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Ernő Várnay[1] – Allan F. Tatham[2]:

A New Step on the Long Way – How to Find the Proper Place for Community Law in the Hungarian Legal Order?

(*A commentary to the Decision 1053/E/2005 AB of 16 June 2006 of the Hungarian Constitutional Court on the constitutionality of provisions of national legislation contrary to the EC Treaty.*)

1. Introduction

The Court rejected a petition requesting a declaration of unconstitutionality – due to the legislature's failure to enact legislation – in respect of two domestic statutory provisions. In effect, the Court was asked to exercise its review control over these national measures that were allegedly in conflict with the EC Treaty. The Decision was accompanied by a concurring and a dissenting opinion.

1. The petition

Two UK-based companies petitioned the Constitutional Court to declare unconstitutional the fact that the Hungarian legislature had failed to comply with its obligations arising from the EC Treaty, and instruct the Parliament to take the necessary measures. The obligations infringed, in particular, were (a) Article 10 EC, the Community loyalty clause; and (b) Article 49 EC on the free movement of services.

The petitioners claimed standing to sue, *inter alia*, on two provisions of Act XXXII of 1989 on the Constitutional Court:[3] section 1(1)(e) according to which the elimination of unconstitutionality by an omission to legislate falls within the competence of the Constitutional Court; and section 21(4) which permits any person to commence these proceedings.

The Parliament's obligations were allegedly breached by two statutory provisions kept in force after Hungarian accession to the EU: first, section 2(7) of Act XXXIV of 1991 on Gambling Operations[4] which states:

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[1] Ernő Várnay is Professor of European Law at the Faculty of Law of the University of Debrecen,
[2] Allan F. Tatham is Assistant Professor at the Faculty of Law of the Péter Pázmány Catholic University, Budapest
[3] *Magyar Közlöny* 1989/77.
[4] *Magyar Közlöny* 1991/91. The "*Magyar Közlöny*" is the Hungarian (Official) Gazette.

> No sales, organization and mediation activity may be pursued in Hungary in connection with gambling activities organized abroad, or advertising or sales promotion activities connected to foreign gambling activities. The advertiser, the advertisement provider, as well as the publisher of the advertisement will be responsible for the violation of the prohibition of advertising activity

Secondly, section 6(5) of Act LVIII of 1997 on Business Advertising Activity[5] which provides: "It is forbidden to publish any advertisement related to gambling or promotional contests of chance organized abroad." The petitioners claimed that they were not compatible with the provisions of the EC Treaty concerning the freedom of services due to the following reasons:

The statutory provisions were unconstitutional because – due to their non-compliance with Article 49 EC – they caused an uncertain legal situation, thereby violating the principle of due process of law – part of the concept of a state under the rule of law – as declared in Article 2(1) of the Constitution[6] as well as Article 2/A(1) of the Constitution, the European integration clause, from which followed the obligation to comply with the EC Treaty.[7]

In order to prove that their case was regulated by Article 49 EC (since gambling is a service),[8] they referred to the gambling case law of the Court of Justice.[9]

2. Reasoning of the Decision

Relying to its own case law, the Constitutional Court stated that the unconstitutional failure to legislate arose only if two conditions were fulfilled at the same time: (i) there was a legal obligation to legislate; and (ii) the failure to do so created an unconstitutional situation.

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[5] *Magyar Közlöny* 1997/59/I.

[6] Article 2(1): "The Republic of Hungary is an independent, democratic state under the rule of law."

[7] Article 2/A(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."

[8] The present commentator notes that on 4 April 2006, the European Commission decided to send official requests for information on national legislation restricting the supply of sport betting services to seven Member States (Denmark, Finland, Germany, Hungary, Italy, the Netherlands and Sweden). The Commission wished to verify whether the measures in question were compatible with Article 49 EC.
The Commission decision to inquire into the compatibility of the measures in question was based on complaints made by a number of service providers and on information gathered by the Commission Services. The complaints concern restrictions on the provision of sports betting services, including the requirement for a State concession or licence (even where a provider is lawfully licensed in another Member State). In some cases, restrictions also extend to the promotion or advertising of the services and to the participation of nationals in the Member State in question in the games: IP/06/436 Brussels, 4 April 2006 http://www.europa.eu/rapid/pressRealeasesAction.do?reference=IP/06/436&format=HTML&aged=0&language=EN&guiLanguage=en (accessed on 22 August 2006).

[9] Case C-243/01 *Gambelli* [2003] ECR I-13031; Case C-67/98 *Questore di Verona v. Diego Zenatti* [1999] ECR I-7289; Case C-124/97 *Markku Juhani Läärä v. Kihlakunnansyyttäjä (Jyväskylä), Suomen Valtio* [1999] ECR I-6067; Case C-275/92 *H.M. Customs & Excise v. Schindler* [1994] ECR I-1039.

One type of the unconstitutional failure to act was when the content of the legislation was inappropriate, and this therefore resulted in an unconstitutional situation.

The Court first examined if, on the basis of the Articles of the Constitution to which the petitioners referred, the legal obligation to legislate had been determined.

The principle of legal certainty which was included in the principle of the rule of law mentioned in Article 2(1) required that the entirety of the law was clear, precise, and predictable in its functioning. However, according to the well-established case law of the Constitutional Court, conflicting regulation of the same situation did not necessarily create unconstitutionality. This only happened if the conflicting regulation breached one or more provisions of the Constitution, for example if one of the rules in question were discriminatory, or was in breach of one of the fundamental rights. Because the petitioners did not indicate any other provision of the Constitution, on the basis solely of Articles 2(1) and 2/A(1) neither of which contained any concrete legal obligation to legislate.

As far as Article 2/A(1) was concerned, it determines only the conditions and framework of the Hungarian membership of the European Union and the place of Community law in the system of Hungarian sources of law (and did not involve any concrete obligation on the part of the legislature).

The Court *obiter dictum* observed, that "in spite of their treaty origin, [the Constitutional Court] does not want to consider the founding treaties and their amending treaties as international treaties."

3. Concurring opinion of Judge Rapporteur Kovács

In his concurring opinion Judge Rapporteur Kovács[10] made explicit one of the major questions of the case: the Constitutional Court had to decide the legal basis of its control of constitutionality related to European (Community) law matters. Failing to modify the Act on Constitutional Court after the accession of Hungary to the European Union, there were two Articles of the Constitution which could be considered: first, Article 7(1) provides that "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 obligation assumed under international law"; and secondly, Article 2/A which provides for the common exercise of competences of the Republic of Hungary in the framework of the European Union.
Neither the Hungarian Constitution, nor the Constitutional Court Act give a sufficiently clear indication on this.

He stated that "in spite of the treaty origin, the norms of the European (Community) law [he did not differentiate between primary and secondary law in this regard] are much more closer to domestic law than to international law. This is obvious when one considers their enforcement via primacy and direct applicability".

[10] Judge Bagi joined in the concurring opinion.

Kovács tried to influence the Court in the highly sensitive issue of how national constitutional courts act as guardians of their national constitutions vis-à-vis Community law.

He referred to the long story of the respect of fundamental rights in the Community law, ending with the establishment of a Charter of Fundamental Rights, underlining the role of the Court of Justice, mentioning the German Constitutional Court and the French *Conseil constitutionnel* as points of reference. He was suggesting that the Hungarian Constitutional Court should, by way of self restraint, opt for a very limited area where it would in principle retain the possibility of exercising its constitutional review power over EC law.

Lastly, he proposed a different argumentation for the dismissal of the present petition based on the *sui generis* nature of the EC Treaty, several provisions of which have direct effect. Since the authentic interpretation of EC law fell within the competence of the Court of Justice, the Hungarian Constitutional Court might examine the alleged breach by the (Hungarian) legislature of an obligation under the primary or secondary (Community) law only in case of a direct threat to constitutional rights. If the Constitutional Court were to go beyond this point, it would go beyond "its natural power."

4. Dissenting opinion of the Judge Bihari, President of the Constitutional Court

The President of the Hungarian Constitutional Court disagreed with the reasoning of the Court and its Judge Rapporteur.

In his view, the real substance of the petition was not the declaration of an unconstitutional failure to act by Parliament. The petition requested the declaration of the non-compliance of the legal provisions in question with the EC Treaty which was, according to Bihari, "an international treaty."

Under section 44 of the Constitutional Court Act, the Court examines rules of law for conflicts with international treaties *ex officio* or upon the petition of the organs or persons specified in section 21(3). In addition, under section 45(1), if the Constitutional Court establishes that a rule of law or other legal means of state administration at the same or lower level than the rule of law promulgating the international treaty conflicts with the international treaty, it annuls in whole or in part the rule of law contrary to the international treaty.

Since the petitioners were not allowed to commence this type of proceeding before the Constitutional Court under section 21(3) of the Constitutional Court Act,[11] the substance of the petition to the Court infringed the law. (The Court infringed the law because it examined the substance of the case albeit it had no competence to do so.)

[11] According to this subsection, the following have the right to commence such proceedings:
a) Parliament, its standing committees or any Member of Parliament;
b) the President of the Republic;
c) the Government or its members;
d) the Chairperson of the State Audit Office;
e) the Chairperson of the Supreme Court;
f) the Prosecutor General.

5. Comment

The hierarchy of norms, the primacy of Community law
5. 1. Review control of international treaties

The petition did not exclude the interpretation given by Judge Bihari, who took the view that the EC Treaty was an international treaty, so the express "abstract control of international treaties" competence of the Constitutional Court under sections 44-45 had to be considered. (In fact, the petitioners had requested this type of review in the alternative).

This competence is based on Article 7(1) of the Constitution, and the concept behind it is the supremacy of international treaties over national legislation (but not the Constitution).

In such way the President of the Constitutional Court refused the constitutionalisation of Hungarian EU membership via Article 2/A (and the Accession Treaty).

This legal construction seems to be sufficient to eliminate the conflicting national legislation from the domestic legal order on a petition or *ex officio* under Article 21(7)[12] or, in terms of European law, the supremacy of the Community law over the national legislation (but not over the Constitution). It is, however, questionable whether sections 44-45 give an adequate legal basis for the supremacy of the secondary Community law over national statutes.

For private petitioners the bad news is that they are not allowed to petition the Constitutional Court.

From the Court of Justice perspective, this solution is not completely satisfying for two reasons.

(1) Under Articles 226-228 EC, the Court of Justice has competence to declare that a Member State has infringed its obligation under the Treaty. Most frequently, the breach of Community law can be attributed to the conflicting Member States' legislation or their failure to act.

Conflict must be avoided between the decision of the Court of Justice and the national (constitutional) court's decision annulling the provision of national legislation. In the spirit of Community law, the solution would for the national court making the final decision to make a reference under Article 234(3) EC. (Another solution *de lege ferenda* would be to deprive the Constitutional Court of this competence concerning Community law.)

(2) The absolute supremacy of the Constitution might impede the supremacy of the Community law over national laws. The other danger can arise when the ordinary national courts become reluctant to set aside national law contrary to Community law without having requested or awaited the prior setting aside of such provision by legislative or other constitutional means.[13]

[12] The same competence exists in Italy: Corte cost. 20 marzo 1995, n. 94: *Giur. cost.* 1995, 788.
[13] Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629, paragraph 24.

The Constitutional Court did not share the view of its President, and clearly stated that it did not regard the EC Treaty "in action" as international treaty.

That is why it did not examine the case as a question of international treaty obligations but rather as a question of constitutionality.

5. 2. Control of constitutionality – from an (almost) European lawyer's perspective

The Judge Rapporteur suggested that in spite of their international treaty origin, European (Community) law (Kovács did not make any difference between EC law and EU law) is "closer to domestic law than to international law". In his view, secondary Community law is of the same legal nature as primary law.

Starting from this relatively fragile thesis, Kovács he explain the *sui generis* nature of the European (Community) law relative to the national legal orders, the principles of primacy and direct effect are mentioned. He also argued that the control of constitutionality must be very limited in both directions.

When the question of (un)constitutionality of Community legislation arises – referring to the relatively new co-operative approach of the German Constitutional Court and the French *Conseil constitutionnel* – the Hungarian Constitutional Court must constrain itself to a narrow area in which it maintains (in principle) the possibility of the exercise of its competence. The concurring opinion does not make any concrete proposal on the substance of this narrow area, it only asks the Court to decide openly and based on principles in this question.

As far as the question of the protection of European (Community) law vis-à-vis national law, he basically suggested to the Hungarian Constitutional Court to accept the authority of the Court of Justice, and exercise its competence only in cases when the conflicting Hungarian legislation caused a "direct danger" to constitutional (fundamental) rights.

In so far as the intensity of the review control was concerned, he also tried to limit the Court's jurisdiction to cases where fundamental rights were directly endangered. But he did not say anything about the level of protection of fundamental rights – one might only speculate that he was personally not against the acceptance of the level achieved by the Court of Justice.

We consider that this view is a relatively well-balanced one, having had due regard to the evolution of the control of constitutionality/international treaties in the Member States and which not left the Constitutional Court completely vulnerable to the absolute supremacy of the European (Community) law over national laws (implying the Constitution).

Preserving the competence of the Constitutional Court in protecting – albeit in a very limited area – constitutional rights, Kovács suggests placing European (Community) law under the Constitution, but at the same time he seems to accept that Community law "sets aside" the national constitutions, and substitutes with its own principles, guarantees etc.

5.3. Control of constitutionality – a constitutionalist perspective?

It is obvious from the Decision that the Court itself was not prepared to follow the Judge Rapporteur, and clarify its position concerning the relationship between European (Community) law and the national legal system, the very nature of the Community law and especially its role: it preferred to avoid (postpone) plain answers.

Relying on the misleading point of Kovács (that Community law is close to domestic law), the Constitutional Court handled the alleged conflict between the Community law and the national law just like the conflict between two pieces of domestic legislation.[14] (Fortunately for European lawyers, the Constitutional Court – at least when assimilating Community law to national law – did not do it by referring to the Hungarian statute promulgating the text of the founding and modifying treaties as part of the Accession Treaty into the Hungarian legal order.[15])

Consequently the basic principles of Community law (primacy, direct applicability, direct effect, the interpretative authority of the Court of Justice as mentioned in Judge Kovács' reasoning) did not have to be echoed in the Decision.

Positioning itself in the line of its previous case-law, it relied on the distinction between "formal" and "substantial" unconstitutionality.[16] The Court only examines "substantial" unconstitutionality and has made limited exceptions to this principle in cases expressly mentioned in the Constitution or statutes.

The test for a successful petition for the declaration of an omission to legislate: indication of the legal obligation (the legal obligation must be sufficiently clear for the content of the law to be made), and indicate, that the failure to act properly caused an unconstitutional situation – a "substantial unconstitutionality". (The Constitutional Court may require that the constitutional problem follows directly – without mediation of other legal rules – from the Constitution.)

In the present case, the "formal" conflict between the EC Treaty and the Hungarian statute was not enough to declare unconstitutionality. The legislator's failure to act was not in itself unconstitutional. The conflict of laws – even if it arose from the conflict between the EC Treaty and the national legislation – was also not in itself unconstitutional.[17] On these grounds, since the present petition did not reveal any "substantial" provision of the Constitution which would have been breached by two the challenged statutory provisions, the petition had to be dismissed.

At the end of another line of argument of the Constitutional Court arrives to the same conclusion: While Article 2/A of the Constitution did not contain any concrete obligation for

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[15] Act XXX of 2004 on promulgation of the Accession Treaty to the European Union: *Magyar* Közlöny 2004/60.
[16] *Decision 22/1990 (X.16) AB*; ABH 1990, 83, 86, *Decision 37/1992 (VI.10) AB*; ABH 1992 , 227, 232, *Decision 14/1996. (IV.24) AB*; ABH 1996, 56, 58-59, *Decision 479/E/1997 AB*; ABH 1998, 967, 968-969, *Decision 1080/D/1997 AB*; ABH 1998, 1045,1046, and *Decision 10/2001 (IV.12) AB.* ABH 2001, 123, 131.
[17] The Court referred to its former case law: *Decision 35/1991 (VI.20) AB*: ABH 1991, 175, 176.

the Hungarian legislature, the essential criterion of a failure to fulfil an obligation to legislate was missing, the unconstitutionality could not be established.
The Hungarian Constitutional Court did not accept the view that the compliance of the Hungarian legislation with EC law would be a "constitutional obligation."[18]

So the Court in a case like this proceeds as follows:
Supposing that the petition satisfies the requirement of an alleged conflict between the Community law because of failure to act (or act properly) and the domestic law, and also indicates a substantial alleged unconstitutional situation, the Court will first examine the existence of the conflict, then the existence of an unconstitutional situation. If the result in both cases is positive, the Constitutional Court will declare the domestic law unconstitutional and (under section 49 of the Constitutional Court Act) will instruct the organ which committed the omission, setting a deadline, to fulfil its task.

We can only suppose that the "*norme de contrôle de la loi*"[19] will be the EC Treaty, and the Hungarian Constitutional Court will not take the risk of contesting the constitutionality of the EC Treaty.

From the point of view of the Court of Justice, the first step – the establishment of the conflict the EC law and the domestic law – implies an interpretation of Community law, the final authority of which lies within its competence. As we have seen under point 5.1 above, with the exception of *acte clair*,[20] the question of preliminary ruling seems to be unavoidable.

There is no indication in the present Decision whether the Constitutional Court is prepared to turn to the European Court. It has been argued that the Hungarian Constitutional Court is not a "national court" for the purposes of Article 234 EC.[21]

Supposed that the both courts accept its competence, the following problem could arise: if the European Court decides that the Hungarian law breaches the Treaty, and the Hungarian Constitutional Court steps forward to examine the substantial constitutionality and finds no unconstitutionality, the Hungarian legislature and the law-enforcement authorities receive a somewhat contradictory sign. The statute is accordingly contrary to EC law (the legislator is obliged to correct it) but not unconstitutional (so at least from the Decision of the Constitutional Court there is nothing to do).

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[18] The French *Conseil constitutionnel*, in it Decision No. 2004-496 of 10 June 2004, declares: "7. Considering that according to the terms of Article 88-1 of the Constitution 'The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that that established them, to exercise some of their powers in common'; that, consequently, the implementation in domestic law of an EC directive results from a constitutional obligation…" For comments on this decision, see E. Sales, "La transposition des directives communautaires: une exigence de valeur constitutionnelle sous réserve de constitutionnalité" (2005) 41 RTDE 597; and J. Dutheil de la Rochère, "Case Note" CML Rev. 42 (2005), 859.
[19] Sales, *ibid*., at pp.599-600.
[20] See Case 283/81 *Srl CILFIT v. Ministry of Health* [1982] ECR 3415.
[21] L. Blutman, *Az előzetes döntéshozatal* (*The preliminary ruling*), KJK-KERSZÖV, Budapest, 2003, p. 233, point 6.7.3.2.

6. Conclusion

Decision 1053/E/2005 AB is an important step on the way towards clarification of the position of the Hungarian Constitutional Court's concerning the relationship between EC law and the national legal order, the primacy of the former over domestic law, and especially the Constitution.

Rejecting the express view of its President, it refused both to regard the EC Treaty as an international treaty, and to use its competence concerning elimination of conflict between international treaties and domestic law.

On the other hand, the Court – in not following its Judge Rapporteur's suggestion of a "Franco-German type" acceptance of primacy – did not draw any consequences from the *sui generis* nature of EC law. It tried to avoid (postpone) answering the hard questions; it handled the EC Treaty as domestic law and dismissed the petition alleging conflict between primary Community law and the domestic statutes on rather formal grounds.

The Decision has left open more questions than it has answered. As a result, it is difficult to foresee the future position of the Court, which at first sight now appears rather reluctant vis-à-vis the basic structural principles of the Community legal order.