dec. 744/B/2004 AB*,³²³ in which the HCC was seised of a petition seeking a ruling of unconstitutionality and annulment of a provision of

³¹⁵ Case 63/83 *R. v. Kent Kirk* [1984] ECR 2689.

³¹⁶ Case T-489/93 *Unifruit Hellas EPE v. Commission* [1994] ECR II-1201.

³¹⁷ Case C-179/00 *Weidacher v. Bundesminister für Land- und Forstwirtschaft* [2002] ECR I-501.

³¹⁸ The HCC did not even consider recourse to the *Marleasing* jurisprudence (Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135) and seek to interpret the Surplus Act to accord with the Regulations.

³¹⁹ See above at Chapter Four, point B.4.

³²⁰ ABH 1997, 41.

³²¹ ABH 1998, 220.

³²² Thus following the case-law of FCC: *Wünsche Handelsgesellschaft*, 22 Oktober 1986, 2 BvR 197/83: BVerfGE 73, 339; [1987] 3 CMLR 225; and *Banana Market II*, 7 June 2000, 2 BvL 1/97: BVerfGE 102, 147; (2000) 21 HRLJ 251.

³²³ *Dec. 744/B/2004 AB*: ABH 2005, 1281. See Várnay (2007), at 430; Fazekas (2007), at 209-210; and Trócsányi & Csink (2008), at 66-67.

Act XXIV of 2004 on Firearms and Ammunition.³²⁴ According to s. 23 of the Firearms Act, this Act was based on Directive 91/477/EEC³²⁵ on control of the acquisition and possession of weapons in line with the Europe Agreement.

The Treaty of Accession to the European Union was promulgated by Act XXX of 2004. According to s. 2 of this Act, from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions before accession shall be binding for and – under certain conditions – applicable in the new Member States. The HCC continued:³²⁶

Directives, as the so-called secondary legislation of the Union, bind the Member States to adopt, in their own processes of legislation, regulations complying with the contents of the respective Directives. Moreover, in line with Article 3 of the [1991] Directive, the Member States may, in their national legislation, adopt regulations more strict than the provisions of the respective Directives.

Having cited *Dec. 17/2004 (V.25) AB* with approval, it added:³²⁷ “Also in the present case, the HCC performed the constitutional review of the Hungarian statute based on the Directive, without affecting the validity of the Directive or the adequacy of implementation.” In this, the HCC is following the route already mapped out by the FCC in *M GmbH*³²⁸ and *European Arrest Warrant*³²⁹ and also adhered to by the Polish CT in its own ruling in *European Arrest Warrant*.³³⁰

It reaffirmed its power to review national transposing legislation in *Dec. 32/2008 (III.12) AB*³³¹ (discussed in detail above) when it considered the constitutionality of certain provisions of the Act transposing into Hungarian law the Agreement between the EU and Iceland and Norway on the surrender procedure between the parties, effectively extending the European Arrest Warrant procedure to these two Scandinavian States. In this case, interestingly, the HCC did not review the actual treaty but rather concentrated on the national transposing statute.

This position was reaffirmed with respect to the Lisbon Treaty in *Dec. 143/2010 (VII.14) AB*³³² in which, as will be recalled,³³³ the HCC ruled that it had the jurisdiction to

³²⁴ MK 2004/56.

³²⁵ Directive 91/477/EEC on control of the acquisition and possession of weapons: OJ 1991 L256/51 (as now amended by Directive 2008/51/EC: OJ 2008 L179/5).

³²⁶ ABH 2005, 1281, at 1282-1283.

³²⁷ ABH 2005, 1281, at 1283.

³²⁸ *M GmbH v. Bundesregierung*, BVerfG 12 Mai 1989, 2 BvQ 3/89: (1989) 24 EuR 270; [1990] 1 CMLR 570.

³²⁹ *European Arrest Warrant*, 18 Juli 2005, 2 BvR 2236/04: BVerfGE 113, 273; [2006] 1 CMLR 378.

³³⁰ *Dec. P 1/05*, 27 April 2005: OTK ZU 2005/4A, Item 42; [2006] 1 CMLR 965.

³³¹ ABH 2008, 334.

³³² *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872.

³³³ See above at Chapter Four, point E.2.d.

examine the constitutionality of Act CLXVIII of 2007 by which Hungary had promulgated the Lisbon Treaty. Nevertheless, it was wary about actually exercising its jurisdiction with such a fundamental treaty and in fact refused to do so but did indicate the consequences of its doing so (for the future):³³⁴ “In the case though when the Constitutional Court would, through a decision, determine the unconstitutionality of such an Act, the legislator should create a situation in which the Republic of Hungary would fully meet its European Union commitments without violation of the Constitution.”

In this way, the HCC took into account the need for a European-friendly approach in such a situation (as underlined by Constitution Art. 6(4)³³⁵) which rejects the threefold choice proposed by the Polish Constitutional Tribunal in this circumstance, i.e., amend the Constitution, change EU law or withdraw from the EU.³³⁶ Here the HCC seeks to avoid confrontation with the EU or the ECJ and proposes its own valid, pragmatic solution that seeks to exclude the possibility of withdrawal and may indicate a preference for domestic constitutional amendment (relatively more straightforward in Hungary through a two-thirds majority vote in Parliament³³⁷) than seeking to re-open an EU-level negotiated act.

4. Refusals to refer

The HCC was called upon to make a reference to the ECJ in the recent *Lisbon Treaty* case³³⁸ and but refused to do so. The petitioner had contended that the new rules and mechanisms of the Lisbon Treaty jeopardised the existence of the Republic of Hungary as an independent, sovereign State, governed by the rule of law. The HCC consequently used the *acte clair* theory and decided that it did not need to make an Art. 267 TEU reference to the ECJ since it was clear from the petitioner’s submissions that they had been based on an inadequate understanding of the Lisbon Treaty.

According to the *acte clair* theory, as defined in *CILFIT*,³³⁹ the highest court is not obliged to refer if the question has not yet been answered in ECJ case-law but the answer to that question is beyond all reasonable doubt. Before it comes to the conclusion that such is the case, the relevant domestic court has to be convinced that the matter is equally obvious both to the courts of the other Member States and to the ECJ. In this respect the national court should bear in mind that: (i) the interpretation of a provision of European law involves a comparison of the different language versions of the provision concerned; (ii) terms and concepts in European law do not necessarily have the same meaning as the laws of the various Member States; and (iii) every provision of European law should be interpreted in the light of European law as a whole, taking into consideration its

³³⁴ *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872, at 875.

³³⁵ Constitution, Art. 6(4): “The Republic of Hungary contributes to achieve European unity in order to realize the liberty, the well-being and the security of the European people.”

³³⁶ *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49.

³³⁷ Constitution Art. 24(2): “A majority of two-thirds of the votes of the Members of Parliament is required to amend the Constitution.”

³³⁸ *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872.

³³⁹ Case 283/81 *Srl CILFIT v. Ministero della Sanità* [1982] ECR 3415, at paras. 16-20.

objectives and its state of development at the moment of application of the provision in question.

In coming to its decision not to refer, the HCC had evidently been guided by the FCC³⁴⁰ and the Czech Constitutional Court³⁴¹ in their own decisions on the constitutionality of the Lisbon Treaty as the HCC mentions them in its own ruling as well as the pending petition before the Polish Constitutional Tribunal.³⁴²

In support of its decision not to refer because Hungary (and the Member States) remained sovereign and independent, the HCC cited new Art. 50 TEU on the right to withdrawal of Member States from the EU, an argument which the FCC had also made in its own *Lisbon* ruling³⁴³ in respect of the continuance of national sovereignty.

Following the theory of *acte clair*, the HCC was able to rebut the petitioner's submissions by making reference to other commonly-known matters which resulted in changes to the EU consequent upon the coming into force of the Lisbon Treaty: e.g., the Charter of Fundamental Rights became a legally-binding document; and the role of national parliaments in decision-making was significantly enhanced. Taken together, these indicated that the petitioner's submissions on the alleged dangers of the Lisbon Treaty were unfounded.

³⁴⁰ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339.

³⁴¹ Czech Constitutional Court in its two *Lisbon* rulings: (1) Czech Const. Ct. Decision of 26 November 2008: Case No. Pl. ÚS 19/08; and (2) Czech Const. Ct. Decision of 3 November 2009: Case No. Pl. ÚS 29/09.

³⁴² *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108.

³⁴³ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 233 and 329-330.

F. CONCLUDING OBSERVATIONS

The HCC's relationship with European law in its early stages proved to be both hesitant and cautious in its decision-making. Even the elucidating Opinions of Kovács, J. (sometimes with another judge concurring) could not make up for this shortfall and left the researcher having to provide an interpretation somewhat dependent on hints and suggestions than unambiguous judicial guidance and thought, an exercise in textual exegesis of rather Biblical proportions.

Such reticence might indeed have resulted from the reaction of a court in a recently-acceded Member State reacting to the judicial atmosphere in this brave new world; and linked to the way in which the HCC still regards itself as the guarantor of the 1989/1990 constitutional settlement. The German FCC enjoys a much longer perspective in this respect and took many years to come to terms with the full implications of Union membership. Its process of "dialogue" or "co-operation" is still ongoing (*cf. Maastricht*³⁴⁴ and *Lisbon*³⁴⁵) and, without doubt, the HCC is seeking to find its own way to its relation with EU law, guided by the German model.

The impact of this model on the HCC has been profound, dating from before the actual operation of the HCC and throughout the development of its transition case-law. Such impact has also been felt in the HCC's approach to EU law, where, even before accession, *Dec. 4/1997 (I.22) AB* expressly "adopted" the then-subsisting FCC orthodoxy on European treaty reform, European secondary legislation and their subjection to domestic constitutional review. Since accession, the HCC impliedly followed this approach but has tended to be more reticent and to avoid any outright conflict with the ECJ.

The HCC's general approach to the issue of EU law still seemed to be an incongruous interplay of shadows and mirrors, a sense of pale images and even paler reflections amounting to tricks of light through opaque glass. This lack of substance and clarification had a negative impact on the perception of the HCC. Granted the Hungarian constitutional jurisdiction might not have been designed to allow for the submission of the types of cases on EU law as had happened before its German and Polish counterparts, but in those cases which came before it, the HCC initially eschewed addressing such principles as priority of application of EU law, direct effect and ECJ references.

Nevertheless, a perceptible change started to occur in the HCC in 2008 in response to further dealing with European integration. Since that time, in a string of cases, the HCC has underlined its wish, in the main, to "deconstitutionalise" the issue of EU law,³⁴⁶ thereby leaving the ordinary courts free to follow it (including the ECJ's interpretations).

From its ruling in *Dec. 143/2010 (VII.14) AB (Lisbon)*,³⁴⁷ clearly inspired by the FCC in its own *Lisbon* ruling, the HCC intends to concentrate only on the sensitive cases

³⁴⁴ *Maastricht*, 12 Oktober 1993, 2 BvR 2134 und 2159/92: BVerfGE 89, 155; [1994] 1 CMLR 57.

³⁴⁵ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339.

³⁴⁶ Thereby following the ECJ in Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

³⁴⁷ *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872.

of *a priori* review of amending European treaties. This is evidenced by its strong invocation to the President or the Government to use their powers under Constitutional Court Act 1989, s. 1(a) and petition the HCC for an *a priori* review of important amendments to the founding European treaties. It therefore appears clear that the HCC has recognised its jurisdiction to conduct not only an *ultra vires* review with respect to the protection of the limits of the powers conferred on the Union by Hungary (which has its original foundation in the FCC ruling in *Maastricht* and recently reaffirmed in *Lisbon*), but also a constitutional identity review (though less well articulated than the FCC in *Lisbon*). The preservation of the constitutional identity of the state stems from its own understanding of the relationship between Art. 2(1) and (2) and Art. 2/A of the Constitution, viz., that the former cannot be emptied of their content vis-à-vis the latter. This would seem to suggest an essential core of sovereignty that cannot be touched by European integration without leading to the infringement of the principles of the democratic state under the rule of law and popular sovereignty.

Despite the acknowledged influence of the FCC, the HCC's ruling in *Lisbon* is diminutive in comparison although its relative size compares favourably with that of the Austrian Constitutional Court, rejecting a petition (on technical grounds) seeking to challenge the constitutionality of the Lisbon Treaty.³⁴⁸ As with the FCC and *Mangold*,³⁴⁹ no doubt future decisions will see how this reasoning of the HCC is put into practice.

³⁴⁸ VfGH, *SV I/10*, 12 Juni 2010: (2010) 37 EuGRZ 493.

³⁴⁹ *Honeywell/Mangold*, 6 Juli 2010, 2 BvR 2661/06: (2010) 37 EuGRZ 497.

