Conference of European Constitutional Courts
XIIth Congress

The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts

Report of
the Constitutional Court
of Republic of Hungary

I. The constitutional court, the other courts and the constitutionality review

A. The judicial organisation of the State

1. The judicial system

1. Please give a brief presentation, using diagrams if necessary, of the different courts that exist in your State and the organisation of their powers. This concerns the ordinary courts as well as the administrative or other courts, the courts of the Federal State as well as the courts of the federated States.

In the Constitution of the Republic of Hungary, with respect to the system of legal remedies, to the administrative regions of the state as well as to the rules of competence, a four-level judicial system has been established as follows:
- local courts (town and metropolitan district courts) at the lowest level;
- county courts (and the metropolitan court) at the county level;
- regional courts of appeal at the regional level; and
- the Supreme Court at the highest level, operating as a general or ordinary court.

In each county and the capital city there is a labour court as well with competence of first instance.

1.1 Local and labour courts

Local courts proceed at first instance in all cases not referred by an Act of Parliament to the competence of a higher level court. Labour courts proceed at first instance in cases originating from employment relationships or from relationships of an employment nature, as well as in other matters referred to their competence by an Act of Parliament.

1.2 County courts and the metropolitan court

All the 19 county courts, as well as the metropolitan court having the same competence, proceed at first instance in cases referred to their competence by procedural laws, while at the second instance they adjudicate appeals lodged against decisions of local or labour courts. At county courts there are panels of judges which hear individual cases as well as criminal, civil, economic and administrative law divisions. Divisions have the possibility to operate jointly as well. County court divisions are comprised of professional county judges dealing with the same type of cases, as well as of judges elected by them for a term of six years from among the judges of local courts operating in the territory of the given county. At certain county courts, with a specified venue, there are military councils operating as well.

1.3 Regional courts of appeal

Regional courts of appeal - operating at a level between county courts and the Supreme Court - have no competence at first instance; they proceed exclusively in cases of legal remedy as laid down in procedural laws and sought against decisions of local or county courts. At regional courts of appeal there are panels of judges which hear individual cases as well as

criminal, civil, and administrative law divisions. The divisions of regional courts of appeal are comprised of judges of the given court of appeal dealing with the same type of cases, as well as of the heads of the respective divisions of county courts. In cases adjudicated at first instance by military panels operating at certain county courts it is the military panels of regional courts of appeal that are to proceed.

(At present there are no regional courts of appeal operating; the pertaining Act of Parliament set the date of 1 January 2003 for the National Court of Appeal to start operating.)

1.4 The Supreme Court

The Supreme Court is the principal judicial organ of the Republic of Hungary. The president of the Supreme Court is elected by Parliament. The Supreme Court:
- adjudicates, in cases determined by an Act of Parliament, appeals for legal remedy lodged against decisions of county courts or regional courts of appeal;
- adjudicates, as extraordinary legal remedy, applications for review;
- in order to ensure a uniform judicial application of law, makes decisions on legal unity which are binding on all courts; and
- proceeds in other matters within its competence.

At the Supreme Court there are panels of judges which hear individual cases and divisions on legal unity, as well as criminal, civil and administrative law divisions. Divisions are comprised of Supreme Court judges dealing with the same type of cases as well as of the heads of the respective divisions of regional courts of appeal.

1.5 The National Council for the Judiciary

In order to ensure the organisational independence of the judiciary, the central administration of the courts is managed by the National Council for the Judiciary, which supervises the administrative activity of the presidents of regional courts of appeal and of county courts. The heads of courts as well as the organs of judicial self-government, the so-called judicial bodies, also participate in the administration of courts. The National Council for the Judiciary (NCJ) consists of 15 members. The president of the NCJ is the president of the Supreme Court, and its members are 9 judges elected by the conference of delegates of judges, as well as the Minister of Justice, the Chief Public Prosecutor, the president of the Hungarian Chamber of Advocates and two Members of Parliament, one of whom is designated by the Constitutional and Judicial Committee, while the other by the Budget and Finance Committee of Parliament.

The competence of the National Council for the Judiciary:
a) in its competence for personnel matters, it gives a preliminary opinion on the persons nominated to the posts of president or vice-president of the Supreme Court. It appoints and relieves of office the presidents, vice-presidents, and heads of colleges of regional courts of appeal and of county courts as well as the head official and deputy head official of the Office of the NCJ, and exercises other employer's rights and personnel competence as well;
b) in its competence for management and administration, it directs the activity of the Office of the NCJ, directing and supervising at the same time the administrative activity of presidents of courts within its appointing competence;
c) in its competence related to normative regulations, it may initiate legislation concerning the scope of duties of courts and give an opinion on draft legal rules affecting courts; and

d) in its budgetary competence, it draws up and submits to the Government a budget proposal for the chapter on the judiciary, as well as the account on the implementation of the preceding year's budget, and exercises the functions related to the administration of the chapter on the judiciary.

2. The Constitutional Court

2. What is the place of the constitutional court in the judicial organisation of the State? If it is part of the judiciary, what is its status within the judiciary?

According to the constitutional order of the Republic of Hungary, the Constitutional Court is not part of the judiciary; it is not a judicial organ.

(The question will be dealt with in more detail in Chapter II, describing the relations between the Constitutional Court and other courts.)

B. The respective jurisdictions of the constitutional court and the other courts in the area of constitutionality review

1. Review of laws and other acts

§ 1. Type of review

3. What acts (of domestic law and international law) are reviewed by the constitutional court in relation to the higher standards that are the Constitution, the principles of constitutional value and the provisions of international law?

The powers of the Constitutional Court are laid down primarily in the Constitution and in Act XXXII of 1989 on the Constitutional Court (hereinafter referred to as the 'Act on the Constitutional Court'). According to Article 34/A (1) of the Constitution, the Constitutional Court reviews the constitutionality of legal rules and performs the functions referred to its competence by an Act of Parliament.

Consequently, the principal task of the Constitutional Court derived from the Constitution is the control of legal norms, that is the passing of judgement on the constitutionality of legal rules.

Under this provision of the Constitution, the Constitutional Court has been granted the competence to review, from the point of view of their constitutionality, all types of legal rules, i.e. Acts of Parliament, government decrees, ministerial decrees and local government decrees. Under the Act on the Constitutional Court, it also has the right to establish the unconstitutionality of international treaties.

4. Is this competence exclusive? If not, which are the other competent courts in this area? How about the other acts and decisions?

The Constitutional Court has exclusive competence as regards the establishment of unconstitutionality of legal rules or international treaties; no other court has the right to establish the unconstitutionality thereof or the right to annul them.

It is not only the constitutionality review of legal rules or international treaties that the Constitutional Court has competence for: in accordance with the Act on the Constitutional Court its competence includes the constitutionality review of other legal means available to the State for normative regulation (hereinafter referred to as 'other legal instruments of public administration') as well. According to Hungarian law, other legal instruments of public administration are the following: decisions containing normative provisions of Parliament, of the government or of the bodies of representatives of local governments, normative instructions of Ministers and heads of organs with a nation-wide competence, statistical communiqués, directions of the Central Bank issued by its President, as well as legal guidance (principled standpoints for the interpretation of legal rules as well as guidelines).

As a general rule, the Constitutional Court has competence for the review of normative acts of state organs. In exceptional cases, however, separate laws may provide for the review of individual (i.e. non-normative) acts as well. Accordingly, under the Act on Higher Education, it may review individual acts of state organs violating the autonomy of higher education institutions. Under the Act on Election Procedure, it proceeds as a forum for legal remedy in certain cases related to national referenda. It is the Constitutional Court with whom appeals may be lodged against a decision of the National Electoral Board concerning the authentication of signatures in a canvass sheet for the initiation of a national referendum, or against a resolution of Parliament ordering a national referendum, or a resolution thereof refusing the ordering of a national referendum which it would be obliged by law to order.

Apart from the constitutionality review of acts, the Constitutional Court also has other types of competence, such as the abstract interpretation of the Constitution, the establishment of unconstitutionality based on omission to legislate, as well as the elimination of collisions of competence between state organs, between a local government and other state organs, or between local governments. On the other hand, its scope of competence does not include adjudication in matters of collision of competence between courts or between a court and other organs of public administration. In cases of unconstitutional operation of bodies of representatives of local governments, it is after requesting a prior opinion from the Constitutional Court that the government can submit to Parliament a proposal on the dissolution of the body of representatives in question.

The remedy available against individual administrative decisions is the appeal which may be lodged with ordinary courts. The general rule is that all administrative decisions are subject to appeal, except for decisions the judicial review of which is prohibited by an Act of Parliament. Administrative decisions not qualifying as decisions of an authority may be appealed against before a court only if it is provided for by an Act of Parliament.

5. Is the review carried out by the constitutional court a prior or subsequent review?

In Hungarian Constitutional Court procedures, the prior control of legal norms is an exceptional institution. Such prior review is exercised by the Constitutional Court in respect of Acts adopted by Parliament but not yet promulgated, of the Standing Orders (Rules of Procedure) of Parliament or of international treaties.

A) Prior control of legal norms

a) Under the provisions of the Constitution, Acts adopted by Parliament are sent by the Speaker of Parliament to the President of the Republic. The President of the Republic shall, within 15 days, or upon a request of urgency from the Speaker of Parliament within 5 days, sign it and see to its promulgation. If the President of the Republic finds any provision of the Act unconstitutional, he or she can, within the above time-limit, turn to the Constitutional Court. In such cases the Constitutional Court shall decide with out-of-turn proceedings. If the Constitutional Court establishes the unconstitutionality of the provision deemed unconstitutional by the President of the Republic, the President of the Republic shall send the Act back to Parliament and may not promulgate it until such unconstitutionality has been eliminated by Parliament.

b) Before adopting its Standing Orders and marking the provisions raising doubts, Parliament may send them to the Constitutional Court for an examination of their conformity with the Constitution. If the Constitutional Court establishes the unconstitutionality of the disputed provision, Parliament shall eliminate such unconstitutionality in the Standing Orders.

c) The constitutionality review of provisions raising doubts in international treaties - before their ratification - may also be requested by Parliament, the President of the Republic or the government. If the Constitutional Court establishes the unconstitutionality of the controversial provision of the international treaty, it may not be ratified until such unconstitutionality is eliminated by the organ or person concluding the international treaty.

B) Posterior control of legal norms

The most significant and most frequently exercised competence of the Constitutional Court is the posterior control of legal norms. In the framework of posterior control of legal norms the Constitutional Court reviews the constitutionality of adopted, promulgated, and - as a general rule - effective legal rules and of other legal instruments of public administration. As a legal consequence of an establishment of unconstitutionality, the provisions declared unconstitutional or the whole legal rule is annulled, and therefore the annulled provisions cease to have effect.

Decisions of the Constitutional Court annulling a legal rule or any provisions thereof are to be published in the Hungarian Official Gazette, the official journal for the publication of legal rules. (Decisions annulling other legal instruments of public administration are to be published in the official gazette where the annulled legal norm was originally published.) As a general rule, the annulled legal rule ceases to have effect as of the date of publication, from which date the given legal rule or other legal instrument of public administration may not be applied.

In this case, the annulment of a legal rule does not affect legal relationships established on the basis thereof, neither does it affect any rights or obligations derived therefrom.

In cases where legal certainty requires it or it is in the applicant's strong interest, however, the Act on the Constitutional Court makes it possible for the Constitutional Court to set a date different from the above for the annulment of a legal rule.

a) Only in exceptional cases does the Constitutional Court have recourse to the possibility of annulment with retroactive effect in order to avoid the violation of legal certainty: in its practice so far it has only made use of this possibility where no legal relationships have been established under the given legal rule or where severely unconstitutional legal rules affected only a specific and narrow circle of addressees.

b) The possibility more frequently made use of by the Constitutional Court is when it annuls the legal norm declared unconstitutional as of a later date in the future. This option is chosen in cases where legislation is also necessary in order to eliminate the given unconstitutionality. In determining the date of annulment, the Constitutional Court takes into consideration the time necessary for the preparation of the legal rule in question.

In the framework of posterior control of legal norms, legal rules promulgated but not yet in effect may also be reviewed by the Constitutional Court. In such cases, if the Constitutional Court declares the unconstitutionality of the given legal rule, the annulled provision shall not take effect.

It is very rare that the constitutionality of legal rules having already ceased to have effect is reviewed by the Constitutional Court: only where the given legal rule is still to be applied in certain concrete cases - e.g. those of constitutional complaint or judicial referral. Since in such cases the annulment of the legal norm is impossible, the legal consequence of an establishment of unconstitutionality is that the Constitutional Court prohibits the application of any unconstitutional provision in the concrete case.

In the early practice of the Constitutional Court it was controversial whether or not international treaties promulgated in domestic law by a legal rule may be the subject of a posterior control of legal norms. The Constitutional Court, however, in its decision made in 1997 (4/1997. (I. 22.) AB) declared that legal rules promulgating international treaties may indeed be the object of a posterior review from the point of view of their constitutionality. This constitutionality review may also include a review of the constitutionality of the international treaty now forming part of the legal rule promulgating it. In cases where the Constitutional Court establishes the unconstitutionality of an international treaty or of any provisions thereof, it is the legal rule promulgating the international treaty that it declares unconstitutional. This decision, however, may not effect the international obligations of the Republic of Hungary. It is legislators who, on the basis of the Constitutional Court's decision, have the obligation to harmonise international legal obligations and domestic law, even if it entails the amendment of the Constitution. Such proceedings occurred later in practice, when the Constitutional Court examined in merit the unconstitutionality of Act I of 1994 on the Promulgation of the Europe Agreement on Association concluded between the Republic of Hungary and the European Communities and the Member States thereof. In its decision of 26 June 1998, the Constitutional Court established the unconstitutionality of certain provisions of the Agreement.

6. Is the review carried out by the constitutional court an abstract or concrete review?

Apart from exceptional cases where its competence includes the review of individual acts, the Constitutional Court has competence for the constitutional control of legal norms only; it may not review the constitutionality of the application of law. The review carried out is usually an abstract one. In its proceedings the Constitutional Court, disregarding the concrete case, reviews the constitutionality of the legal rule or normative act challenged by the applicant.

Only in two cases may the body carry out a concrete control of legal norms: on the basis of constitutional complaints or when a judge, staying the proceedings of the case pending before him or her, requests the constitutionality review of a legal rule to be applied in the case. Even then the Constitutional Court carries out a control of legal norms in that it rules on the constitutionality of a legal norm that has been or would be applied in the case, but here it takes into consideration the given case as well. In this type of concrete control of legal norms, the Constitutional Court, beyond the annulment of a legal norm established as unconstitutional, also declares the inapplicability of the unconstitutional legal norm in the case stayed by the judge or in the case constituting the object of constitutional complaint. In such cases of concrete control of legal norms the unconstitutionality of the legal norm that has been or would be applied is reviewed by the Constitutional Court even if the legal norm has already ceased to have effect. The establishment of unconstitutionality of a legal norm does not automatically entail a declaration of the prohibition to apply it; in the case of judicial referral it is ordered upon request lodged by the judge, while in the case of constitutional complaints the Court considers whether or not a „specially important interest" of the applicant justifies a prohibition to apply the legal norm.

It is not only in such instances of concrete control of legal norms that the establishment of unconstitutionality of a legal norm affects concrete individual cases. The Act on the Constitutional Court declares that the Constitutional Court may order a review of criminal proceedings closed with a final sentence under an unconstitutional legal norm, if the sentenced person has not yet been relieved of its disadvantageous consequences and if annulment of the applied provision would entail a reduction in or omission of the sentence or measure, or an exemption from or limitation of responsibility.

§ 2. Referral to the constitutional court

a. Types of referral

7. How can the constitutional court be accessed (action for annulment, preliminary question, constitutional appeal, etc.)? How many cases have there been for each type of referral?

The legal rules pertaining to the Constitutional Court regulate its scope of competence only, without any special provisions as to the different types of referral. As regards the content thereof, the Act on the Constitutional Court provides that they must contain, apart from the grounds on which they are based, a definite request. The Constitutional Court accepts the referral only if the legal provision to be reviewed is exactly indicated, if it invokes the provision of the Constitution which - according to the applicant is - violated by the disputed legal rule, and if the competence within which the proceedings are to be carried out is indicated. Applications for the exercise of posterior constitutional control of legal norms must contain an action for annulment as well.

Accordingly, the Constitutional Court may be accessed in order to request the:
a) exercise of prior control of legal norms (i.e. a prior review of adopted but not yet promulgated Acts of Parliament), of the Standing Orders of Parliament, or of certain provisions of international treaties;
b) posterior review of the unconstitutionality of legal rules or of other legal instruments of public administration;

c) posterior review of whether legal rules or other legal instruments of public administration violate an international treaty;
d) adjudication of constitutional complains lodged because of a violation of rights enshrined in the Constitution;
e) elimination of unconstitutionality based on omission;
f) elimination of a collision of competences;
g) abstract interpretation of provisions of the Constitution;
h) annulment of legal rules or individual decisions violating the rights of self-government of higher education institutions; or
i) review of whether local government decrees are in conformity with legal rules.

As regards national referenda, objections may be raised against
- a decision of the National Electoral Board on the authentication of a canvass sheet or the concrete question, or
- a resolution of Parliament ordering a national referendum or refusing to order a national referendum which it would be obliged by law to order.

Between 1 January 1990, when the Hungarian Constitutional Court started operating, and 31 December 2000 the number of applications broken down by types of referral were the following:
a) exercise of prior control of legal norms (i.e. a prior review of adopted but not yet promulgated Acts of Parliament), of the Standing Orders of Parliament, or of certain provisions of international treaties **- 18 referrals;**
b) posterior review of the unconstitutionality of legal rules or of other legal instruments of public administration **- 4954 referrals;**
c) posterior review of whether legal rules or other legal instruments of public administration violate an international treaty **- 1 referral** (In applications for the posterior establishment of unconstitutionality of legal rules applicants often refer to a violation by the legal rule of international treaties. Since such review is generally requested by those not entitled to initiate such proceedings, the Constitutional Court refuses to review the violation of international treaties for lack of standing. However, as the Constitutional Court may *ex officio* review legal rules as to whether they are contrary to international treaties, it frequently carries out the review in merit even if the applicant has no standing.)
d) adjudication of constitutional complaints lodged because of a violation of rights enshrined in the Constitution **- 157 referrals;**
e) elimination of unconstitutionality based on omission **- 354 referrals;**
f) elimination of a collision of competences **- 23 referrals;**
g) abstract interpretation of provisions of the Constitution **- 24 referrals;**
h) annulment of legal rules or individual decisions violating the rights of self-government of higher education institutions **- 4 referrals;**
i) review of whether local government decrees are in conformity with legal rules - **434 referrals;**
j) objections against a decision of the National Electoral Board on the authentication of a canvass sheet or the concrete question **- 8 referrals;** and
k) objections against a resolution of Parliament ordering a national referendum or refusing to order a national referendum which it would be obliged by law to order **- 1 referral.**

b. Actions for annulment

8. Does direct recourse exist to the constitutional court against statutes? And against other regulations and acts?

Those entitled to initiate proceedings with the Constitutional Court may do so directly, by way of lodging a written application with the Constitutional Court.

Public prosecutors play a special role in the initiation of Constitutional Court proceedings. One of the tasks of public prosecutors' offices is to exercise legality supervision over public administration decisions. If a public prosecutor notices any violation of law in ministerial decrees or in any other legal instruments of public administration issued by a ministry or other central organs, he or she may lodge a protest against the legal norm in question with the issuer thereof. If the organ issuing the normative act disagrees with the public prosecutor's protest, it must submit the protested normative act to the Constitutional Court.

9. Who can bring such actions and within what time limit?

Under Article 32/A (3) of the Constitution, anyone may initiate proceedings for the posterior constitutionality review of normative acts. Any natural person, legal person or organisation not having legal personality has the right to turn to the Constitutional Court, without having to prove that their own interests are affected.

Proceedings for the review whether rules of domestic law violate international treaties may only be initiated by:
a) Parliament, a standing committee thereof or any Member of Parliament,
b) the President of the Republic,
c) the Government or a member thereof,
d) the President of the State Audit Office,
e) the President of the Supreme Court, or
f) the Chief Public Prosecutor.

Constitutional complaints for the violation of rights enshrined in the Constitution may be lodged with the Constitutional Court by those who have suffered legal injuries in the course of the application of unconstitutional legal rules and who have already tried all other avenues of legal remedy or who have no other means of legal remedy at their disposal.

The establishment of infringement of law and annulment of local government decrees may be initiated by the heads of county offices for public administration.

In the majority of cases there is no time-limit prescribed by law for filing an application. Constitutional complaints, however, must be lodged with the Constitutional Court within 60 days of service of the final decision. Similarly, time-limits have been established for objections to be submitted in matters of national referenda. Objections against decisions of the National Electoral Board on the authentication of a canvass sheet or the concrete question must be submitted within 15 days of the publication of such decisions, while objections against a resolution of Parliament ordering a national referendum or refusing to order a national referendum which it would be obliged by law to order must be submitted within 8 days of the publication thereof.

10. Can the constitutional court suspend statutes or other regulations and acts?

No, the Constitutional Court has no such competence.

Who can refer cases to the constitutional court?

c. Preliminary issues - plea of unconstitutionality

11. Which courts can refer cases to the constitutional court? If any court can put a preliminary question, does that mean that a broad or restrictive interpretation is given to the notion of 'court'?

In fact all the courts (for details see the answer to question 1) can refer to the Constitutional Court and initiate the posterior control of legal norms.

Consequently, neither a broad nor a restrictive interpretation of the notion of 'court' comes up in statutory regulations. Neither authorities deciding matters of public administration nor courts of arbitration can therefore be considered courts in that they may not raise preliminary questions of constitutionality.

12. Are the courts obliged to put the question?

According to the Act on the Constitutional Court judges shall initiate proceedings with the Constitutional Court if, in a case pending before them they should apply legal rules or other legal instruments of public administration which they deem unconstitutional.

Accordingly, raising preliminary questions of unconstitutionality is an obligation for judges proceeding in the case, as it follows from the form of verb „shall initiate" used in the pertaining Act of Parliament. It is therefore an obligation to make a referral in all cases where the legal rule to be applied raises questions of unconstitutionality.

If, however, one of the parties requests the staying of proceedings and the referral to the Constitutional Court, judges have discretion in deciding whether such request is well-founded and to which extent they act on such requests.

13. Is it possible to oppose, by a procedure of objection, opposition or recourse, the submission of all or part of a case to the constitutional court by a decision of referral? If so, who can initiate this procedure and how does it proceed? What are the consequences?

In accordance with the rules of civil procedure, courts make an order to stay proceedings whenever they make a referral to the Constitutional Court. Since under the rules of civil procedure - except for orders entailing the payment of costs or pecuniary penalties or orders made specially appealable by law - no orders made in the course of proceedings are appealable, orders initiating posterior control of legal norms with the Constitutional Court and staying proceedings are not deemed, either by an Act of Parliament or by judicial practice, orders against which legal remedy may be sought.

As for criminal procedure, regulation has virtually the same effects. The Act on Criminal Procedure lists all the grounds on which the staying of proceedings may be based. Like in civil procedure, the staying of proceedings is made in an order. Although orders made in the course of proceedings are appealable according to the Act on Criminal Procedure, the list of grounds for staying proceedings does not contain the preliminary question of unconstitutionality (as it is laid down in the Act on the Constitutional Court), and therefore no legal remedy may be sought against the staying of proceedings to this end.

However, mention must be made of the fact that our practice may not be considered finally settled as to whether legal remedy may be sought against judicial decisions to initiate with the Constitutional Court a constitutionality review of the applicable legal rule. There has been a precedent in practice for appealing against such a decision. (See also the answer to question 34.)

14. What is the procedure for referral to the constitutional court? What is the role of the parties in drawing up the preliminary question? Can the preliminary question be raised ex officio? In that case, are the discussions on the question reopened?

In accordance with the Act on the Constitutional Court, courts stay proceedings pending before them simultaneously with the referral to the Constitutional Court, which staying lasts until the Constitutional Court makes its decision.

Constitutional Court reviews are primarily initiated by the courts *ex officio*, an exception from which is the parties' right to propose such referral. Under the Act on the Constitutional Court those who deem that the legal rule applicable in their lawsuit pending before a court is unconstitutional, may initiate the court's referral to the Constitutional Court as well. It only means, however, that the party may propose an order for staying proceedings and make a proposal for the content of the referral, but the proceeding judge is not bound by such proposals.

15. Do the courts that put the question rule on the constitutionality or unconstitutionality of the regulation at issue?

The Act on the Constitutional Court lays down the general requirement for all types of referral that the application on which the proceedings are based must contain the grounds for the referral as well as a definite request. Accordingly, the initiation by the court must indicate the grounds on which the referral is based, i.e. the legal rule it deems unconstitutional. Apart form a request to establish the unconstitutionality of the challenged provision, the referral must contain an action for the annulment thereof as well.

Since the court must therefore put the preliminary question in an explicit way, it is inevitable that it take a stand on the unconstitutionality of the legal rule at issue and elaborate its standpoint thereon.

If it is a party to the case pending before the court that initiates the proceedings for the establishment of unconstitutionality of the legal rule applicable in the given case, the court may, as described in point 14 above, reject this request. Such a decision need not contain reasons. Giving reasons for the decision would, in fact, mean taking a stand on the constitutionality of the legal rule at issue, i.e. performing a control of legal norms, for which it has no competence.

Screening

16. Is there a screening procedure which allows the constitutional court to limit the number of cases or to speed up the hearing of those cases (nonsuit, quick reply, demurrer, evident unfoundness, identity or similarity of questions which the constitutional court has already answered)? What is the proportion of cases screened in this way?

Referral by judges is regulated by the same requirements of form as other applications requesting posterior control of legal norms. Under the Act on the Constitutional Court applications must contain the grounds serving as a basis for the application as well as a definite request. Referrals of judges are therefore screened the same way as other applications, and in case of formal deficiencies - e.g. lack of indication of a provision of the Constitution or of a legal rule, or lack of an action for the annulment thereof - the court is called on to supplement them. If the issue has already been ruled on (the Constitutional Court has already taken a stand in the question), the application is refused. Such cases are very scarce in number, though.

Scope of referral of the constitutional court

17. What is the import of the considerations of unconstitutionality given by the court that puts the question (court a quo)? Must the constitutional court take these considerations into account or can it ignore them? Can it raise, ex officio or at the request of the parties, the arguments of unconstitutionality not envisaged by the court a quo or is it restricted by the decision of referral? Can the constitutional court review regulations not intended by the preliminary question yet linked thereto?

In forming its standpoint, the Constitutional Court must only adhere to the Constitution and to Acts of Parliament. Accordingly, while it may take into consideration those contained in the referral, it is not bound thereby.

18. Are all aspects, both in law and in fact, of the action pending before the court a quo referred to the constitutional court?

In its referral to the Constitutional Court, the court *a quo* requests a posterior constitutional control of legal norms and simultaneously the establishment of the inapplicability in the given case of the legal rule deemed unconstitutional. The Constitutional Court has then the competence to annul the legal rule proving unconstitutional and establish its inapplicability in the case stayed by the court *a quo*. Thus the Constitutional Court does not review the facts of the case. In Constitutional Court procedures, the Act on the Constitutional Court allows only a restricted use of means of evidence anyway. However, it is not this restriction on means of evidence that excludes the review of the facts of the case but the competence of the Constitutional Court, which is exclusively for the constitutionality review of the legal rule itself.

The other legal aspects of the case not mentioned in the referral, as a general rule, do not constitute the object of review either, so the Constitutional Court does not review either compliance with procedural requirements or the proper application of the law.

Relevance of the question

19. Can the constitutional court dismiss the question on the grounds that it is not useful to the settlement of the action brought before the court a quo?

If the referral of the court *a quo* complies with the provisions of the Act on the Constitutional Court, the Constitutional Court is bound thereby. It does not consider whether the question of constitutionality is useful or not to the settlement of the given case, it only makes a decision on the application. If the referral does not contain those elements prescribed by the Act, the Constitutional Court dismisses it on grounds of formal deficiencies; such dismissal, however, is not a judgement on the relevance of the question.

Interpretation of the question

20. Can the constitutional court reformulate the question in order to make it clearer and to define the constitutional debate better? If so, what use is made of this option?

It is not questions but applications that are lodged with the Constitutional Court, which is bound by such applications. This does not mean, though, that the Constitutional Court gives a narrow interpretation to the application or that it can rule on the problem of constitutionality only along the reasoning contained therein. The body interprets the content of the application in a way that it be suitable for identifying the real question of constitutionality. In addition, the Constitutional Court has on several occasions extended the review to other legal rules which were not contained in the original application but whose review became necessary, for example due to their closely interrelated object.

Interpretation of the reviewed regulation

21. Must the constitutional court adhere to the interpretation of the reviewed regulation given by the court a quo?

The Constitutional Court is not bound by the interpretation contained the application of the judge *a quo*. There has been a precedent for the Constitutional Court defining itself the constitutional content of a certain legal norm, i. e. giving, as to its effect, an interpretation of law binding on legislators and ordinary courts as well. This competence of the Constitutional Court is not explicitly laid down in the Act on the Constitutional Court.

Jus superveniens

22. What is the impact of a legislative amendment to the challenged regulation subsequent to the decision of referral?

As for applications lodged by judges, since the constitutionality of the challenged legal rule is reviewed from the aspect of its impact on the given case, and in this context the amendment of the legal rule often does not affect the decision in the case, the body carries out the review regardless of the amendment or even repealing thereof. As for the posterior control of legal norms, on the other hand, repeal of the given legal rule entails discontinuance of proceedings.

Parties

23. Can the parties before the court a quo or third parties (individuals, institutions, other courts, etc.) participate (voluntarily of compulsorily) in the procedure before the constitutional court? Can one intervene before the constitutional court on the mere grounds of being a party before a court deciding on merits in an action similar to the one that led the court a quo to put the preliminary question?

The parties to the lawsuit may not participate in Constitutional Court proceedings initiated by the judge. However, the Constitutional Court may invite to the hearing the person filing the application or, in justified cases, other persons as well, but the body rarely makes use of this statutory option. The parties to the lawsuit are informed of the Constitutional Court proceedings by the court's order, since the court *a quo* says proceedings whenever it makes a referral to the Constitutional Court. No third party (involved in another lawsuit) may participate in Constitutional Court proceedings on grounds of similarity of his or her case pending before a court, but he or she may file an independent application, which the body judges together with the issue submitted by the court *a quo* on account of identity of object.

24. Is there a counsel for the defence? If so, in what form? Is there a counsel for the prosecution with the constitutional court?

In Constitutional Court proceedings the parties participate through their applications, provided they have the opportunity therefor as described above. Legal representation is provided for by law in Constitutional Court proceedings as well, but it is not compulsory. There is no person in Constitutional Court proceedings who advocates the presumption of unconstitutionality.

Points of law in the constitutional proceedings

25. Does the withdrawal of suit before the court a quo or the death of a party before the same court subsequent to the decision of referral have an impact on the progress of the constitutional action?

The case in question is so far unprecedented; however, under the rules of civil procedure withdrawal of the action entails the discontinuance of the lawsuit, while the death of a party entails legal succession, provided the party has a legal successor. If the lawsuit is discontinued by the court *a quo*, the constitutional proceedings having lost their purpose the court *a quo* withdraws the referral. In this case the Constitutional Court discontinues proceedings.

d. The constitutional appeal (for example recours d'amparo, Verfassungsbeschwerde etc.)

Object of the constitutional appeal

26. What is the object of the constitutional appeal? Against which acts can such an appeal be lodged? Once a constitutional appeal has been referred to it, can the constitutional court examine the facts of the case?

Constitutional complaints are submitted in order to remedy injuries generated in the course of the application of an unconstitutional legal rule and violating the rights of the affected person enshrined in the Constitution.

Although the Act on the Constitutional Court provides for the possibility of constitutional complaint only where the injury has been caused by the application of unconstitutional *legal rules*, in the standing practice of the Constitutional Court constitutional complaints may also be submitted in cases where the injury is caused by the application of other legal instruments of public administration which are unconstitutional. Constitutional complaints may request a constitutionality review of both effective and ineffective legal rules; but only on condition that the legal rule in question has been applied in the given case and the injury has been caused by the application of the unconstitutional legal rule.

The Constitutional Court reviews the constitutionality of the legal rule applied in the given case. It has no competence to alter, quash or annul administrative or judicial decisions; the Constitutional Court may only establish the unconstitutionality of the applied legal rule, annul it, and retroactively prohibit in the given case the application of the legal rule declared unconstitutional. This latter decision, however, is only made where legal certainty or very important interests of the person initiating the proceedings specially justify it. This way, even though the facts of the case on which the constitutional complaint is based are inevitably examined as well, it does not mean a review or (re)qualification thereof, for which the Constitutional Court has no competence.

Allowability of the appeal

27. Who can refer an appeal to the constitutional court? How?

Complaints to the Constitutional Court may be submitted by anyone, both natural and legal persons. In the practice established by the Constitutional Court, however, the complaint may only be submitted by the injured person (or a legal representative acting on behalf thereof). The Constitutional Court accordingly refused, on grounds of lack of standing, the application referred to it by the counsel of the plaintiff in the challenged case, who was unable to attach powers of attorney for the constitutional proceedings and therefore requested the Constitutional Court to regard the application to be submitted on his or her own behalf.

The referral of constitutional complaints is regulated by the same rules pertaining to constitutional procedure in general: such a complaint must be submitted in writing to the Constitutional Court, and the legal rule deemed unconstitutional by the person submitting it as well as the provisions of the Constitution to which it is deemed contrary must be indicated. Apart from this the complaint must contain an explicit request for the annulment of the unconstitutional legal rule, and if a retroactive prohibition of the application of the legal rule in the given case is requested as well, it is advisable to put it in an explicit way.

Constitutional complaints may be submitted within 60 days of the final decision found injurious. Failing to meet this time-limit entails forfeiture of rights. The meeting of the time-limit must be proved by the person submitting the complaint by attaching thereto a copy of the acknowledgement of receipt of the court certifying service, from which the date of service can be clearly determined.

28. Is appeal to the constitutional court only possible once all other avenues of appeal have been tried?

The concerned person may appeal to the Constitutional Court only once all other ordinary avenues of legal remedy have been tried, or when no legal remedy is available to him or her. The complaint is therefore not adjudicated in merit if the person submitting it has not made use of his or her right to appeal in the case. The Constitutional Court does not adjudicate a complaint either that has been submitted after 60 days of service of the final decision because the person submitting sought some extraordinary means of legal remedy and waited for a decision to be made therein.

However, it is possible to submit constitutional complaints against decisions made in extraordinary legal proceedings if the injury was caused by this decision, i.e. where after the conclusion of ordinary proceedings of legal remedy the person had no reason to submit an application. In such cases the time-limit of 60 days is to be counted from the date of service of the decision made in the extraordinary proceedings of legal remedy.

Screening

29. Is there a screening procedure which allows the constitutional court to limit the number of cases or to speed up the hearing of those cases (selection of cases, nonsuit, quick reply, demurrer, evident unfoundness, etc.?) What is the proportion of cases screened in this way?

The screening procedure is regulated by the general rules of procedure.

The Constitutional Court may not sort cases; it must make a decision in all of them without neglecting any or qualifying any as devoid of interest.

Parties

30. Does the plaintiff participate in the procedure before the constitutional court? If so, in what form? What about the other parties? Can or must certain public authorities intervene in the proceedings?

Neither the plaintiff or the applicant lodging a constitutional complaint, nor the opponent thereof in the lawsuit may participate in Constitutional Court proceedings in any form or capacity. No other parties may do so either. Public authorities do and may not intervene in Constitutional Court proceedings.

31. Is there a counsel for the defence? If so, in what form? Is there a counsel for the prosecution with the constitutional court?

As a general rule, the Constitutional Court does not adjudicate constitutional complaints in public sessions. Consequently, if the applicant has a legal representative, his or her arguments must be submitted in writing.

2. Settlement of conflicts between courts

32. Is it the task of the constitutional court to circumscribe the respective jurisdictions of the other courts? If so, how does it proceed?

The Constitutional Court has no such competence. (NA)

II. The relations between the constitutional court and the other courts

A. The organic link

33. What are the organic links between the constitutional court and the other national courts (conditions of admission, appointment procedure, etc.)?

It is not a precondition of becoming a Constitutional Court judge for the nominated person (or some of the nominated persons) to have formerly been judge with another court. The Act on the Constitutional Court provides that anyone with twenty years of professional practice as a lawyer is eligible to become a judge of the Constitutional Court, but there is no provision specifying in which legal profession this practice must have been acquired (i.e. even jurisconsults or university professors with no professional practice but of recognised competence in the theory of law are eligible to be elected judge of the Constitutional Court).

In the course of the history of the Constitutional Court so far, in its body of 11 members there have always been Constitutional Court judges with former practice as judges with other courts, but the majority of the members have been elected form among professors at universities of law.

B. The procedural link

34. What are the procedural links between the constitutional court and the court referring the case to it or against which the appeal was lodged (for example, a judge-to-judge meeting in order to clarify or refine the question)? If so, what use is made of this option?

Relations between the Constitutional Court and other courts are based on the „pure" separation of constitutional control of legal norms from adjudication in specific cases; the former being performed by the Constitutional Court and the latter by the other courts. Even constitutional complaints are directed at the constitutionality review of the applied legal norm, and the Constitutional Court has no competence to proceed if the essence of the problem is the unconstitutional application of the legal rule. This construction fundamentally determines the relations between the Constitutional Court and the other courts.

If the concrete control of legal norms is initiated by a judge, the judge must stay the proceedings pending before him or her until the decision of the Constitutional Court. In such

cases the proceedings may be continued after the Constitutional Court has made its decision, with the court making its own decision by taking into consideration that of the Constitutional Court (the ruling on the constitutionality of the legal rule). The Constitutional Court makes its decision within the framework of the judicial referral (the constitutional request contained in the order to stay proceedings). If such an application is incomplete, the Constitutional Court calls on the judge to supplement it. The proceedings are carried out in writing, and the Constitutional Court makes its decision on the basis of the documents. The judge *a quo* and the Constitutional Court (Constitutional Court judge acting as rapporteur) have no personal communication.

One question related to judicial referral and not yet clarified is whether the parties may appeal against a decision of the judge to refer the case to the Constitutional Court. Nor is practice in this area uniform either: some of such decisions contain the fact that they are non-appealable (for they represent a sovereign constitutional law decision of the judge), while some mention a possibility of appeal. In the latter event the case may not reach the Constitutional Court through this channel, provided the court of second instance accepts the appeal against the order requesting constitutionality review. (If the judicial referral, due to the decision of the court of second instance, failed to reach the Constitutional Court, the party may request the constitutionality review of the applied legal norm, in the form of a constitutional complaint, after the final decision has been made.) In practice, however, courts of second instance tend not to prevent courts of first instance from seeking constitutionality review. (See also the answer to question 13.)

C. The functional link

§ 1. The review and its effects

35. Do the rulings of the constitutional court always constitute a binding precedent for the other courts?

The Act on the Constitutional Court provides that the decisions of the Constitutional Court are binding on everyone, including courts. Once the Constitutional Court has annulled a provision of a legal rule, it is not applied by the courts.

Whether courts should adhere to the interpretation of the Constitution laid down in the reasoning of the Constitutional Court's decisions is a more complex issue. The constitutional criteria related to the realisation of a fundamental right or constitutional principle are elaborated by the Constitutional Court from case to case and can be found in the reasoning attached to the given decision (or interrelated decisions). The content of fundamental rights or constitutional principles as interpreted by the Constitutional Court is not as easily transferred to judicial practice as ('black or white') decisions on the constitutionality of concrete legal rules.

36. What are the review methods of the constitutional court (annulment, dismissal, declaration of constitutionality, declaration of unconstitutionality, interpretative decisions, interpretation reserves, annulment of a judicial decision, establishment of deficiencies, establishment of limited validity, etc.)? If necessary, distinguish for the different types of referral (action for annulment, prejudicial question, constitutional appeal).

a) In the case of abstract control of legal norms the Constitutional Court annuls the unconstitutional legal rule, or if it establishes no unconstitutionality, it dismisses the application. In exceptional cases the Constitutional Court may also define the constitutional content of the legal norm. This option is made use of where the unconstitutionality may be eliminated without annulling the legal rule.

b) A separate competence of the Constitutional Court is the examination of unconstitutionality based on omission (and the establishment thereof). Such proceedings are initiated if the realisation of certain fundamental rights is prevented by a failure of legislators to legislate. If unconstitutionality based on omission to legislate is established, the Constitutional Court calls on legislators to meet their obligation to regulate within the time-limit laid down by the Court.

c) In the case of constitutional complaints or judicial referral the Constitutional Court draws the legal consequences for the legal norm (annuls the legal rule or dismisses the application) on the one hand, and on the other hand - if it establishes the unconstitutionality of the legal norm - may declare the prohibition of applicability in the given case. (For details see point 37.c.)

d) A specific competence of the Constitutional Court is the abstract interpretation of the Constitution. When making a decision on the interpretation of the Constitution, the Constitutional Court performs an activity which is close to legislation; it expresses, in connection with a real constitutional problem, its standpoint on a provision of the Constitution. Proceedings in this competence may only be initiated by certain defined public law organs or officials, among others by the President of the Supreme Court. In one case (in the issue whether minors may be members of gay associations) the Constitutional Court gave an interpretation of the Constitution upon a request submitted by the President of the Supreme Court, in order to assist the constitutional solution of a case pending before the Supreme Court. In its decision made in this competence the Constitutional Court gives a general and conceptual interpretation of the given provision of the Constitution, since it may not react to the concrete problem (on account of which the interpretation of the Constitution was requested).

e) Like in the case of the abstract interpretation of the Constitution, the President of the Supreme Court has the right to request a review of legal rules from the aspect whether they violate international treaties. Such a request has so far been made on one occasion by the President of the Supreme Court (on the issue of some provisions of law absolving the statutory limitation of certain crimes and contrary to an international convention). The Constitutional Court annuls legal rules contrary to international treaties, or - if no such infringement is established - dismisses the application.

The other competences of the Constitutional Court do not affect its relations with other courts.

Under this point an answer must be given also to the question whether or not the Constitutional Court may annul judicial decisions. The Hungarian Constitutional Court has no competence to review and annul judicial decisions made in individual cases; the decisions of the Constitutional Court may only exert an indirect impact thereon. (See also the answer to question 37.)

However, mention must be made of a topical issue in connection with the above. There is a relatively new institution in the Hungarian legal system, the decision of the Supreme Court on

legal unity, the main objective of which is to unify Hungarian judicial practice. Even concrete legal disputes may give rise to a decision on legal unity. It is yet unclear whether the Constitutional Court may carry out a constitutionality review of such decisions of the Supreme Court on legal unity, and if it may, what legal consequences it may be derived from the unconstitutionality thereof. The Constitutional Court has no explicit competence therefore; the draft for the amendment of the Act on the Constitutional Court, however, does contain this new type of competence.

Even at present there is a case pending before the Constitutional Court in which the constitutionality review of a Supreme Court's decision on legal unity is to be carried out. Until the amendment of the Act the Constitutional Court tries to solve the problem through the interpretation of its already existing competences, when the decision on legal unity gives an unconstitutional content to a certain legal rule. The Constitutional Court has several options: it may annul the legal norm interpreted in the decision on legal unity, or it has been raised as another possibility to establish the unconstitutionality of the decision on legal unity without the annulment thereof and to simultaneously set a time-limit for the Supreme Court to review the given decision on legal unity. If such time-limit expires without results, the Constitutional Court would, in the second stage of proceedings, annul the legal norm interpreted in the decision on legal unity instead of the decision itself. Others argue that Supreme Court's decisions on legal unity may be „interpreted" as legal norms and may therefore be reviewed by the Constitutional Court in its competence for posterior constitutional control of legal norms. There is no generally accepted standpoint in this issue, so the problem will only be finally settled by the adoption of the amendment mentioned above.

37. What are the legal effects of the rulings of the constitutional court (ex nunc, ex tunc; erga omnes, inter partes; etc.), individually, on the original action and on all actions before common law courts, on other regulations, administrative acts - statutory or individual - or judicial decisions, etc. (for example, is there a re-examination procedure)? Can the constitutional court limit or sustain the effects in time?

The Constitutional Court enjoys great freedom in determining the date of annulment of unconstitutional legal norms. As a general rule, the Act on the Constitutional Court provides for annulment with *ex nunc* legal effect, but in order to ensure legal certainty the Constitutional Court may resort to *ex tunc* or *pro futuro* annulment as well. Relatively rarely does the Constitutional Court annul unconstitutional legal rules with retroactive effect, while *pro futuro* annulment is more frequently ordered, mainly in cases where annulment with an immediate effect would entail a legal gap seriously endangering legal certainty. *Pro futuro* annulment provides time for legislators to adopt legal rules that are in accordance with the Constitution.

According to the Act on the Constitutional Court, decisions of the Constitutional Court on the annulment of a legal rule do not affect legal relationships established before the publication of such decisions, neither do they affect rights or obligations derived therefrom. This general rule applies to all three types of effects in time. On the other hand, in exceptional cases the decision of the Constitutional Court may nonetheless affect legal relationships established on the basis of the unconstitutional legal norm. The three types of such cases are the following:

a) If the Constitutional Court annuls a substantive rule of criminal law, it is prescribed by the Act on the Constitutional Court to order a review of the criminal proceedings terminated with

a final decision in cases where the convicted person has not yet been relieved of the disadvantageous legal effects thereof and if the annulled provision applied in the proceedings would entail reduction or dispensing with the sentence or measure, or exemption from or reduction of responsibility. In such cases the Constitutional Court, in the enacting part of it decision, establishes the unconstitutionality of the legal norm on the one hand (annulment with *ex nunc* effect), and orders a review of criminal proceedings on the other hand. The courts then, in certain cases with the assistance of public prosecutors, perform the tasks resulting from the Constitutional Court's decision. Such decisions are consistently applied (implemented) by courts as follows from the content thereof.

b) The decision of the Constitutional Court on the constitutional complaint has a peculiar effect on the legal relationship on which the complaint was based. If the Constitutional Court establishes, in the framework of the constitutional complaint, the unconstitutionality of the legal rule applied in the case of the plaintiff, it annuls the legal rule in question (with *ex tunc, ex nunc* or *pro future* effect), and in the individual case it may consider in its judicial discretion - according to the wording of the Act on the Constitutional Court, „if an especially important interest of the person submitting the complaint requires it" - whether to prohibit the application thereof. While the legal norm is always annulled with an *erga omnes* effect, the declaration of prohibition of application only pertains to the individual case. If the constitutional complaint is successful, the plaintiff is granted a *quasi* preference: on the basis of the prohibition of application declared in the Constitutional Court's decision he or she has the right to initiate the re-opening of the case with an ordinary court, so the courts must make a new decision in the given case now that the formerly applied unconstitutional legal norm no longer exists (and therefore may not be applied).

If, on the basis of the legal norm declared unconstitutional and annulled this way, others request the declaration of prohibition of application as well, these complaints may not be dealt with by the Constitutional Court in merit (i.e. it may not consider the especially important interests of plaintiffs). The reason for this is that the control of a legal norm has already been carried out by the Constitutional Court. On the other legal relationships established on the basis thereof the Constitutional Court does not even have an indirect effect; the review of individual decisions made in such cases may only be done, provided the conditions laid down by law are met, in proceedings of review conducted by the Supreme Court.

In constitutional complaints, therefore, the legal consequences of the unconstitutionality of the legal norm are separated from the prohibition of application in individual cases; while decisions on legal norms have an *erga omnes* effect, the prohibition of application pertains to the individual case without the Constitutional Court having the right to adjudicate on the substance of the individual case in question.

c) Decisions of the Constitutional Court affect proceedings in individual cases of judicial referral as well. Here the decision exerts an impact similar to the impact in the case of constitutional complaints in that the Constitutional Court may order a prohibition of application. If the Constitutional Court declares the applicable legal norm unconstitutional and annuls it, in its decision thereon it provides - just like in the case of constitutional complaints - separately for the legal norm itself and separately for the prohibition of application. When the Constitutional Court orders the prohibition of application in the case on which the judicial referral is based (the declaration of which is a matter for judicial discretion as in the procedure of constitutional complaints), the judge adjudicates the case without applying the legal rule declared unconstitutional. While the control of legal norms has an *erga*

omnes effect in such cases as well, the prohibition of application may only pertain to the case serving as a basis for judicial referral.

38. Is the authority of the rulings of the constitutional court always respected? Does it sometimes meet with opposition from institutions or courts? Do the other courts sometimes experience difficulties in implementing the rulings of the constitutional court?

Decisions of the Constitutional Court on the annulment of legal rules are absolutely respected by all courts and institutions, and this (most binding) legal consequence of unconstitutionality is implemented according to the Constitutional Court's decisions.

- The implementation in practice of the Constitutional Court's decisions involves more ambiguity where the Constitutional Court defines the constitutional content of the legal norm. The Constitutional Court has made use of this „means" since 1993, when it made a decision on interpreting its scope of competence for the posterior control of legal norms. There is no explicit statutory provision prescribing in which type of cases (or under which conditions) the Constitutional Court may determine constitutional requirements, nor does the law regulate how the constitutional requirements declared by the Constitutional Court should be implemented in practice. Here again, the general rule applies that the Constitutional Court's decisions are binding on everyone. Constitutional requirements have not met with explicit opposition by those applying law, there has been a precedent, however, of a certain constitutional requirement (e.g. broader opportunities to articulate criticism against politicians or other public figures) not being integrated in its entirety into practice.

According to the standpoint taken by the Constitutional Court in 1993 on constitutional requirements, „if decisions of the Constitutional Court are ignored in judicial practice and, as a consequence, the legal rule is implemented according to the unchanged and still unconstitutional application of law, the Constitutional Court shall, on the principle of „living law" annul the reviewed legal rule." Such proceedings, i.e. where the annulment of a legal rule is necessitated by the complete ignorance of the given legal requirement in judicial practice, have not been conducted so far.

- If the constitutional complaint is approved by the Constitutional Court and it orders a prohibition of application, the plaintiff - as described above - may initiate the re-opening of the case. Grounds for the re-opening of a case which are based on a Constitutional Court decision have only been acknowledged in positive law since 1999, as a consequence of a Constitutional Court decision. Previously, decisions of the Constitutional Court on the prohibition of application could be realised on the principle of being „binding on everyone", and the Constitutional Court held that the plaintiff became entitled to initiate review proceedings. It was during this period that courts (and finally the Supreme Court as well) refused to hear again in merit a case in which the plaintiff had already been successful before the Constitutional Court.

- The Constitutional Court is in a peculiar position when it establishes unconstitutionality based on omission. In such cases the Court calls on legislators to meet their obligation to legislate by a certain time-limit. If they fail to comply, such failure has no legal consequences. Practice shows that although legislators - especially Parliament - do not always adopt the missing rule within the time-limit set for them, the provisions prescribed in the Constitutional Court's decision are generally sooner or later adopted.

§ 2. Interpretation by the constitutional court

a. The case law of other courts accepted by the constitutional court in the exercise of its own jurisdiction

39. Does the constitutional court consider itself bound by the interpretations of the challenged act given by the Supreme Court or other courts (theory of living law, for example)? Can the constitutional court, however, give another interpretation?

The theory of „living law" was integrated in the judicial practice of the Hungarian Constitutional Court in 1991. According to this theory „it is not the text of the legal norm in itself but the legal norm as implemented, effected and realised - i.e. 'living law' that the Constitutional Court must compare with the content of the provisions of the Constitution and with constitutional principles. The Constitutional Court holds that 'living law' is to be understood as legal rules together with their interpreted and applied content."

Such „living law", formulated in the course of judicial application of law, causes constitutional problems where although a legal norm may be interpreted in accordance with the Constitution, in practice it is effected with a content contrary to that - i.e. with an unconstitutional content. In fact it is the principle of „living law" that gave rise to the above mentioned possibility of determining constitutional requirements, in which procedure the Constitutional Court attaches to the given legal norm an interpretation of law different from that of courts.

Judicial interpretation, on the other hand, may also assist the Constitutional Court in cases where the person lodging the application misinterprets the legal rule in question. One of the arguments cited in such cases is the content which a uniform judicial practice attaches to the given legal rule.

Somewhat different from the above issues is the interpretation by the Supreme Court unifying judicial practice and taking the form of decisions on legal unity. The problems related thereto have been dealt with in point 36.

In the interest of the realisation of the constitutional principle of legal certainty, the Constitutional Court refrains from attaching, to legal norms interpreted in a decision on legal unity, a constitutional requirement contrary thereto. (Neither has the Supreme Court, in its interpretations, countered any former decision of the Constitutional Court.) We must point out here that the two interpretations have fundamentally different functions. Constitutional requirements are determined in the framework of the control of legal norms, while decisions on legal unity are aimed at the elimination of controversial judicial practices. Conflicts between the two interpretations (or an action by the Constitutional Court in reaction to a decision on legal unity) may only occur when - quite rarely, in fact - the Supreme Court adjudicates issues affecting fundamental rights.

b. The effects of the interpretation of the constitutional court and the acceptance of the case law of the constitutional court by the other courts in the exercise of their own jurisdiction

40. Is the interpretation of the constitutional rules and the legislative rules given by the constitutional court binding on the other courts? What happens in case of non-adherence to the interpretation of the constitutional court?

Other courts are bound by the interpretation of the Constitutional Court, regardless of the competence (or case) it has been made in. We can find that in countless judicial decisions, at both first and second instance, the arguments of a decision made in an individual case are based on - and quote - the Constitutional Court's decisions and the interpretation of the Constitution contained therein. All this takes place „outside" the Constitutional Court, so the Constitutional Court has no influence over whether any of its decisions are misinterpreted by a court. Practice, however, has shown that in most cases the system of judicial fora as well as the „active involvement" of those participating in the proceedings (parties and counsels) do bring about a correct application of the interpretation contained in the Constitutional Court's decision.

41. Can the constitutional court declare that a rule is constitutional only in the exact interpretation given by it? Can this interpretation deviate from that of „living law"? If so, what use is made of this option?

The Constitutional Court can in fact declare that a legal rule is constitutional only in the exact interpretation given by it. Such a declaration can be made in the form of a constitutional requirement attached to the legal rule. As described above, this can differ from the interpretation in living law.

42. What are the effects for the other courts of a purely interpretative decision?

This question has already been answered above.

III. The interference of the European courts

A. The constitutional court and the other courts vis-á-vis *the European Convention on Human Rights and the case law of the European Court of Human Rights*

43. Is the constitutional court bound by the case law of the European Court of Human Rights? If this case law is not binding, does it influence the course of action of the constitutional court?

It is not bound, in the sense that the European Court of Human Rights (ECHR) makes a decision on whether in a concrete case the rights of the plaintiff enshrined in the Convention have been violated, while the Constitutional Court, as a general rule, on whether a domestic legal rule is unconstitutional; in its decisions ECHR applies the Convention to concrete cases,

while the Constitutional Court makes a decision, regardless of the concrete legal dispute or case, on whether a legal norm is contrary to the Constitution. On the other hand, the Constitutional Court is bound by the case law of ECHR in that the Convention, ratified by Hungary and - through its promulgation - integrated into the country's laws, became part of Hungary's domestic law. One related provision of the Constitution says that Hungary's „legal system shall accept the generally recognised rules of international law, and shall further ensure the harmony between domestic law and the obligations assumed under international law". This provision is, naturally, binding on the Constitutional Court as well. Two provisions of the Convention are especially relevant from this aspect. One of them, Article 32, grants ECHR the jurisdiction to interpret the Convention. The other lays down that States that are parties to the Convention consider the decisions of ECHR binding on themselves in any case in which they are involved as parties.

Even though no application has so far been submitted to the Constitutional Court claiming that a Hungarian legal rule is contrary to the Convention and requesting therefore an annulment thereof on account of a collision with international law, such an application is quite possible. (We must note, however, that - as mentioned above - a control of legal norms on account of a collision with international law may only be initiated by holders of certain offices.) Should the Constitutional Court adjudicate a case like that, it would certainly base the examination of the content of the given provision of the Convention on the decisions of ECHR interpreting the same.

Apart from the above, the case law of ECHR exerts a significant influence on the activity of the Constitutional Court. It is worthy of note that when adopting the provisions of the Constitution related to human rights in 1989, legislators drew inspiration from the Universal Declaration of Human Rights as well as the International Covenant of Civil and Political Rights, which latter is closely related to the Convention (at the time Hungary was not yet a party to the Convention, but it had already signed the Covenant). The content of rights enshrined in the Constitution and the Convention, therefore, is the same or shows a close resemblance, which makes it reasonable for the Constitutional Court to consider the case law of ECHR in preparing its decisions related to fundamental constitutional rights. In fact, the Constitutional Court in most of its decisions affecting human rights explicitly refers to the judicial practice of ECHR in the same domain and quotes the decisions thereof in a concrete form.

44. Can the court base its decision on a provision of the European Convention and, in doing so, possibly deviate from the action of the constitutional court?

Ordinary courts may base their decisions on provisions of the European Convention, and since the Convention is part of the Hungarian legal system and it is therefore directly applicable, courts not only *may* but *must* consider its provisions.

In applying the Convention, no court has countered a Constitutional Court standpoint so far, and even though such a case is hard to imagine, one can not exclude a theoretical possibility thereof.

45. Must a lawsuit have been brought before the constitutional court before an appeal can be made to the European Court of Human Rights (after having tried all internal avenues of appeal)?

Formerly it was the European Commission of Human Rights that established the requirements as to what avenues of legal remedy must be exhausted for an application to be admissible, which practice of the Commission has been followed by the single Court as well. The organs at Strasbourg, accordingly, do not require the applicant to turn, before submitting the application with ECHR, to the Constitutional Court - with a request for posterior control of legal norms or a constitutional complaint - after having exhausted all other internal avenues of legal remedy even if, in principle, there would be a possibility therefore in order to remedy the injury in domestic law.

B. The constitutional court and the other courts vis-á-vis *the case law of the Court of Justice of the European Communities*

46. Is the constitutional court bound by the case law of the Court of Justice of the European Communities? If this case law is not binding, does it influence the course of action of the constitutional court?

At present the Republic of Hungary is not a Member State of the European Union, and consequently the decisions of the Court of Justice of the European Communities are not binding either on those applying law in Hungary or the Constitutional Court. The case law of the European Court of Justice, however, exerts an influence on the judicial activity of the Constitutional Court. So far the Constitutional Court, in the reasoning of its decisions, has referred to the decisions of the European Court of Justice on three occasions.

Decision 30/1998. (VI. 25.) AB, dealing with the theoretical questions of constitutionality review of the procedure leading to the adoption of a domestic legal rule promulgating an international treaty, referred to Decision C-327/91 /1994) ECR I-3641, 3678 and declared that the result of the review may serve as a basis for the establishment of unconstitutionality of the Act of Parliament promulgating the international treaty.

Decision 28/2000. (IX. 8.) AB, interpreting the constitutional conditions of labour law, employment agreements and especially those of the allowability of positive discrimination, referred to the following decisions of the European Court of Justice:
- Barber v. Guardian Royal Exchange Assurance Group (C-262/88);
- Kalanke v. Freie Hansestadt Bremen (C-450/93); and
- Marchall v. Nordrhein-Westfahlen (C-409/95).

The reasoning of Decision 37/2000. (X. 31.) AB, examining the constitutionality of tobacco advertisements, took into consideration the regulation thereof in the European Union as well. It called attention to the fact that the European Court of Justice had annulled Directive 98/43/EC. The Constitutional Court also pointed out that the decision of the European Court of Justice did not exclude a partial prohibition of certain forms of tobacco advertisements, inasmuch as such forms are in accordance with European Union freedoms. (C-476/98. Federal Republic of Germany v. European Parliament and Council of the European Union)

47-48. As Hungary is not yet a Member State of the European Union, these questions at present are not relevant in connection with Hungary .

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