# WHAT ROLE FOR CONSTITUTIONAL COURTS IN A MULTI-LEVEL CONSTITUTIONALISM?[1]

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## I. Introduction

A long time ago in a galaxy far, far away, constitutional courts were final arbitrators of constitutional issues, speaking with the authority of the most supreme legal document of their country, explaining its meaning and enjoying its pathos without being politically accountable to anyone. These bodies made from the often obscure text of a constitutional code whatever they wanted. They used their power for good – and sometimes – for evil, not being compelled to favour anybody but to follow their own persuasion about constitutionalism. They grew in power and the constitution became – as Justice Hughes put it in 1907 - what the judges say it is.

But, as you may know from your own experience, the accession to the EU has changed everything. As one of the greatest judges of the 20th century, Lord Denning put it in his famous words: "[W]hen we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back."[2]

What I am intending to do in the next few minutes, is to highlight some cases from the rather extensive case law of the Hungarian Constitutional Court in order to show how the Court "learnt to swim in the upcoming tide", and also to make some general remarks about the role of constitutional

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1 Slightly amended and by some notes extended version of the contribution delivered at the International Workshop on Human Rights Enforcement Mechanisms held at the ELTE University, Budapest, November 24-25th.

2 *Bulmer Ltd. v. Bollinger S. A.* [1974] A.C. per *Lord Denning M.R.*

courts in the EU as it is the most sophisticated system of multi-level constitutionalism.

I chose three cases:[3] the sugar quotes case, the case concerning the implementation of the working time directive, and the case on the European arrest warrant.

## II.1. The sugar quotes case – Decision of the Constitutional Court 17/2004. (V. 25.)

By the accession, some transitory measures were needed to regulate the sugar market and to avoid misuse of the rather generous EC price regulation. As the Hungarian Parliament was in delay, the necessary national measures had been introduced rather late; and hence, the applicable law had to be enacted retroactively. This circumstance, not without any justification, was criticised by the President of the Republic as being contrary to legal certainty. So, he initiated a constitutional review of the Act.

The Constitutional Court made the following observations: "the connection between the Act of Parliament and the regulations of the European Union is as follows:

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

[3] For an overview of the Hungarian case-law see M. Dezső and A. Vincze: *Magyar Alkotmányosság az európai integrációban* (Budapest: HVG-Orac, 22012) p. 210-237; M. Varju and F. Fazekas: *The reception of European Union law in Hungary: The Constitutional Court and the Hungarian judiciary*, 48 Common Market Law Review (2011) pp. 1945-1984.

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

In essence, the Court came to the rather peculiar conclusion that the implementing Hungarian Act has nothing to do with EU law, and hence it can be reviewed in the fullest extent. And the Court did so.

The Czech Constitutional Court in the very same situation,[4] however, stated that even if an issue had been explicitly delegated to the Member States, and therefore it is up to the Member States to adopt and to apply their own legislation it cannot be asserted that Community law in no way operates in such fields. Hence, the Czech Constitutional Court cannot entirely overlook the impact of Community law on the formation, application, and interpretation of national law, all the more so in a field of law where the creation, operation, and aim of its provisions is immediately bound up with Community law. In other words, in this field the Constitutional Court interprets constitutional law by taking into account the principles arising from Community law.

Nothing like that happened in Hungary. Putting it frankly, the Court simply sabotaged the full effectiveness of EU law without making any reasonable attempts to clarify the problem at EU level either by a preliminary question or by trying to find another way of cooperation between European and domestic law.

### II.2. The working time directive case – Decision of the Constitutional Court 72/2006 (XII.15.)

The starting point of this particular case was the failed implementation of the Directive 2003/88/EC of the European Parliament and of the Council concerning overtime compensation in Hungary.

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4 Sugar quotes Pl.ÚS 50/04 ze dne 08.03.2006 Cukerné kvóty (sugar quotas) see e.g. J. Zemánek: „The emerging Czech constitutional doctrine of European law" 3 *European Constitutional Law Review* (2007) 418-435.

Those, whose compensation was at stake, sought naturally remedy before ordinary courts, and – no surprise – won the case as the directive had direct effect against the state as employer.[5] Some petitioners – thinking that law must be on their side – filed the case before the Constitutional Court trying to achieve a declaration of unconstitutionality of the implementing measure. The Constitutional Court, however, let them down by a confusing statement that the founding and amending treaties of the European Communities were not considered as treaties under international law but as domestic law. The Constitutional Court declared that the Founding Treaties – being primary sources of the law – and the Directive – being a secondary source of the law – are as community law part of the internal law, since Hungary has been a Member State of the European Union since 1 May 2004. There were no words about supremacy or direct effect, only a few – quite puzzling und contradictory – remarks about – in other cases very leniently interpreted[6] – competences of the Constitutional Court which must have hindered it to make justice.

In this case, the Court sabotaged EU law again by not-recognizing in any form whatsoever supremacy or direct effect as constitutionally significant principles. Moreover, the Court also denied justice for a lot of people. The effect was that members of those professions which won the cases prior to this decision at least before the ordinary courts, lost their cases before the ordinary courts as well, since these courts respected the rather puzzling decision of the Hungarian Constitutional Court.

### II.3. The European Arrest Warrant – Decision of the Constitutional Court 32/2008 (III. 12.)

An Agreement was concluded between the EU and its Member States on the one side and the Kingdom of Norway and the Republic of Iceland on the other side concerning surrender procedures, which agreement, in essence, tried to make the European arrest warrant applicable also in relation to Norway and Iceland. In 2008, the Constitutional Court declared the said

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5 See M. Dezső and A. Vincze (note 3): pp. 221-224.

6 See A. Vincze: „32/A [Alkotmánybíróság]", in Jakab András: *Az Alkotmány kommentárja* (Budapest: Századvég, 2009) Nr. 157-158.

Agreement to be unconstitutional because of violation of the *nullum crime sine lege* priciple.

Looking at the case from the result, one might agree with it as similar decisions were taken also in Germany, Poland and the Czech Republic.[7] Hence, the reasoning should decide as to whether the decision is acceptable. In this respect, the case is rather disappointing. There are two aspects to be highlighted here.[8]

First, the Constitutional Court never really asked the question as to whether it has the jurisdiction to deal with the case. The agreement in question was – at least in my view – a mixed one, which means that some parts of the agreement were concluded by the Member States, as having the power to do so, and some other parts by the EU as having the power to do so. Under these circumstances, the first question to be answered was as to whether the challenged provisions were concluded within the powers of the Member States, and hence, as such whether they were apt for a review by the Constitutional Court. This question was never asked or answered. Apparently, the Constitutional Court did not really understand the importance of this question.

Secondly, it is hard to explain why the Constitutional Court was stuck to a very domestic understanding of the principle of *nullum crimen sine lege*, and why it did not try to construct this very principle in light of the requirements of European integration, or, at least, why it did not try to explain why it preferred a domestic approach to a European one.

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7 See Z. Kühn „The European Arrest Warrant,Third Pillar Law And National Constitutional Resistance / Acceptance The EAW Saga as Narrated by the Constitutional Judiciary in Poland, Germany, and the Czech Republic" 3 *Croatian Yearbook of European Law and Policy* (2007) 99-133.

8 For a more detailed analysis see A. Vincze: Az Alkotmánybíróság esete az Unió által kötött nemzetközi szerződésekkel, *Európai Jog*, 2008/4. pp. 27-34.

## III. Some conclusions

I picked only three cases but I do hope they can illustrate a dilemma. We surely cannot accept the decisions of the Constitutional Court in the first two cases, since the Constitutional Court was not ready to take into account the very needs of the EU. In the last case, however, one might agree with the decision under some circumstances. The question is obvious, why cannot we accept the first two decisions, and what do we expect from constitutional courts in the EU?

One might have expected the followings: In the first case: as the Constitutional Court did realize the European roots of the problem it should have either come to a conclusion respecting the very requirements of European law such as supremacy and direct effect, or it should have put forward a preliminary question and articulated the constitutional problem on a European level. In the second case, the expectations are basically the same. What makes it much more difficult to understand the decision, is the injustice made by the judgment. The Constitutional Court was not willing to accept that the rights infringed had a European dimension as well, and the aggrieved citizens were also infringed as European citizens in their rights belonging to the legal heritage conferred upon them by the Treaties.[9] The third case is rather interesting. The arrest warrant cases in Germany and Poland showed that national worries are widespread regarding extradition. However, both of these Constitutional Courts put forward sophisticated arguments and articulated their concern thoroughly, and most importantly tried not to simply sabotage the European integration but rather find a way for co-existence.

Supremacy, direct effect and pre-emption of EU law made the preeminent role of national constitutions, and, by the same token, also the role of the national constitutional courts somewhat unsecure. Are direct effect and supremacy not predominantly those attributes which are connoted with national constitutions? If yes, how can be then two of them, a national and a supranational? The Bible teaches us: "No servant can serve two masters: for either he will hate the one, and love the other; or else he will

[9] Cf. case 2662, van Gend en Loos ECR 1963, 1.

hold to the one, and despise the other" (Luke 16,13). This is the very situation faced by national constitutional courts in the EU: serving two masters. But how to do it?

One can clearly see that the relationship between national constitutional courts and the ECJ has not been without difficulties, as no national constitutional or supreme courts have fully accepted the predominance of EU law. The German Constitutional Court, as it is well known, reserved some questions – first of all human rights – to be finally arbitrated on in Karlsruhe (even if it seems to lose its mojo in some recent cases). The House of Lords[10] – in the very famous and very long *Factortame* saga – accepted the supremacy of EU law, unless the Parliament clearly expresses its wishes otherwise, which point is as important in UK constitutional law as the human rights are in the German one.

Why are we ready to accept these reservations? I think for two reasons. Firstly, they express the very foundations of both constitutions: human rights, and eminently human dignity, are, for obvious historical reasons, of enormous importance in German Constitutional Law. Invoking them is not a reason just made up. The Sovereignty of Parliament is the very cornerstone of the British constitution, one cannot speak about constitution without it. This is something that cannot be given up without losing the fundaments. That is the reason why we cannot *ab ovo* deny the decision of the Hungarian Constitutional Court in the third case. This is about something fundamental.

On the other hand these courts – the German and the British for instance – did not intend to merely sabotage EU law. Even if they expressed some reservations in relation to supremacy and to direct effect, these reservations have been made with an openness and readiness to include European values. Let it be the gradual restriction of the standing of the constitutional complaint in Karlsruhe or the virtually undraftable legal instrument which could exclude the applicability of European law.[11]

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[10] P. Birkinshaw: European Public Law (London: Butterworths, 2003); P Craig: Britain in the European Union, in Jeffrey Jowell – Dawn Oliver: The Changing Constitution (Oxford: OUP, [6]2007) 84-107.

[11] T. Hartley: *Constitutional Problems of the European Union* (Hart Publishing, 1999).

The constitutional courts can serve two masters under two conditions: first, they are capable to reduce the scope of the constitution to its very essentials (the condition of co-operation), and secondly, they are ready to step in if these values or constitutional fundaments are infringed (the condition of guarding the own constitution). This is the way, at least as I see, the Czech Constitutional Court chose by amending its framework of reference. This way is rather to follow instead of the quite introverted, not to say xenophobic, argumentation chosen by its Hungarian counterpart. In this sense the recent case-law shows some improvement.[12]

## SUMMARY

## What Role for Constitutional Courts in Multi-level Constitutionalism?

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Constitutional courts have been traditionally the watchdogs of constitutional values controlling legislation enforcing rule of law and human rights standards. However, moving the centre of gravity from the nation state to the European Union has changed their function. Pro forma, they still remained the cornerstone of constitutionalism with a broad jurisdiction to quash any legislation. Nonetheless, the political realty makes such broad powers merely illusory, and political theory suggests a rather deliberative model of judicial co-operation between union and state courts. As the Hungarian Constitutional Court eye-catchingly cannot cope with its tasks if a question is embedded in a European constellation, the situation does beg the question how constitutional courts should carry out their duties in a multi-level constitutional system.

[12] See the Decison Nr. 32/2012. (VII. 4.) on the constitutionality of tuition fees. For a detailed analysis A. Vincze: Az Alkotmánybíróság döntése a hallgatói szerz□dések alkotmányosságáról – a foglalkozás megválasztása és a rendeleti jogalkotás, *Jogesetek Magyarázatai* 2012/3 (forthcoming).

## RESÜMEE

# Welche Rolle für die Verfassungsgerichte im verfassungsrechtlichen Mehrebenensystem?

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Verfassungsgerichte waren traditionsgemäß die Hüter der Verfassungswerte durch die Kontrolle der Gesetzgebung und durch die Erzwingung der Rechtsstaatlichkeit und der Grundrechte. Der Wechsel der politischen Gravitation vom Nationalstaat zur Europäischen Union hat aber ihre Funktion verändert. Pro forma sind sie immer noch der Schlüssel der Verfassungsordnung geblieben und haben weiterhin breite Kompetenzen zur Vernichtung jeglicher legislativen Akte. Die poltische Wirklichkeit macht aber die Ausübung solcher breiten Befugnisse illusorisch. Die Politische Theorie arbeitet eher mit einem deliberativen Modell der Kooperation zwischen den Gerichten der Union und den der Mitgliedstaaten. Das ungarische Verfassungsgericht ist auffallender Weise nicht im Stande seine Aufgabe zu erfüllen, wenn die zu beantwortende Frage in einer europäischen Konstellation gestellt wird. Dementsprechend stellt sich die Frage, wie sollten die Verfassungsgerichte ihre Aufgaben in einem verfassungsrechtlichen Mehrebenensystem erfüllen.