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The Constitutional Court of Hungary
Magyar Köztársaság Alkotmánybírósága

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REPORT SUBMITTED BY THE HUNGARIAN CONSTITUTIONAL COURT

I. Constitutional courts between constitutional law and European law

1. Is the constitutional court obliged by law to consider European law in the performance of its tasks?

We cannot speak about a *stricto sensu* clear constitutional obligation. Nevertheless, both the former Constitution (in force until 2011) and the current Fundamental Law (entered into force on the 1 January, 2012) contains provisions on the harmony between international legal commitments and national law on the one hand and the participation in the European Union on the other hand.[1]

Just to cover briefly the situation *ante*, let us point out that also Article 7(1) of the former Constitution was shaped according to the Austro-German traditions of the dualism, even if some uncertainties could be felt in the formulation.

Article 7 of the Constitution:
(1) The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law.

In article Q of the Fundamental Law, however, a rather clear "receptionist" version of the dualism can be found.
Article Q of the Fundamental Law:
(1) In order to establish and maintain peace and security and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with all the peoples and countries of the world.
(2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law.

[1] Part I of the Report is based on the paper of Prof. Péter KOVÁCS: "International law in the recent jurisprudence of the Hungarian Constitutional Court – Opening of a new tendency?" presented at the conference "Judgements of the European Court of Human Rights – Effects and Implementation", Georg-August University Göttingen, September 2013

(3) Hungary accepts the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in rules of law.

(*Note*: The two quotations above are the official translations of the documents, the two Hungarian texts, however, are much closer to each other than the two English translations.)

As far as the European integration clause is concerned, its first version appeared only at the beginning of the 2000s in the preparatory phase of the accession to the European Union as Article 2/A of the Constitution. The question of the transfer of sovereignty was duly settled, however the status of EU law (and especially the so-called secondary legislation) was lacking. This was a point constantly criticized in the doctrine emphasizing that an eventual reference to the disposition on international law could not be satisfactory because of the *sui generis* legal nature of EU law. Moreover, Article 7(1) could concern treaties and international custom and general principles of law but the status of the norms adopted by international organs seemed to be occulted.

Article 2/A of the Constitution:
(1) The Republic of Hungary may exercise certain competences deriving from the Constitution in conjunction with the other member states in order of her participation in the European Union as a member state, based upon international treaty, to the extent that is necessary to exercise rights and perform obligations, under the European Communities and European Union (hereinafter: the European Union) foundation treaties; the exercise of these competences may be realized independently, through the institutions of the European Union.
(2) A majority of two-thirds of the votes of the Members of Parliament shall be required for the ratification and adoption of the international treaty specified in subsection (1).

Article E of the Fundamental Law is very similar in its wording as far as the transfer of sovereignty is concerned but the criticized lack of reference to the mandatory character of EU regulations and other similar norms seems to be over and secondary norms of EU law are already taken into consideration, too.

Article E of the Fundamental Law:
(1) In order to achieve the highest possible measure of freedom, well-being and security for the peoples of Europe Hungary shall contribute to the achievement of European unity.
(2) In order to participate in the European Union as a Member State, and on the basis of an international treaty, Hungary may, to

the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties, exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the European Union.
(3) The law of the European Union may stipulate generally binding rules of conduct subject to the conditions set out in paragraph (2).
(4) The authorisation for expressing consent to be bound by an international treaty referred to in paragraph (2) shall require the votes of two-thirds of all Members of Parliament.

The Constitutional Court has several decisions that can be considered as the manifestation of the "*völkerrechtsfreundliche Auslegung"* and the *"EU-freundliche Auslegung"* on the basis of these Articles.

2. Are there any examples of references to international sources of law, such as
a) the European Convention on Human Rights,
b) the Charter of Fundamental Rights of the European Union,
c) other instruments of international law at European level,
d) other instruments of international law at international level?

There is no direct reference to precise treaties either in the former Constitution, or in the current Fundamental Law. It is, however, important not to forget that there is a *verbatim* identity (or a very close similarity) between most of civil liberties as to the formulation in the Fundamental Law (or in the former Constitution) and in the European Convention on Human Rights.[2] In the Fundamental Law we can recognize textual importation also from the European Charter of Fundamental Rights.[3]

3. Are there any specific provisions of constitutional law imposing a legal obligation on the constitutional court to consider decisions by European courts of justice?

No, but see Answer I/1.

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[2] Interdiction of torture and inhuman treatment - ECHR: Article 3; Constitution: Article 54 (2); Fundamental Law: Article III (1); a *habeas corpus* - ECHR: Article 5 (3), (4); Constitution: Article 55 (1),(2); Fundamental Law: Article IV (3); a *fair* trial - ECHR: Article 6 (1); Constitution: Article 57 (1); Fundamental Law: Article XXVIII (1); presumption of innocence - ECHR: Article 6 (2); Constitution: Article 57 (2); Fundamental Law: Article XXVIII (2); right to defence - ECHR: Article 6 (3)b,c; Constitution: Article 57(3); Fundamental Law: Article XXVIII (3); *nullum crimen sige lege* and *nulla poena sine lege* - ECHR: Article 7; Constitution Article 57 (4); Fundamental Law: Article XXVIII (4); privacy - ECHR Article 8(1); Constitution: Article 59 (1); Fundamental Law: Article VI (1); freedom of thought, conscience and religion - ECHR: Article 9(1); Constitution: Article 60; Fundamental Law: Article VII (1); freedom of opinion and press - ECHR: Article 10 (1); Constitution: Article 61; Fundamental Law: Article IX (1); freedom of association - ECHR: Article 11 (1); Constitution: Articles 62-63; Fundamental Law: Article VIII (1),(2); interdiction of discrimination - ECHR: Article 14; Constitution: Article 70/A; Fundamental Law: Article XV.

3 See for example the wording of the right to good administration – Charter: Article 41(1); Fundamental Law: Article XXIV (1)

4. Is the jurisprudence of the constitutional court influenced in practice by the jurisprudence of European courts of justice?

Yes.

5. Does the constitutional court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?

Yes.

During the first decade of its existence, i.e. under the old Constitution, the Constitutional Court was attached to take into consideration the jurisprudence of the European Court of Human Rights and several of its judgments were cited in the constitutional jurisprudence in order to show the public that the Court is aware of *dicta* of the ECHR. Nevertheless, one could feel that the Constitutional Court had the ambition to secure a higher level of protection of fundamental rights by considering the European Convention of Human Rights and the ECHR as a minimum standard.

The jurisprudence of the Court of Justice of the European Union was also followed by the Constitutional Court, which, however, soon came to the conclusion that contrary to the conflict of national law with traditional international law, the examination of the compatibility of a national legal norm with EU law does not fall under its competence: in this way, the Constitutional Court wanted to avoid being submerged by petty cases on the one hand. (At that time the action of the Constitutional Court could be triggered *quasi* by anybody even without any direct interest due to the institution of *actio popularis* and the examination of an alleged conflict with international law could be claimed by any member of the Parliament.) On the other hand, jurisprudential sovereignty could be more easily preserved because the question of referring to the ECJ of Luxemburg for a preliminary ruling emerges much more rarely in such a hypothesis. In the case of the Lisbon Treaty, however, the Constitutional Court profited from the *acte clair* doctrine in order to avoid the violation of EU law and to avoid the preliminary ruling problem in a sovereignty issue.[4]

[4] In the Decision 143/2010 the Constitutional Court recognizes "that the authentic interpretation of the EU treaties and other EU-norms falls under the competence of the European Court of Justice." (ABH 2010, p. 703)
The Constitutional Court used the theory of *acte clair* and did not need to refer the case to the European Court of Justice, because it was evident that the petitioner's arguments were a result of imperfect and inadequate reading and understanding of the Lisbon Treaty when he contested the constitutionality of the Act of promulgation. Consequently the pure *verbatim,* full quotation of Article 49/A (currently Article 50) of the Treaty on the European Union was enough to see that contrary to petitioner's allegation, no state could be obliged to uphold its membership if it does not want to do so. (ABH 2010, pp.703-704)
Following the philosophy of the *acte clair*, the Constitutional Court considers that in order to rebut the petitioner's arguments, it is enough to refer to changes of rules on the European Union posterior to the Lisbon Treaty which can be regarded as facts of common knowledge: e.g. the attribution of legally binding

The transition from the Constitution to the Fundamental Law seems to emphasize the importance of the scrupulous observance of the ECHR jurisprudence. The Constitutional Court benefited from the new situation by explaining the necessity to guarantee the protection of fundamental rights in the constitutional jurisprudence at least at the same level as in the European jurisprudence. However, this time the optic was slightly different: the Constitutional Court seemed to be afraid of being surpassed by a more performing ECHR and it took into account the sudden changes of the constitutional framework.

In a case concerning a new taxation law enjoying retroactive effect which was backed however by a recent constitutional amendment, the Constitutional Court was asked *inter alia* to check the amendment as well. Even if the Constitutional Court kept to its traditional position, i.e. not to check constitutional amendments with the exception of a procedural irregularity of their adoption,[5] it expressed a warning. This happened at the time when the Fundamental Law had already been adopted by the Parliament but not yet in force.
The thesis is the following:
"There are some fundamental rights the essential content of which is formulated in the same manner in the Constitution as in an international treaty (e.g. the International Covenant on Civil and Political Rights and the European Convention on Human Rights). In such cases, the level of the protection of fundamental rights guaranteed by the Constitutional Court cannot be in any case lower than the level of the international protection, namely that of the European Court of Human Rights. Consequent to the principle of *pacta sunt servanda* [Article 7(1) of the Constitution, Article Q (2)-(3) of the Fundamental Law] the Constitutional Court is bound to follow the Strasbourg jurisprudence and the level of the protection of fundamental rights which is thereby defined, even if such a turn could not be deduced necessarily from its own 'precedents-decisions'."[6]

In the last years, the most important ECHR related cases are the following ones:

- Decision 166/2011 a priori control of the reform of the penal procedure on "highly important cases";
- Decision 6/2013 on the constitutional control of the Act on religions;
- Decision 1/2013 a priori control of the new electoral law with special regard to the registration of voters;
- Decision 4/2013 on the case of the prohibition of totalitarian symbols by penal law. (See the case and the antecedents under Answer I/6)

nature to the Charter of Fundamental Rights, the enlargement of the role of competences of national parliaments according to Protocol No. 2 on subsidiarity and proportionality, etc. All these show that the petitioner's arguments for the alleged dangers of the Lisbon Treaty are unfounded. (ABH 2010, p. 709)

[5] Decision 61/2011, ABH 2011, pp. 317-319 (ABH means the common abbreviation of "Alkotmánybíróság Határozatai" [Resolutions of the Constitutional Court], published by the Constitutional Court as a yearbook)

[6] Decision 61/2011, ABH 2011, p. 321

6. Are there any examples of divergences in decisions taken by the constitutional court and the European courts of justice?

Another step towards a new form of relationship between the ECHR-jurisprudence and the Hungarian constitutional jurisprudence can be illustrated with the case of the prohibition of totalitarian symbols by penal law.[7] This article[8], added to the Penal Code in 1993, was examined in 2000 by the Constitutional Court which found it compatible with the constitution and the ECHR.[9] The European Court of Human Rights came however to the conclusion first in *Vajnai v. Hungary*[10] and then in *Fratanolo v. Hungary*[11] cases that the given disposition of the Hungarian Penal Code is a violation of article 10 of the ECHR. It was also emphasized that the Strasbourg "precedents" chosen by the Hungarian government when defending the position, were mostly irrelevant.[12]

The Constitutional Court came back to the issue in 2013:
When Mr. Vajnai (leader of a very small Communist Party without representation in today's Hungarian Parliament) submitted to the Constitutional Court a constitutional complaint, the Court referred (not only but *inter alia*) to the Strasbourg jurisprudence in order to explain why its opinion was modified.

"The judgment of the European Court of Human Rights is declarative i.e. it does not mean directly the transformation of legal issues but its practice could give help to the interpretation of constitutional rights – secured in the Fundamental Law and international conventions - and to the definition of their content and their field of application. The content of the rights secured in the European Convention of Human Rights is embodied in judgments delivered in individual cases, thus promoting the common perception of the interpretation of human rights. The observance of the Convention and the practice of the ECHR cannot lead to the limitation of the protection of fundamental rights secured by the Fundamental Law and to the definition of a lower level of protection. The practice of Strasbourg and the Convention define the minimum level of the protection of fundamental rights that all contracting parties have to assure but the national law may establish a different and namely a higher order of requirements in order to promote human rights."[13]

"All this taken into consideration, the Constitutional Court stated that the judgment of the ECHR in the case of Vajnai v. Hungary contains such considerations related to article

[7] Decision 4/2013
[8] *Article 269/B: The use of totalitarian symbols*
"(1) A person who (a) disseminates, (b) uses in public or (c) exhibits a swastika, an SS-badge, an arrow-cross, a symbol of the sickle and hammer or a red star, or a symbol depicting any of them, commits a misdemeanour – unless a more serious crime is committed – and shall be sentenced to a criminal fine. (pénzbüntetés).
(2) The conduct proscribed under paragraph (1) is not punishable, if it is done for the purposes of education, science, art or in order to provide information about history or contemporary events.
(3) Paragraphs 1 and 2 do not apply to the insignia of States which are in force."
[9] Decision 14/2000, ABH 2000, pp. 81-111
[10] Case of *Vajnai v. Hungary*, Application no. 33629/06, judgement of 8 July, 2008
[11] Case of *Fratanolo v. Hungary*, Application no. 29459/10, judgement of 3 November, 2011
[12] Case of *Vajnai v. Hungary* §50.
[13] Decision 4/2013, §19

269/B of the Penal Code which should be considered as a legally important new circumstance and point of view making it necessary to proceed to a new constitutional examination."[14]

7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the constitutional court taking it into consideration in its decisions?

The Constitutional Court emphasized in a case on "hate speech" that "*freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man* in the concept of the European Court of Human Rights which shapes and obliges the Hungarian jurisprudence."[15]
The second half of the sentence "the concept of the European Court of Human Rights which shapes and obliges the Hungarian jurisprudence" became, however, subject of a doctrinal debate and also a *hot potato* in the Constitutional Court itself because of the stipulation of an "obligation"[16]. The Constitutional Court did not repeat this expression any more.
The observation of the ECHR-jurisprudence by the ordinary judges is rather the fruit of the "harmony" clause in the Constitution and in the Fundamental Law, and in practice due to some internal rules and documents of the Supreme Court (Kúria) than to the above-mentioned dictum of the Constitutional Court. The appearance of the ECHR "precedents" in the jurisprudence of the Constitutional Court and the doctrinal debates on pages of different scientific publications and reviews of the judiciary as well as the formation of the younger generations could influence judges to follow more or less closely the evolution of the ECHR-jurisprudence.

8. Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national constitutional courts?

The Vajnai[17] and the Fratanolo[18] cases are to be mentioned (see Answer I/6) as a kind of an indirect critic on the observation of the ECHR-jurisprudence by the Hungarian Constitutional Court. There was no other major "conflict" between the Constitutional Court and the European Court of Human Rights.

[14] Decision 4/2013, §20
[15] Decision 18/2004, ABH 2004, p. 306. Here, the Constitutional Court enumerated several Strasbourg *dicta* for the proof of the above sentence (in italics) which is from Handyside case. See Handyside v United Kingdom (5493/72) §49: *"Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man."*
[16] See the former Article 53 and the current Article 46 of the Convention -
former Article 53: "*The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.";* current Article 46: *"Binding force and execution of judgments*
(1) The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."
[17] Case of *Vajnai v. Hungary*, Application no. 33629/06, judgement of 8 July, 2008
[18] Case of *Fratanolo v. Hungary*, Application no. 29459/10, judgement of 3 November, 2011

II. INTERACTIONS BETWEEN CONSTITUTIONAL COURTS

1. Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European constitutional courts?

Yes, but seldom.[19]

1)

The German Federal Constitutional Court (BVerfG) is the most frequently referred constitutional court in the jurisprudence of the Hungarian Constitutional Court. (The influence was particularly strong in the first few years of the history of the Constitutional Court, following its foundation in 1990. Later the references were not always open. In the period between 1999 and 2008 twelve German decisions were explicitly mentioned in eleven Hungarian decisions.);

2)

Several decisions referred to different courts of the United States of America (four to the federal Supreme Court and other federal courts, and one to the Supreme Court of Virginia, making sixteen references in total in the investigated period);

3)

The French Conseil Constitutionnel also appeared in the Hungarian constitutional court decisions, with seven other European Constitutional Courts: the Constitutional Court of Austria, Belgium, Cyprus, Czech Republic, Italy, Poland, and Slovenia.

2. If so, does the constitutional court tend to refer primarily to jurisprudence from the same language area?

No.

Notwithstanding the fact that Hungarian language is the most widely spoken non-Indo-European language in Europe[20] - the Hungarian Constitutional Court has no possibility to refer to any jurisprudence in Hungarian language outside Hungary, because such does not exist.

[19] According to the study of Prof. Zoltán Szente conducted in the framework of the research project of the International Association of Constitutional Law "The Use of Precedents of Foreign Courts in Constitutional Review", see SZENTE Zoltán: A nemzetközi és külföldi bíróságok ítéleteinek felhasználása a magyar Alkotmánybíróság gyakorlatában 1999–2008 között, In: Jog, Állam, Politika, 2010/2. pp. 47-72.

[20] Hungarian is officially recognized as a minority or regional language in Austria, Croatia, Romania, Zakarpattia in Ukraine, and Slovakia; and Hungarian is also one of the official languages of Vojvodina (Serbia), and an official language of three municipalities in Slovenia (Hodoš, Dobrovnik and Lendava).

3. In which fields of law (civil law, criminal law, public law) does the constitutional court refer to the jurisprudence of other European or non-European constitutional courts?

Mostly in public law.

At the beginning of its functioning it was typical that the Hungarian Constitutional Court adopted whole legal concepts from foreign jurisprudence, mostly from Germany and from the United States of America (for example the principle of necessity and proportionality, and the doctrine of clear and present danger). Later the use of foreign precedents served more as illustrations.

1)
The subject matter of the decisions in which the Hungarian Constitutional Court referred to the German Federal Constitutional Court (BVerfG) were various:

- rules of procedure for approving the annual budget;
- the limits of constitutional review;
- the law of the EU;
- and some special fundamental rights, e.g. use of name, drug prohibition.

The analysis pointed out that in some cases references were made both to the ECHR and the BVerfG, while in others only the German jurisdiction served as an example, simply because of the fact that in these cases the ECHR had no competence (for example cases concerning rules of procedure for approving the annual budget and the limits of constitutional review).

2)
All of the decisions of the American courts were referred only in two areas:

- freedom of expression, and
- self-determination (euthanasia).

3)
The Constitutional Council in France was mentioned in decisions concerning

- the rules of procedure for approving the budget;
- the law of the EU; and
- electoral law.

While the seven other European Constitutional Courts were mentioned only in connection with:

- non-discrimination;
- privacy;
- right to assembly; and
- the law of the EU.

4)
References almost never occurred in decisions made by the norm control of local government decrees, and in the cases concerning referenda (between 1999-2008, subsequently both fields of competence were abolished by the new Act on the Constitutional Court of 2010).

4. Have decisions of the constitutional court noticeably influenced the jurisprudence of foreign constitutional courts?

- The Constitutional Court of the Republic of South Africa declaring capital punishment to be unconstitutional in Case No. CCT/3/94 in the matter of The State versus T Makwanyane and M Mchunu referred to, inter alia, Decision 23/1990 of the Hungarian Constitutional Court:

  "The only case to which we were referred in which there were not such express provisions in the Constitution, was the decision of the Hungarian Constitutional Court. There the challenge succeeded and the death penalty was declared to be unconstitutional." [point 38]; and
  "For the present purposes it is sufficient to point to the fact that the Hungarian Court held capital punishment to be unconstitutional on the grounds that it is inconsistent with the right to life and the right to dignity. Our Constitution does not contain the qualification found in section 54(1) of the Hungarian constitution, which prohibits only the arbitrary deprivation of life. To that extent, therefore, the right to life in section 9 of our Constitution is given greater protection than it is by the Hungarian Constitution." [point 84-85];

- The Romanian Constitutional Court referred to the Hungarian jurisprudence in its nine decisions.

5. Are there any forms of cooperation going beyond the mutual acknowledgement of court decisions?

Members of the Constitutional Court often take part in bilateral meetings (for example regularly with the members of the Austrian Constitutional Court), as well as in international conferences, and these are occasions to foster further cooperation in different ways.

On the level of legal advisors and other employees (such as librarians) the Hungarian Constitutional Court cooperates with several European Constitutional Courts and supports the idea to get experience from inside the organisation (for example study trips to the German Federal Constitutional Court and the French Constitutional Council, and receiving guests from the Constitutional Court of Armenia and from Kosovo).

III. Interactions between European courts in the jurisprudence of constitutional courts

1. Do references to European Union law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the constitutional court?

We did not yet met such a case in our jurisprudence when the ECJ/ECHR interactions (or eventual conflicts) were at stake.

2. How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the European Union?

Probably, the jurisprudence of the Hungarian Constitutional Court will not have an important effect on this relationship.

3. Do differences between the jurisprudence of the European Court of Human Rights, on the one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the constitutional court?

In case if the Hungarian Constitutional Court would turn towards the affirmation of its competence vis-à-vis EU-law, such an effect can be imagined, but actually it is improbable. It is true however that the emergence of such a refugee issue which happened recently in Austria (U 466/11-18) cannot be excluded. In such a situation, probably the Hungarian Constitutional Court would also try to give a harmonizing interpretation of the jurisprudence of the ECJ and ECHR.