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Confronted with direct applicability of a directive: the Hungarian Constitutional Court before challenges

As we all know, direct applicability of Community law means that the Community legislation can create directly rights and obligations not only for the Member States, but for the individuals as well, this law can be cited before national tribunals, they are obliged to implement it and assure its realization. The fact that the Hungarian – quite recently acceded – legal system is not entirely working this way is clearly visible for people trying to invoke their rights derived from Community law. This problem is something the Hungarian legislation, the tribunals and the whole legal system have to work on in order to fulfill the obligations resulting from the accession.

It is the tribunals in general where the practitioners face the incapacity to invoke Community law; this article is going to deal with the most important tribunal of the country, the Hungarian Constitutional Court (hereinafter: Constitutional Court or Court). As nearly everything both in life and in the science, this problematic has two faces as well. To put it in a nutshell, the Constitutional Court – whose task is to decide in the most important disputes touching the legal order itself – tries to avoid to enounce in disputes concerning European law, and solves the given case without the Community dispositions. Hence, its jurisprudence has an inevitable echo and we cannot avoid to examine the different approaches among the judges of the Court in this context.

As this article was born on apropos of a recent decision of the Hungarian Constitutional Court, Decision 72/2006 (XII. 15.) (393/B/1994) (hereinafter: Decision 72/2006), where there is direct contact with a directive, the direct applicability of directives is going to be examined very briefly (A), then we are going to see what is the other European constitutional courts' attitude to the question (B), and at last we are going to get to the question: directives (and Community law in general) before the Constitutional Court (C).

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A. Direct applicability of a directive

1. Direct applicability of Community law

Before coming to the decisions of the Court, the status of Community law in the Member States has to be clarified, as, finally, this has become one of the most important questions last year.

In the frame of this article, direct applicability of Community law in general is not going to be treated in depth,[2] still, the very first case, establishing the whole problematic, the Costa v. E.N.E.L.[3] has to be mentioned, where the claim of the primacy has been determined: the Court of Justice of the European Communities (hereinafter: ECJ) clarified the legal basis of the primacy of Community law pronouncing that the states conferred a part of their competences to the Community, and so resigned of certain of their sovereign rights (and declared that it lays out of its competence to examine directly whether a national disposition is contrary to Community law). Though Community law is a special legal system, in international law the primacy of the supra- or international rules is a well-known phenomenon (though this time I do not want to enter into the dualist-monist debate). Concerning the constitutions of the Member States – and so that of the Hungarian Republic which the Constitutional Court is obliged to take attention to –, it was the case Internationale Handelsgesellschaft[4] (already in 1970) where, besides the fact that the leading and characteristic role of the Court of Justice became evident, the primacy of Community law was declared for the totality of the legal order of a member state, even and expressly for the constitutions as well. The (second) Simmenthal-case[5] even ordered the national – ordinary – tribunals to apply Community law versus national law in case of direct applicability, and emphasized that they should not wait e.g. for the Constitutional Courts to nullify the national rules contrary to Community law. And it concerns both the directly applicable regulations as well as directives. If – as determined in the Simmenthal-case – the ordinary tribunals are imposed to function this way, it is especially true as to constitutional courts. In the Omega case[6] – concerning murdering-games – the ECJ even ignored the national Constitutional rules and based its judgment solely on Community law. The Constitutional Court seems to act in the opposite way in the case 72/2006, basing its judgment exclusively on national regulations and completely ignoring the Community ones.
The entering into force of the European Constitution[7] – which has a more than uncertain future at the moment – would have simplified an alike subject by expressing explicitly the primacy of Community law.

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[2] Concerning direct applicability of European law in general, e.g. certain treaties and the regulations (which was at his time not an easy topic either), see furthermore JACQUÉ, Jean Paul: *Droit institutionnel de l'Union européenne*. Dalloz, Paris, 2004, pp. 567 ff.

[3] ECJ, Flaminio Costa v. Enel, 6/64. Judgment of July 15, 1964.

[4] ECJ, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 11/70. Judgment of December 17, 1970.

[5] ECJ, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, 106/77. Judgment of March 9, 1978. pp. 21-23.

[6] ECJ, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, C-36/02, Judgment of October 14, 2004; This article only concerns the reasons adduced… otherwise it should be reminded of the case Köbler v. Austrian Republic (C-224/10, judgment of September 30, 2003) where – corresponding to the international rules of state responsibility – it was stated that the responsibility of a Member State could be established on the basis of acts of the Supreme Courts or Constitutional Courts as well.

[7] Treaty establishing a Constitution for Europe, for further information see

2. Direct applicability of directives in general

The aim of the direct applicability of a directive as well as other sources having "*effet direct*" is that these have the position of internal law which is primarily assured by the national courts. Actually this – giving direct effect to international dispositions – is not a new phenomenon, even the Permanent International Court of Justice declared this possibility;[8] though – admittedly – this is much more present in the very special – *sui generis* – Community law than in international law in general. It would mean normally that national legislation and courts become only a kind of executive… which raises disputes all around Europe concerning the question of legitimacy, the theory of Montesquieu.[9]

In general, directives do not have direct effects as they are addressed at the Member States, and have to be transposed. It is – normally – the above mentioned transposition which produces legal effects, so equally the right to invoke these dispositions as well as the rights and obligations derived from them.[10] Actually, the direct applicability of a directive had its own way in the jurisprudence of the Court of Justice as well.

As we are going to see below, the question arose already in the 1970s:[11] the problem becomes actual – even nowadays – only if the state failed to transpose or transpose properly the directive within the given time limit.[12] In this case not posing any sanction against the state which has not fulfilled its obligations would create a rather unjust situation.[13] It is the premise known in civil law: *nemo auditor turpitudinem suam allegans*.

Though not every directive – not transposed at all or not transposed in time – is capable of being directly applicable: they have to be precise and unconditional. The above mentioned *nemo auditor turpitudinem suam allegans* works in this direction as well. The state cannot invoke the lack of transposition against the individuals before the ECJ. The problem is that direct applicability of directives could only be invoked against the state, but was not applicable between individuals, so the rights of individuals were hurt without doubt.[14] Solution is for example that national judges are obliged to interpret national law in conformity with directives.[15]

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http://europa.eu/constitution/index_en.htm.

[8] PCIJ, March 13, 1928, Competences of the tribunals of Danzig.

[9] See HERZOG, Roman – GERKEN, Lüder: Europa entmachtet uns und unsere Vertreter. In: *Welt online*, 13th January 2007, http://www.welt.de/politik/article715345/Europa_entmachtet_uns_und_unsere_Vertreter.html (last visited March 26, 2007). See furthermore point C.

[10] Directives give to Member States the chance to adapt the rules to national conditions when transposing the rules, staying within the frame of the margin of appreciation the directive itself allows.

[11] Cases 33/70, SpA SACE vs. Finance Minister of the Italian Republic, Judgment of December 17, 1970, and 41/74, Van Duyn vs. Home Office, Judgment of December 4, 1974.

[12] See ECJ, 8/81, Ursula Becker vs. Finanzamt Münster-Innenstadt, Judgment of January 19, 1982. pp. 17-26.

[13] The infringement procedure provides of course the possibility to sanction the culpable state, this procedure – after article 226 of the EC Treaty – is only open for the Commission… uses nothing for the individuals whose rights would derive from the directive – as it is anything but not sure that the Commission starts the procedure: due to financial causes, lack of importance, lack of capacity, no information on the failure.

[14] Concerning the debates see JACQUÉ, ibid. note 1, pp. 573 ff. with such famous cases as the Faccini Dori (91/92, July 14, 1994).

[15] C-106/89, Marleasing SA vs. La Comercial Internacional de Alimentacion SA, November 13, 1990, direct applicability of interpretation. As to the directives see furthermore CRAIG, Paul – DE BURCA, Gráienne: *EU Law*. Oxford University Press, New York, 2003. pp. 202-229.

3. Directive 93/104

The given directive's direct applicability is – as *Judge Péter Kovács* mentions it in his concurring opinion to Decision 72/2006 – well-based in the jurisprudence of the ECJ: in the cases Pfeiffer, Abdelkader Dellas, Robinson-Steele/RD Retail Services Ltd and Commission vs. United Kingdom, the ECJ has already announced that the conditions of direct applicability are fulfilled.

Here is a short summary showing respectively which of the dispositions of directive 93/104 the ECJ already had the possibility to pronounce on. In the – German – Pfeiffer and others vs. Deutsches Rotes Kreuz, Kreisverband Waldshut eV[16] case the ECJ declared, concerning article 6 (2), that "the provision fulfils all the conditions necessary for it to have direct effect".[17] In the – French – Abdelkader Dellas-decision[18] the ECJ disagreed with national legislation not in compliance with the directive. In the – British – Robinson-Steele/RD Retail Services Ltd and Commission vs. United Kingdom cases – with regard to article 7 (1), the ECJ pronounced on the interpretation of questions like the calculation of overtime, its pecuniary compensation, or what is effectively a rest – all questions that could have helped in the actual case before the Constitutional Court.

Concerning the recently acceded Hungary, another important question is, what should happen with directives which were born and came into force (i.e. had to be executed, transposed) before the country's accession to the European Union. The answer is more than simple: as determined in article 2 of the Principles of the Accession Treaty, the country is bound by the legal acts adopted prior to the accession. There is no purchase in this subject (the respective questions are of course specified later in the Treaty), but none of these dispositions concern the rules of directive 93/104. So the Hungarian legislature has the – admittedly huge – task to transpose this directive equally (among many others), or at least not to adopt legislature contrary to the in the treaty accepted Community *acquis*, and so, contrary the dispositions of directive 93/104.

B. Approaches in Europe

In the followings, the attitude of other European constitutional courts is going to be examined, especially what concerns the problematic of not becoming a quasi-executive of the European legislation, but guarding the realization of this as it constitutes a significant part of the legal system of the given country. In addition, some examples of other Member States' constitutions are going to be mentioned, as – according to the opinion of the author – it is in a huge part the Hungarian Constitution's text responsible for the present – absolutely not satisfying – situation.

[16] Cases C-397/01-403/01, Pfeiffer et al. vs. Deutsches Reutes Kreuz, Kreisverband Waldshut eV, Judgment of October 5, 2004.
[17] Ibid. p. 120.
[18] C-14/04, Abdelkader Dellas, Confédération générale du travail, Fédération nationale des syndicats des services de santé et des services sociaux CFDT, Fédération nationale de l'action sociale Force ouvrière vs. Premier ministre, Ministre des Affaires sociales, du Travail et de la Solidarité, judgment of December 1, 2005. p. 63.

The question within the frame of the present article is going to be treated especially on the points: sovereignty, primacy and fundamental rights. It should not be forgotten either that the most accepted theory concerns the European Union as a *sui generis* formation (it can be found in the Maastricht-decision of the Bundesverfassungsgericht – "Staatenverbund").

As to the protection of state sovereignty, the French Conseil d'État ("Amsterdam" decision), the Spanish Constitutional Court (European Parliamentary elections decision, 1992) as well as the Danish Supreme Court (decision on sovereignty conflicts, 1998) represented an attitude which is not in silence safeguarding the given allotment of competences between EU and Member State institutions. And, to an extent, even the traditionally and highly dualistic Italy accepts the delimitation of its sovereignty in its Constitution in order to maintain "peace and truth" among the nations, which flatters the vanity of international law in general (article 11 of the Italian Constitution[19]).

As to our subject, we have to mention the jurisprudence of the French Conseil d'État and the German Bundesverfassungsgericht, where the core of the question was equally the constitutionally warranted essence of sovereignty,[20] and opened the door for the national constitutional courts to control the constitutionality of the Community legislation. The basis of this jurisprudence, the so-called Solange I and II decisions constitute nevertheless the other side of the problematic. It is more to our point that in the so-called "Euro" decision[21] of the German Bundesverfassungsgericht it is declared that he is competent to interpret the constitutional obligations of the Member State institutions.

Actually, it could be subject of a proper article to figure out how the Member States' Constitutional Courts[22] handle the question of the primacy of Community law. To give a short summary, the typical approaches are:[23] those who reject Community law's supremacy over national constitutions (Denmark or the Baltic states), those who reject the principle of supremacy, but modify the constitution in order to enable applicability of Community law (e.g. France or Poland, Hungary), those who accept primacy, but with delimitations (e.g. Sweden, Finland, Greece or Portugal, the above mentioned Germany or Italy) and finally those who accept entirely this principle (Austria). Nevertheless, the delimitations only concern preoccupations or situations where individual rights and freedoms could be affected by Community legislation and are presumed to be better protected in the national constitutions. In the case of Decision 72/2006 it is completely different: these *are* quasi individual rights protected against the – for them disadvantageous – national legislation…

Admittedly, the case of Decision 72/2006 of the Constitutional Court is not unique. The European constitutional courts in general try to avoid to decide in petitions concerning

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[19] "[…] it agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed[…]"

[20] See KECSKÉS, László: Az EU-csatlakozás magyar alkotmányjogi problémái. *Magyar Tudomány*, 2006/9. pp. 1081-1089. p. 1085.

[21] BVerfGE, E 97, 350.

[22] In the Netherlands, there is no Constitutional Court, constitutional control is provided through parliamentary ways.

[23] See KONDOROSI, Ferenc: *Az EU-tagság Jogi Összefüggései.* Budapest, Emberi Jogok Magyar Központja Közalapítvány, 2006, pp. 15 ff.

Community law. The constitutional courts of the elder EU-countries had nevertheless the time to develop their attitude in this problematic.

The situation is different from state to state, as the – as above mentioned: significant – constitutional dispositions concerning the country's constitutional relationship are only similar, but not adequate. Contrary to the below detailed Hungarian constitutional disposition, the French Constitution says (article 88-1): "The Republic participates in the European Community and the European Union, which constitutes of states who have chosen freely – based on their establishing treaties – to exercise together some of their competences."[24] These highly general terms were completed with the enunciation of the French Conseil Constitutionnel in 2004 saying that "the transposition of a directive *results from a constitutional stipulation* which could only be overshadowed if there was an explicit disposition contrary to the [French] Constitution".[25] In 2006, it became even more obvious that France's Conseil Constitutionnel had also its problems with pronouncing on directives. In its decisions in July and November 2006, the followings were determined: after article 61 of the French Constitution, it is the Conseil Constitutionnel's task to guard the respect of the transposition of a Community directive, though within a double limit:[26] the above already mentioned constitutional one (which shows the primacy of the French Constitution, [explicitly: "integrant principles of the constitutional identity of France"][27] on Community directives) on one hand and evading the response in the before-promulgation conflict of national law with a directive on the other hand – giving to the national jurisdictional authorities the right to ask for a preliminary ruling.[28]

Concerning Italy, two decisions of the Italian Constitutional Court have to be mentioned: the Frontini (1973) and the Fragd judgments (1989). Both are quasi the parallels of the German Solange-cases, so essentially concerned the inalienable rights of individuals as well as the basic rights and values declared in the Constitution. And, in a decision of 1995 the Corte Costituzionale announced that – apart from the obvious evidence – it could only react in case of violation of the basic constitutional principles or rights guaranteed in the Constitution.[29] The protection of basic constitutional values and rights constitutes nevertheless, as declared above, the other part of the problematic under focus in this article, though – admittedly – not independent from it.

It is worth mentioning that in other states which adhered to the Union at the same time, mostly the same problematic occurred as in Hungary. For example the Czech Constitution[30] was not afraid to clarify the relationship of international and national law in a 2001 amendment

[24] « La République participe aux Communautés européennes et à l'Union européenne, constituées d'Etats qui ont choisi librement, en vertu des traités qui les ont instituées, d'exercer en commun certaines de leurs compétences. »
[25] Conseil Constitutionnel, Décision n° 2004-496 DC (June 10, 2004), p. 7. ; France's this kind of attitude could be object of a proper article.
[26] Décision n° 2006-540 DC – (July 27, 2006), pp.18-20. and Décision n° 2006-543 DC – (November 30, 2006), pp. 5-7.
[27] Décision n° 2006-540 DC, p.19. and Décision n° 2006-543 DC, p. 6.
[28] Décision n° 2006-540 DC, p.20. and Décision n° 2006-543 DC, p. 7.
[29] Corte Costituzionale, Ordinanza 536/1995 (December 15, 1995). "Alla Corte costituzionale, infatti - ferma la possibilita' del controllo di costituzionalita' per violazione dei principi fondamentali e dei diritti inviolabili della persona -, non compete fornire l'interpretazione della normativa comunitaria che non risulti di per se' di "chiara evidenza" [...]".
[30] Article 10 of the Czech Constitution.

which happened in connection with the accession. They – having become clearly monist – simplified the situation.

C. Directives and the decisions of the Constitutional Court

1. The general attitude of the Constitutional Court to international law

As *István Illésy* writes, the conceptions of constitutional law and international law do not take into consideration that their starting-point is not the same: the former is based on the state sovereignty, the latter on the equal sovereignty of the states.[31] Maybe it could explain a part of the problem in Hungary.

However it is, the cause of the problems and hesitations of the Constitutional Courts, and especially that of the Hungarian Constitutional Court can be based on the place of Community law in the national norm-pyramids,[32] which is quite individual in every country, as to their different appreciation of the relationship between international and national law (question of monism and dualism), or national law and Community law (question of primacy).[33]

Hungary's attitude concerning the relationship between international and national law was not unequivocal. The legal decree 27/1982 did not really help to find out whether the country is monist or dualist. The new law L/2005, aiming to clarify the situation, has taken a step into a new direction, it is nevertheless in the cross-fire – not having reached the entire solution. Nevertheless, the Constitution itself has not been amended in the respective article, so article 7 (1) remained our monist-dualist paragraph,[34] as it does not clarify where international treaties in general take place in the Hungarian legal system.[35] (The wording "shall harmonize" does not tell us much, it is rather ambiguous.) Due to the unequivocal legislation, the questions of primacy, direct applicability and the collision of national and international law, all complicated issues, remain more or less up to the Court to solve. And that is the same concerning supranational law as well.

A part of the lawyers suggest as a solution the acceptance of the monist conception (especially in the light of the Community law problematic) and are convinced the problems would be solved that way. But probably – or rather possibly – alone with the monist conception it is not done. Although the primacy of national law is not a popular theory nowadays, it is not completely unthinkable, so the primacy of international treaties should be declared explicitly.[36]

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[31] ILLÉSSY, István: Brèves rémarques sur la hiérarchie des orders juridiques et la souveraineté. In: ILLÉSSY, István (ed.): *Constitutional Consequences of the EU Membership*. Pécs, University of Pécs, Faculty of Law, 2005. p. 188.

[32] As to this and similar theories see KOVÁCS, Péter: *Nemzetközi közjog*, Budapest, Osiris, 2006, p. 55 ff.

[33] See furthermore KOVÁCS, Péter: Nemzetközi szervezetek szankciós határozata magyarországi érvényesíthetőségének alkotmányjogi gyakorlata és problémái. in: BODNÁR, László (ed.): *EU-csatlakozás és alkotmányozás*, Szeged, SZTE-ÁJK Nemzetközi Jogi Tanszék kiadványa, 2001. pp. 133-162.

[34] Article 7 (1) of the Hungarian Constitution says: "*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.*"

[35] As to article 7 Hungarian Constitution see KOVÁCS, Péter: Alkotmányosság és nemzetközi jog. in: JOBBÁGY, Gábor (ed.): *Iustum, aequum, salutare*. Emlékkönyv Zlinszky János tiszteletére. Budapest, Osiris, 1998. pp. 187-203. pp. 188 ff.

[36] See article 55 of the French or article 94 of the Holland Constitution.

Nevertheless, the author of this article – unlike many considerable lawyers of our country – does not want to campaign in favour of the monistic conception (which would be anyhow rather interesting after law L/2005).

Judge Imre Vörös was convinced a few months before the amendment of the Constitution that as the relationship between national and international law is not clarified, the relationship of the Hungarian legal order and Community law is unmanageable. The situation has not changed much.

2. *The attitude of the Constitutional Court to Community law and Decision 72/2006*

a) Article 2/A of the Constitution and the question of sovereignty

In connection with the accession to the EU, article 2/A was introduced. It says: *"(1) By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as 'European Union'); these powers may be exercised independently and by way of the institutions of the European Union. (2) The ratification and promulgation of the treaty referred to in Subsection (1) shall be subject to a two-thirds majority vote of the Parliament.*"[37]

Several critics have been raised against this article:[38] in brief – and it is clearly visible in the jurisdiction of the Constitutional – it does not provide the necessary legal frames of the Member State status, endangers the sovereignty and lacks absolutely the guidelines for the national courts as to the application of Community law. Maybe, to avoid similar problems is the reason why the Court wants to protect the Constitution and avoid its breach by ignoring Community law?...

Some blame the "austere" conception of sovereignty,[39] that it had to come to this amendment[40] of the Constitution saying it was on one hand not necessary, on the other hand, not efficient. For now it became (or should have become) more than obvious for the public lawyers of Hungary that the amendment was not adequate: it did not solve the problematic at all.[41] As *Jenő Czuczai* states, there is one thing positive in article 2/A: it mentions explicitly the European Union, unlike some other – that time – candidate countries…[42]

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[37] See PETRIK, Ferenc (ed.): *Alkotmány a gyakorlatban*. Budapest, HVGOrac, 2005. pp. 62-64.

[38] See e.g. CHRONOWSKI, Nóra: Constitutional Consequences of Hungarian EU Membership. in: ILLÉSSY, István (ed.): *Constitutional Consequences of the EU Membership*. Pécs, University of Pécs, Faculty of Law, 2005, pp. 53-95, pp. 59 ff.

[39] KECSKÉS, László: Az EU-csatlakozás magyar alkotmányjogi problémái. p. 1081.

[40] The Hungarian Constitution (law XX/ 1949) was amended by law XLI/2002.

[41] See furthermore: CZUCZAI, Jenő: National preferences in light of the constitutional adaptation process to the EU accession acquis. The Hungarian experiences in a comparative dimension of Central ad Eastern Europe. *Európa 2002*, 2004/1. pp. 49-56., especially p. 55, and as to the critics of article 2/A of the Constitution: CZUCZAI, Jenő: Kritikai meglátások a kormánynak a Magyar Köztársaság Alkotmányáról szóló 1949. évi XX. tv.-nek az EU csatlakozást érintően szükséges módosításáról szóló T/1114 számú törvényjavaslatáról. *Európa 2002*, 2002/4. pp. 26-32. p. 27.

[42] CZUCZAI, Jenő: Kritikai meglátások… p. 27.

There are several suggestions existing for the amelioration of article 2/A, most of them are concerned – not without a reason – as to the sovereignty and legal certainty. We should keep in mind that the source of the Union's derived competences is the Member State, so it is up to the state itself to determine to what an extent its sovereignty is supposed to be abridged. (Nevertheless, the situation is different as to national law in general or as to the Constitution, which is not exactly our subject now.) Member States – and so Hungary – can define, which are the fields where they delimitate their sovereignty. Some authors would give this opportunity to the Constitutional Court – which is a very good idea at first sight, though the Court does not seem to take up the gauntlet. Probably, because it is effectively not his task.

It is evident that the Hungarian accession to the European Union – besides its positive results – has not been an entire success in many ways. Even when focusing on the problematic "Hungarian Constitutional Court and Community law", it is more than evident that the problem itself is generated by the mistaken legislature.

b) Which paragraph – as to Community law?

The country being an active member of this new order only for the last three years, its judicial system has not yet got acclimatized to the new conditions: not only its "ordinary courts" are challenged,[43] but it seems that the Hungarian Constitutional Court – as, like mentioned above, once sure the European fifteen's (twelve's, etc.) constitutional courts as well – has its problems when facing disharmony between national and Community legislation. Two articles should help the Court to clarify the relationship Hungarian law – Community law: Articles 2/A (paragraph 1) and 7 (paragraph 1). The latter, concerning the country's attitude to international law (international obligations) became a *generalis* disposition and like that, is overshadowed now (or should be) by the former, *specialis* disposition, put into the Constitution when becoming member of the European Union (Communities).

When accepting article 7 as legal basis, the feeling of the later in detail treated denial of justice would appear knowing that Law XXXII/1989 on the Hungarian Constitutional Court determines in its Article (1.c) that the Court can decide on the colliding of a law or any other legal provision with international treaties, and in its Article 21 (3) that concerning this question, the procedure can only be started by a *limited circle of persons* (e.g. MPs)… Nevertheless, putting aside for a minute or two this problem, it has to be stated that the Court is competent to both preliminary and subsequent control of international treaties.[44] Both the Founding Treaties of the Communities (and the Union) and the Accession Treaty are international conventions, even if they are considered as part of a *sui generis* legal system or a kind of *supra*national (and not only *inter*national) law.[45]

[43] There are only a few cases where national courts take Community law explicitly into consideration – see case BH 2005/6, concerning the change of content of certain crimes contained in the Criminal Code (not modified apropos the accession to the EC).
[44] The latter competence is highly disputed, and is based on Decision 30/1998. (See later.) Judge Imre *Vörös* and Barna *Berke* are convinced that the Constitutional Court does not have competence for a subsequent norm control in case of international treaties.
[45] Here, we focus on the competence of the Court only concerning the examination of constitutionality of legal provisions and whether they violate international treaties.

There is a measurable incoherence between the members of the Court: some would like to consider Community law questions under Article 7,[46] others[47] point out that Law XXXII/1989 should be modified and that "in spite of the treaty origin, the norms of the European (Community) law […] are much more closer to domestic law than to international law. This is obvious when one considers their enforcement via primacy and direct applicability".[48] There are authors[49] who – in accordance with some of the judges at the Constitutional Court – consider that between the inner-state application of Community law and "normal" international treaties a parallel cannot be drawn. The mechanisms are not at all the same. And, due to this, the classical monism-dualism models cannot even be applied concerning Community law.

From the point of view of an individual's *locus standi* to challenge a primary source of Community law before the Constitutional Court, judge *Mihály Bihari* puts[50] there is no reason to make a distinction between traditional international treaties and EU-treaties: as far as an individual is not entitled to sue an international treaty (only some „priviliged applicants" like the head of state, government, the parliament, or an MP etc. are allowed to do so), the Court acted *ultra vires*. From this point of view, international treaties and Community treaties have the same nature.

Judge *Imre Vörös*[51] is convinced that article 7 of the Constitution cannot be applied for Community law concerned cases before the Constitutional Court at all. And, the hierarchy here is: 1. Community law 2. Constitution 3. national law. He[52] is convinced that as Community law comes in the hierarchy before the Constitution, so cannot be unconstitutional. But – and that is what I am asking – what about the situation, as here: national law versus Community law? Can national law be constitutional but contrary Community law, or *vice versa*? Or – is everything contrary to Community law automatically unconstitutional? Or *vice versa*? ...

Barna Berke finds that – as the Community law does not become part of the national law as the incorporation of international treaties – the even examination of Community regulations and directives by constitutional courts is problematic.

In order to decide how we consider Community law, under article 7 or article 2/A, the followings have relevance as well. As to the collision of national with international, and national with Community law, a significant difference has to be taken into consideration, namely that in the first case, international responsibility of the state arises, in the second, there *is* an obligation of the national tribunals to disregard in their jurisdiction the non-conform national provision.

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[46] See dissenting opinion of Judge Mihály *Bihari* in the case 1053/E/2005, June 16, 2006.
[47] See concurring opinion of Judges Péter KOVÁCS and László KISS in the case 72/2006 (XII. 15.) (393/B/1994).
[48] See concurring opinion of Judges Péter KOVÁCS and László KISS in the case 72/2006, p. 2., cited by VÁRNAY, Ernő – TATHAM, Allan F.: A New Step on the Long Way – How to Find the Proper Place for Community Law in the Hungarian Legal Order? *Miskolc Journal of International Law*, *www.mjil.hu*, Vol. 3. (2006) pp. 76-84
[49] See e.g. BERKE, Barna: A nemzetközi szerződések alkotmányossági vizsgálatának megalapozásához. *Magyar Jog*, 1997/8. pp. 449-461.
[50] Decision 1053/E/2005 (16 June 2006), Dissenting opinion of Judge Mihály BIHARI, para. 4.
[51] VÖRÖS, Imre: Az EU-csatlakozás alkotmányjogi: jogdogmatikai és jogpolitikai aspektusai. *Jogtudományi Közlöny*, 2002/9. pp. 397-407. p. 406.
[52] VÖRÖS, Imre: Az EU-csatlakozás alkotmányjogi: jogdogmatikai és jogpolitikai aspektusai. p. 406.

If we keep in mind that the Constitutional Court could be faced with Community legislation when the EC legislators overpass their competences vis-à-vis constitutional competences, or when the secondary sources have to be examined due to content problems, it could be interpreted that – as Community rules are integrant part of our legal order – they can be put under the norm control of the Court, on the other hand the ECJ has exclusive competence concerning interpretation of Community law. Those judges of the Constitutional Court who would like to avoid even in the future mentioning EC rules during a norm control, argue with that. Nevertheless, we have to emphasize that the Constitutional Court has the competence to control all the norms, even those Community ones which create general obligatory behaviour rules. Several authors suggest that this situation should be discharged.

c) The jurisprudence of the Constitutional Court

This decision was not the first time for the Court to deal with Community questions. Even before the accession, in 1997 and 1998, the Court had the occasions to pronounce on some related questions. The situation at that time was very simple: Hungary was not a member of the EC. But after the accession, the problematic sounds a bit different – as mentioned before, in a huge part the legislature seems to be responsible for it. In the decision 1053/E/2005 of June 16, 2006 the question has been – similarly – whether national legislation is contrary to EC obligations of Hungary.

Decision 4/1997 (I. 22.)[53] stated that international treaties (i.e. their promulgating acts) can be subjects of subsequent examination of constitutionality, which would be a clear sign of being dualistic. Anyhow, in this decision the Court *expressis verbis* mentions the German Constitutional Court and refers to the nature of Community law as well.

The other important decision of the Constitutional Court (Decision 30/1998 (VI. 25.)) dealt explicitly with the collision of Community law and the Constitution. The fact that the primacy of the Constitution was declared, has to be regarded knowing the fact that Hungary was at that time long before the accession. Maybe that is why the Court considered Community law as foreign law. EU-lawyers[54] argue that the relationship was different though after the European Agreement, and that the dynamics of the events suffered under it. Nevertheless, it should be reminded on the reasoning: it puts into question whether during the Community legislation the principles of popular sovereignty and rule of law prevail…[55] Judge *Vörös* e.g., who added a dissenting opinion to Decision 30/1998 (VI. 25.),[56] is convinced that the decision is mistaken, and – unlike stated in it – the Constitutional Court does not have the competence to control international treaties subsequently, as found there – it was a false interpretation of its own competence. He is convinced that the decision was taken "in the lack of knowledge of

[53] See KECSKÉS, László: Alkotmánymódosítás Magyarország EU-csatlakozása kapcsán. Info-*Társadalomtudomány*, December 2002, Nr. 59. pp. 53-67
[54] E.g. László KECSKÉS
[55] As to this problematic see the above cited Roman Herzog-article…
[56] Short summary of Decision 30/1998 (VI. 25.) in: Bulletin on Constitutional Case-Law, Venice Commission, Council of Europe, 1998/2, Strasbourg.

European law".[57] The difficult question of relationship between national and Community law should have been clarified there, which did not happen. Not in 1998, and not twice in 2004 or 2006. *Imre Vörös* blames already Decision 53/1993 (X. 13.) for the situation of today:[58] creating a ternal hierarchy of norms (1. Constitution, 2. international law, 3. national law), which was not evident at all.

After the accession, the problematic has already occurred in Decisions like 17/2004 (V. 25.) or 774/B/2004, but, finally, Decision 1053/E/2005 of June 16, 2006 signalized that there is not much clarification to expect in the near future either.[59] In this case, the Court was asked to declare unconstitutional the fact that the Hungarian legislature failed to comply with the Community obligations, infringing article 10 EC and article 49 EC. The petition was based on Article 2/A, but the Court rejected the demand, as there is no concrete obligation for the legislator in this article. The alternative demand was based on Article 7, but the Court at least clarified: "in spite of their treaty origin, [the Constitutional Court] does not want to consider the founding treaties and their amending treaties as international treaties".[60]

As repeated in point 11, para 4 of Decision 72/2006,[61] the Treaties as well as the Directives are considered to be part of the internal legal order. Their place in the hierarchy is nevertheless not clarified… Are they next to the Constitution, at the same level? Above? Under, but above other national statutory provisions?... What if the collision of Community law and Constitution comes up in the near future? … We should not dare to think about it.

d) Possible explanations

If we would like to be drastic, one could say that the Hungarian Constitutional Court behaves in a way concerning Community law as if it was fire or an epidemic disease, postponing every clear answer. But why?

It could be argued that the Court with its decisions concerning Community law reacts on the from some aspects negative development of the Community legislation, and has chosen its own way to deal with the problems brought up e.g. by the former state's president of the German Republic, Roman Herzog in January, when he – via the media – expressed his concerns the EU endangering the parliamentary democracy in Germany.

Roman Herzog, former president of the German Republic, expressed himself more than sceptic, to be honest, even more than critic as to the structure of Europe, its future and the question of

[57] VÖRÖS, Imre: Az EU-csatlakozás alkotmányjogi: jogdogmatikai és jogpolitikai aspektusai. *Jogtudományi Közlöny*, 2002/9. pp. 397-407. p. 401.
[58] VÖRÖS, Imre: Az EU-csatlakozás alkotmányjogi: jogdogmatikai és jogpolitikai aspektusai. *Jogtudományi Közlöny*, 2002/9. pp. 397-407. p. 399.
[59] See VÁRNAY, Ernő – TATHAM, Allan F.: A New Step on the Long Way – How to Find the Proper Place for Community Law in the Hungarian Legal Order? *Miskolc Journal of International Law*, *www.mjil.hu*, Vol. 3. (2006) pp. 76-84.
[60] Decision 1053/E/2005 (June 16, 2006) III. 2.
[61] Decision 72/2006 touches upon certain questions of the employment and remuneration of people working in the field of public health. Especially readiness, surplus work and duty have been in the focus, and the affected provisions not only allegedly collided with Community law, but with several national legal acts as well, such as the Labour Code itself.

legitimacy. He doubts that Germany can still be considered as a parliamentary republic[62] (!)… And it is very close to our subject: He claims that the legitimacy of parliamentary democracies is put into question when Minister Councils become legislators, and the traditional core of sovereignty and democracy, the parliament becomes a secondary role. In Germany, the proportion of legal provisions brought by the Parliament between 1998 and 2004 has been the following: 84 percent had their origin in Brussels, only 16 percent in Berlin. Maybe the Constitutional Court wants to avoid this problematic by putting its head into the sand, or – on the contrary – wants to protect the Hungarian legal system by ignoring the European one.

As the Constitutional Court itself emphasizes, even after the accession to the European Union, the main function of the Court remained the protection of the Hungarian Constitution and the constitutional system.[63] In the meantime though, there have been significant changes…

The Constitutional Court claims as well that interpretation of Community law is the clear task of the ECJ and does not want the interference of the competences (see point e)). The most possible explanation would be maybe that the Court is eager to protect its competence, which is understandable. It is the Court's way to react on the bizarre situation the legislator has created for him.

e) Possible solutions

Several solutions have been mentioned during the last years: monism, Supreme Court, preliminary ruling, cooperation, just to name some of them. Which is the most adequate, has not yet been object of severe official investigations. Maybe there is another option, e.g. the Court itself. One should prevail soon, because – in my opinion – the situation of *denegatio iustitiae* persists…

According to some authors' opinion, concerning Community law, monist conception is required.[64] And, Constitutional Courts are competent to control norms of Community law origin, as they have become part of the national legal system. The national norms, if doubtful, have to be examined by a competent forum. Otherwise, on the other hand, the constitutional values are endangered if the streaming Community legislation is not under control of fora paying attention to constitutional values.

Other authors (e.g. *Kondorosi*) are convinced that the role of the Constitutional Court is not clear as to the situation when a national regulation is contrary to Community law and this is task of the ordinary courts who can ask for preliminary ruling. The problem of *erga omnes* effect of the Court's decision should not be forgotten either. The author of this article nevertheless does not want to accept that it is only the Supreme Court (this is one of the proposed solutions) who could give a unity decision which could solve a situation like this. But there is one thing we agree on: in the present situation the Constitutional Court cannot do its job

[62] HERZOG, Roman – GERKEN, Lüder: op.cit. Herzog names as one of the main causes of the problematic the ECJ and its competence-widening tendence in its jurisprudence.
[63] As to the role of the Hungarian Constitutional Court after the accession see KUKORELLI, István – PAPP, Imre: A Magyar Alkotmány EU-konformitása. *Európai jog*, 2002/6. pp. 3-9. p. 5.
[64] See KECSKÉS, László: Indító tézisek a Magyar Köztársaság Alkotmánya EU-vonatkozású szabályainak továbbfejlesztéséhez. *Európai jog*. 2004/3. pp. 3-11.

efficiently. I suggest solving it in the – presumably very long[65] – meantime with a larger interpretation of its competences.

László Kecskés e.g. suggests a close cooperation between the ECJ and the Hungarian Constitutional Court, which could give opportunity to protect the Hungarian sovereignty from EU-based affections, but would not be enough to safeguard the EU-originated rights of the individuals against national legislation.[66] (Nevertheless, when interpreting direct applicability and *effet direct*, the Court's view does not correspond to that of the ECJ. But until the Constitutional Court is negating to take into consideration of the Community dispositions, there is no need to discuss further the meaning of these notions. At first, it should reconsider its competences.)

The question arises whether in the case 72/2006 the ECJ could have been asked for interpretation after EC article 234. (Although it is subject to debate whether constitutional courts are considered as national tribunals as to this article, see the case of Dorsch Consult[67].) However, the preliminary decisions cannot solve the problematic entirely. Furthermore, Constitutional Courts are – based on the ECJ's requirements – normally not admitted to ask for interpretation in norm control cases (as they do not really fit into the conditions), but as no tribunal has tried it before (only the Austrian and the Italian, but not concerning norm control), it could even work.[68]

At the present though, it could seem that the Hungarian Constitutional Court and the Court of Justice of the European Communities do a kind of "denial of justice", some kind of "negative competence", the Constitutional Court saying that the given question concerns the ECJ (as it is on the interpretation of Community law), and on the other side the ECJ saying that – as he cannot declare the illegality of a national norm – the question must be handled at the national – constitutional – level.[69]

There is an urgent need of amendment of the Constitution, because this situation is getting delicate: in case of collision between European and Hungarian national law, the ECJ has no direct competence because it cannot supervise national legislation (the ECJ has competence only to pass a decision about the compatibility of a given piece of national legislation with Community law but it cannot suppress it), but the Constitutional Court is not competent either, because Community law related questions ought to be out of its competence. How illegal is it? What are the basic principles of law which are not breached in this situation? (There are some, not too many…) It seems to be a kind of *denegatio iustitiae*… Some suggest the solution by the definite recognition that Community law prevails, accentuating that "the rule of

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65 In Hungary, for the amendment of the Constitution two-third of the total votes is required.
66 As to the present Constitutional disposition developing ideas, see: KECSKÉS, László: Indító tézisek…
67 ECJ, Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH, C-54/96, Judgment of September 17, 1997.
68 As to possible solutions, especially concerning the relationship between ECJ and Hungarian Constitutional Court, see CHRONOWSKI, Nóra – NEMESSÁNYI, Zoltán: Európai Bíróság – Alkotmánybíróság: felületi feszültség. *Európai jog*. 2004/3. pp. 19-29.
69 In case of preliminary ruling the ECJ avoids to pronounce the inconformity of national law with Community law, but declares that a text alike would not be conform.

effectiveness and the recognition of the primacy of community law in the Constitution are not the same"[70].

Most of the time the question for the European, constitutional or public lawyers arose in the form whether Community law could require primacy in the application against national constitutions.[71] Nevertheless, the Hungarian Constitutional Court's attitude leads to another question: what if the Court remains silent in similar questions?

Conclusion

As *Ernő Várnay* has written in his article, concerning decision 1053/E/2005: "The Decision has left open more questions than it has answered."[72] And how true it is! Six months later more than ever. I understand that to take a clear position in the Constitutional Court requires at least a kind of compromise between its members which they are far from, obviously. Nevertheless, the problem is actual, and its actuality will not disappear with the time. Because problems like those in Decision 72/2006 are going to be more often, not rarer. And, as here, they may touch upon very sensible, basic rights (and obligations) of individuals, better protected in Community than in national law (contrary to taken obligations)? If these petitions are going to be rejected as in June, how could the situation of *denegatio iustitiae* be explained? If admitted, and decided on a completely different basis than its essential, does not the Constitutional Court pursue an ostrich policy? Solutions are required, not only from the Constitutional Court, more from the side of the legislator; the Court could nevertheless draw the latter's attention to the unsatisfactory situation. It is urgent, if we do not want to loose the illusion of living under the rule of law and of positive judicial effects of the EU accession.

[70] CHRONOWSKI, Nóra: Constitutional Consequences of Hungarian EU Membership, p. 65., KECSKÉS, László: Az EU-csatlakozás magyar alkotmányjogi problémái.
[71] See: KONDOROSI, Ferenc: *Az EU-tagság Jogi Összefüggései.* Budapest, Emberi Jogok Magyar Központja Közalapítvány, 2006, p. 10.
[72] VÁRNAY, Ernő – TATHAM, Allan F.: A New Step on the Long Way… p. 83.