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## The Legal Doctrine and Legal Policy Aspects of the EU-Accession

**Abstract.** The author deals with an important question of the Hungarian constitutional law, which question plays a relevant role during the accession process of a state of the European Union (EU). It means that the question of legal harmonization always arises, when a state is going to join the EU. The author focuses on the question, whether the international law—namely the law of the EU—or the national law should be privileged in given cases. The author introduces the possible conflicts between international law and domestic law with the help of several examples. The author refers to the numerous solutions of member-states of the EU and also mentions the situation of some would-be member-states, too. The author analyses the practice of the European Court, as well by underlining some important cases, inter alia, the famous case of Van Gend en Loos. The author highlights the point of view that the Community law precedes the constitutions of the member-states. As a result of this the Hungarian constitution has to be modified in order to meet the requirements of the legal harmonization process, which will emerge with the access of Hungary to the EU.

**Keywords:** constitutional law, constitution, EU-law, legal harmonization

### I. The problem: A conflict between international law and domestic law

#### 1. De lege lata relationship between international law and domestic law

1.1. In the first approach, the accession of Hungary to the European Union (EU) presupposes that the relationship between international law and domestic law is constitutionally settled.

In this respect, Hungary is not in an *advantageous* position. According to Para. 1 of Article 7 of the Constitution: “The legal system of the Republic of Hungary accepts the generally recognised principles of international law and shall harmonise the country’s domestic law with the obligations assumed under international law.” This article of the Constitution should be the governing one for the jurisdiction in case a *conflict* between domestic law and international law occurs, i.e., if international law, that is, an international agreement or inter-

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national customary law contains contradicting provisions to these of domestic law.

1.2. The emergence of this conflict has become more likely in a broader scope as a result of the process of integration of Hungary into international co-operation with higher intensity since the transition in 1990. Hungary as a member state of the international community and the UN, and a signatory state or a contracting party to several international conventions in human rights or international economic relations obviously shall not dispose of such free scope of legislation, as it used to before accession to these international treaties. Becoming a member state to these treaties also implies that Hungary *cannot create domestic law, which contradicts their content, whereas, with respect to effective domestic statutes, we are posed with the question concerning what way the lawmaker can resolve a potential conflict.*

*Some examples:* The accession of Hungary to two human rights treaties (the UN Charter and the European Convention on Human Rights) excludes the codification of capital punishment, while our accession to the WTO Convention excludes the possibility of the imposition of e.g. discriminative customs fees. Furthermore, since our accession to the Washington Convention on the protection of foreign investments, the codification of such important fields, which would not guarantee immediate, unconditional and just indemnification and due process of law, is inadmissible. So long as the Republic of Hungary codified domestic law that is contrary to the international treaty, Hungary would be adjudicated and obligated to correct domestic law, either by the Strasbourg Court, which is competent in the area of human rights, or by the proceeding panel of arbitrators in the scope of the Washington Convention, or by the competent dispute settlement council in the scope of the WTO. If Hungary failed to comply, its *liability* under international law for the breach of an international treaty would obtain and ultimately it would be faced with the option of the “uphold of its membership” in the respective international treaty or the withdrawal. The uphold of “domestic law” however that is contrary to international treaties is not tolerated on a long-term basis by the dispute settlement mechanism of the these treaties.

In the scope of the European Agreement, the European Community-Hungary Association Council was established between the European Community and the Republic of Hungary, furthermore, the implementation of the Agreement was transferred to its competence. Accordingly, the Council promotes the implementation of the Agreement gradually by adopting adequate decisions framed in legally binding government decrees.

1.3. The majority of international treaties, however, does not allow legal dispute settlement mechanisms: the requirement of the harmony between international law and domestic law, therefore, needs to be secured in general under domestic law, and in particular constitutionally, with respect to the fact that a fundamental problem of the functioning of the legal system arises. Therefore, the harmony needs to be guaranteed under the Constitution, since *Para. 1 of Article 2 of the Constitution binds the Hungarian organs of jurisdiction, that is, courts and other authorities, to enforce the Hungarian legal system*: (“The Republic of Hungary is an independent, democratic state under the rule of law.”). This principle and the deduced requirement of security in law, which prevails in the general practice of the Constitutional Court, positively imply the requirement above, disregarding the fact that the judges, government officials and civil servants, by taking an oath on the Constitution, take an oath that they shall comply with constitutional rules as well as assure that they are observed.

Therefore, an *exemption* from the constitutional liability to implement Hungarian domestic law also needs to be guaranteed under the Constitution itself and its instrument is that the Constitution positively and clearly takes a stand point concerning the relationship between international law and domestic law. *However, Para. 1 of Article 7 of the Constitution quoted above is not adequate to achieve this goal.*

1.4. Concerning the relationship of international law and domestic law, the following *three issues* shall be considered:

- the monist-dualist conceptions,
- a division between the technique of transformation/adoption codification, and in this context,
- the issue of the self-executing and non-self-executing character of international treaties.

The core of these well-known, fundamental issues of international law—on a simplified way—is as follows:<sup>1</sup>

a) According to the *dualist conception*, international law and domestic law are two separate legal systems in terms of substantive law. According to the *monist* conception they are not, therefore, international law as framed by several national legislators shall be applied by the domestic jurisdiction con-

<sup>1</sup> For a summary, see, Bodnár, L.: A nemzetközi jog jogrendszerbeli helyének alkotmányos szabályozásáról [On the Constitutional Regulation of the Placement of International Law in the Legal System]. In: *Alkotmány és jogtudomány [The Constitution and Legal Science]*, Acta Universitatis Szegediensis de Attila József Nominatae, Tomus XLVII, Fasciculus 1–18, Szeged, 1996, 22. and the following pages.

cerned, and so shall domestic law framed by the domestic lawmaker. According to the monist conception, the difference is merely formal: the former was made by several lawmakers, while the latter was made by a single one.<sup>2</sup>

b) The codification-technical consequences of the two conceptions, i.e., how international law becomes an integral part of domestic law, is deduced by the transformation-adoption model. According to the previous one, which echoes the dualist conception, separate domestic legislation, incorporation is deemed as necessary following the ratification, while according to the latter one, which “reflects” the monist conception, such incorporation procedure is unnecessary, since international treaties are incorporated into domestic law on their ratification and promulgation.

c) Finally, the conception, which attributes *self-executing character* to international treaties, is consistent with the monist-adoption conception. Accordingly, international treaties are to be implemented directly by the national courts and no separate rule of implementation is necessary to be enacted.

In the modern *globalising world economy and world politics*, with respect to the contemporary intensity of international relations and the increasing significance of regional integration, it is the *monist-adoption, self-executing model*, which can be considered as up-to-date. The problem, however, is that Para. 1 of Article 7 of the Hungarian Constitution quoted above shall not support either of these conceptions, since this provision is not positive, but *ambiguous*,<sup>3</sup> meaningless and eclectic.<sup>4</sup>

1.5. It is no wonder that *the Constitutional Court*, when it applied Para. 1 of Article 7, encountered significant difficulties.

1.5.1. *AB Decision of 53/1993 (X.13.)* (ABH 1993. 327) *postulated or more correctly, “interpreted” a tripartite hierarchy in the Constitution, which is unjustified or unformulated* under Para. 1 of Article 7. Accordingly, the Constitution dominates the hierarchy, and international law is subordinated to it, whereas domestic law prevails at the bottom, neither of which may not contradict the levels above.

<sup>2</sup> Vörös, I.: Az Európai Megállapodás alkalmazása a magyar jogrendszerben [The Implementation of the European Treaty in the Hungarian Legal System], *Jogtudományi Közlöny*, 1997, no. 5., 229–239.

<sup>3</sup> Bragyova, A.: Igazságtétel és nemzetközi jog [Retroactive Justice and International Law], Glossza az Alkotmánybíróság határozatához [Commentary on the Decision of the Constitutional Court], in: *Állam- és Jogtudomány*, 1993. nos. 34, 217–218., 220.

<sup>4</sup> Bodnár: *op. cit.*, 21–22.

Besides, the decision adopted the conception of German constitutional legal science and the idea of the German Federal Constitutional Court concerning Article 25 of the *Grundgesetz*,<sup>5</sup> according to which the necessary transformation has already been implemented in principle and in general as pursuant to Para. 1 of Article 7 of the Constitution with an effect to the future, therefore, no separate transformation is necessary.

The attempt for the “*introduction*” of the monist conception however, against the best intentions, was a failure. Since the Hungarian Constitutional Court, either as a result of its incompetence or simply of its insensitivity, disregarded a fact, which was also misconstrued by the “constructors” of the revised Constitution in 1989, namely, that Article 25 of the *Grundgesetz* pertained exclusively to international customary law, i.e., the general principles of international law, whereas a separate article, i.e., Article 59 based on the dualist-transformation model pertained to the international law of treaties.<sup>6</sup> Para. 1 of Article 7, which was definitely framed under the influence of the *Grundgesetz*, testifies both an awareness of Article 25 of the *Grundgesetz* and the fact that the legislators were not aware of the existence of Article 59.

Consequently, it is understandable that Para. 1 of Article 7 of the Hungarian Constitution specifies as a constitutional requirement merely the harmony of international customary law and domestic law, whereas, it does not take a stand on a harmony with international treaty law. Furthermore, it neglects the clarification of the hierarchical relationship between international law and domestic law.

The requirement of “*harmony*” in itself is both meaningless and ambiguous, since it can imply both

— the necessity to adjust domestic law to international law, and also its contrary:

— that international law is hierarchically subordinated to domestic law. This interpretation obviously excludes any participation in international relations, since in case of conflict, domestic statutes would have priority in jurisdiction. The mere possibility of such interpretation should be categorically excluded under the text of the Constitution itself.

1.5.2. The defective provision in the Constitution “transplanted” incompletely from the *Grundgesetz*, consequently, did not facilitate that the Constitutional Court, while it was framing AB Decision of 53/1993 (X. 13), which is other-

<sup>5</sup> Hesse, K.: *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 16th edition, 1988, n. 103; BVerfGE 15, 25 (34).

<sup>6</sup> *Grundgesetz. Kommentar.* (hrsg.: von Horst Dreier), Mohr, Siebeck, 1998. Bd. 2, 1118, and the following pages. Hesse, K.: *op. cit.*, 101–104.

wise loaded with *a number of mistakes and technical deficiencies* of international law, clarified the relationship between international law and domestic law in a reassuring manner.<sup>7</sup> Hungarian special literature on international law has exposed the statements of the decision concerning international law to strong criticism (e.g. *the original English technical term of adoption was misconstrued and translated as „adaptation“*),<sup>8</sup> and reached the conclusion that „the Constitutional Court ... drafted the decision irrespective of the doctrinal grounds of international law.”<sup>9</sup>

Nevertheless, it can be definitely inferred on the grounds of the positive analysis of the Hungarian legal system,<sup>10</sup> (not on the grounds of the analysis of the Constitution) i.e., of the provisions of *Act XXXII of 1989 (Abtv) on the Constitutional Court* concerning competence and procedural law. One has to take into consideration especially its Point c) of Article 1, Para. 3 of Article 21 and Articles 44–46 that the Hungarian legal system is constituted on the basis of the dualist conception, the transformation technique and on the recognition of the non-self-executing character of international treaties.

The “settlement” of the issue in such a ruling is, of course, an absurdity in constitutional law.

1.5.3. The Constitutional Court in its *AB Decision of 4/1977 (I. 22.)* (ABH 1997. 41.) reaffirmed its former standpoint and corrected some of its mistakes, which, however, did not modify the fact that the body in itself as a “legislator” did not manage to readjust the Hungarian legal system from the dualist-transformation, non-self-executing model to the monist-adoption, self-executing model.<sup>11</sup>

1.5.4. To sum it up, we can assert that the Hungarian Constitution does not contain a judicially governing provision either on the status of international law in the hierarchy of the sources of law, or on the admissibility or constitutionality of the direct application of the norms of international law by the Hungarian courts.

<sup>7</sup> Bragyova: *op. cit.*, 218.

<sup>8</sup> Bragyova: *op. cit.*, 218.

<sup>9</sup> Bodnár: *op. cit.*, 22.

<sup>10</sup> Vörös: *Az Európai Megállapodás... op. cit.*, see, especially, the explications in part IV.

<sup>11</sup> See, my dissenting opinion attached to the decision (ABH 1997, 53–54.); see also, Vörös, I.: *Dixi et salvavi, Különvélemények, párhuzamos indokolások (Dissenting Opinions and Parallel Motivations)*, Budapest, 2000, 107.

## 2. *Some foreign examples:*

This is not the case in a number of foreign legal systems. Article 28 of the Greek Constitution and Article 15 of the Russian Constitution positively sets forth

- the priority of international law versus domestic law and
- the doctrine of the obligation that national courts and other authorities directly enforced international law. Surprising as it may seem, Article 122 of the Albanian Constitution also contains a very high-standard provision.<sup>12</sup>

In the Czech Republic, the Constitution was amended on 18 October, 2001 expressly in the framework of the preparation for the EU-Accession. In that framework, the relationship between international law and domestic law was also settled. Article 10 of the Constitution accordingly specifies: “Those promulgated international treaties, the ratification of which the parliament consented to and which bind the Czech Republic, shall be part of its legal system. If such an international treaty provides otherwise than domestic law, the provisions of the international treaty shall be applied.”

## II. Legal doctrinal bases

### 1. *Three fundamental problems:*

The clarification of the legal doctrinal bases necessitates the analysis of three legal doctrinal issues:

- the relationship between international law and domestic law,
- the transfer of sovereign rights, and as a special sub-category of this second scope of issues,
- the problem of the potential transfer of sovereign rights specifically to the EU.

1.1. The unsettled character of the relationship between international law and domestic law

a) Since the relationship between international law and domestic law in the Hungarian Constitution can be construed as an open question, *the relationship between the Hungarian legal system and the law of the European Community is also unsettled.*

b) That is not a simple issue even in the relationship between the legal system of the member states and Community law, since both the Italian<sup>13</sup>

<sup>12</sup> Czuczai, J.: The Legal Alignment Process with the Constantly Evolving Constitutional acquis of the EU in Central and Eastern Europe, *Európa*, 2002, 1 March 2001. no. 1., 3. sqq.

and the German Constitutional Courts<sup>14</sup> have expressed their reservations concerning the absolute interpretation of the priority of Community law, according to which the latter prevails over not only a significant part of constitutional rules and other domestic statutes, but also over the national-member state constitutions.

In its *Frontini-Decision*, the Italian Constitutional Court set forth the limits of the doctrine of the priority of Community law (the issue of which we revert to later) as laid down and proclaimed by the European Court of Justice, which emphasised that although Community law could actually overrule the Italian Constitution, however, it shall certainly not overrule either inalienable rights guaranteed to persons under the Constitution or the fundamental principles as pursuant to the Constitution. Although, Article 11 of the Italian Constitution provides for the admissibility of the transfer and, consequently, the limitation of sovereignty, nevertheless, the fundamental principles and rights above are the “counter-balances” and “*controlimiti*” of this constitutionally guaranteed option. In its *Fragd-Decision* of April 21st of 1989, the Constitutional Court reserved the right to review the issue whether the respective regulations of Community law and the articles of the Italian Constitution concerning the protection of human rights are in accordance.<sup>15</sup>

The German Federal Constitutional Court equally held that *Community law shall not have absolute priority* over the protection of fundamental rights as guaranteed under the German *Grundgesetz*, until Community law provides similar protection: the constitutionality of Community law in this respect shall be constitutionally measured against the norms of the *Grundgesetz*.

c) These statements, according to the interpretation of *de Witte*, imply that *the thesis of the relative priority of Community law prevails* concerning the

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<sup>13</sup> On the priority of Community law, see, Várnay, E.—Papp, M.: *Az Európai Unió joga (The Law of the European Union)*, Budapest, 2002. 235, and the following pages. On the decisions of the Italian Constitutional Court, see, de Witte, B.: *Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries?* In: *EU Enlargement. The Constitutional Impact at EU and National Level* (ed.: A. Kellermann, J. W. de Zwaan, J. Czuczai), The Hague, 2001. 74. sqq.

<sup>14</sup> The Maastricht-Judgement, BVerfGE 89, 155, The “Solange”-Judgements, e.g., BVerfGE 73, 339, the argumentation of which was recently affirmed by the Federal Constitutional Court in its ruling of 7 June 2000, BVerfG, 2 BvL 1/97, *Europäisches Zeitschrift für Wirtschaftsrecht*, 2000. 702.

<sup>15</sup> Gaja, G.: *New Developments in a Continuing Story: The Relationship between EEC Law and Italian Law*, *Common Market Law Revue*, 1990. 83.



relationship between the constitutions of the member states and Community law, thereby, they refute the doctrine of absolute priority.<sup>16</sup>

d) The relevance of the problem is adequately demonstrated by the *confusion*, which occurred when *the Hungarian Constitutional Court* dealt with the motion related to the unconstitutionality of *Article 62 of the European Agreement on the Establishment of an Association between the Republic of Hungary and the European Communities and their Member States* ratified under Act I of 1994. In my print of view, the Constitutional Court does not have competence to deal with the subsequent norm control of an international treaty even if it was ratified in compliance with the transformation conception,<sup>17</sup> since the constitutionality of an international treaty can only and exclusively be examined in the scope of a *preliminary* norm control (Point a) of Article 1 of Abtv.).

da) The Constitutional Court disregarded this minor “triviality” of procedural law, examined the motion on its merits and in its *AB Decision of 30/1998 (VI. 25)* (ABH 1998, 220.) it arrived at the conclusion that Para. 2 of Article 62 of the European Agreement, which specified competition law prohibitions, is not expressly unconstitutional, nevertheless, the Court stipulated constitutional criteria for its implementation.<sup>18</sup> According to the decision, the constitutional criterion is that Hungarian courts and judges authorities may not directly implement the application criteria as pursuant to Para. 2 of Article 62, which refer to and are contained in Community law.

Whereas, the Constitutional Court held that two provisions of the European Community-Hungary Association Council included in the Supplement of Government Decree no. 2320/1996 (XII. 26.) are *unconstitutional* and thereby annulled them, whereas, they were purported to implement the provisions of Article 62.

db) The decision (ABH 1998, 226–227), which was adopted not only in the absence of competence and sufficient knowledge of European law and *in several technical respects wrongly, contested the immediate effect and direct applicability of Article 62 of the European Agreement*, while it misinterpreted the content of the second notion above as established in the science of

<sup>16</sup> de Witte: *ibid.*

<sup>17</sup> See, note 11.

<sup>18</sup> The Constitutional Court is not competent to determine the “constitutional criteria”, since no Hungarian statute authorises it to apply such legal consequences. The body applies this legal consequence prescribed by itself *contra legem*, and what is an even graver mistake, *contra constitutionem*. See, Dissenting Opinion of Constitutional Court Justice, Vörös, I.: *Dixi et salvavi* (note 11.) 71, 92, 110.

international law.<sup>19</sup> Relying on that, the decision in a self-contradicting manner concluded that in commercial relations between the member states and Hungary respective *Hungarian law*, i.e., Competition Act (No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices) shall be applicable with respect to the criteria specified under Community law.

The standpoint above is *defective* on the grounds that if there are international elements in relations of civil law, family law or labour law, *the rules on international collision of private law* prevail, since these norms define which law should be applied.<sup>20</sup> Article 62 shows familiarity primarily with civil law, since it pertains to the market conduct and competition conduct of companies—competition restrictions or abuse of economic superiority. In view of the fact that it is a competition law rule, those rules, which fundamentally bear the character of private law obtain *together* with those norms, which bear the character of public law and codify state intervention. Hence, such scope of legal norms as a typical instance of omnibus law shall not fall either under “private law” or “public law”, but they are part of business law, which combines the elements of both branches of law.

At the end of the 20th century, we cannot set out from *a conception of the dualism of “public law” and “private law”*, unless we admit our legal technical ignorance, and especially, we cannot base a constitutional court decision on that doctrine. As it is known, the dualism based on this structure disintegrated in the second half of the 19th century.<sup>21</sup>

The Decision of the Constitutional Court, framed in the absence of the knowledge of the content and legal relevance of the *interstate commerce clause*, is misconstrued not only with respect to the fact that in such cases it is Hungarian law that shall be applied, but also when *it considers competition law as part of “public law”* (ABH 1998, 230): the application of Article 62 „shall incur that relations under public law are effective”. By accumulating these misconceptions, the Constitutional Court concluded that since the criteria

<sup>19</sup> According to my view, Article 62 has direct effect and needs to be implemented directly. See, Vörös, I.: *Az Európai Megállapodás... op. cit.* Point 3.3., Part IV.

<sup>20</sup> Burián, L.—Kecskés, L.—Vörös, I.: *Magyar nemzetközi kollíziós magánjog [Hungarian International Collision Private Law]*, 4th edition, Budapest, 2001, 70–75.

<sup>21</sup> Rittner, F.: *Wirtschaftsrecht*, 2nd edition, 1987, 10–23., Eörsi, Gy.: *Jog—gazdaság—jogrendszer-tagozódás [Law, Economy, the Structure of the Legal System]*, Budapest, 1977. 65., 73., 79., 110. Here, Eörsi develops the arguments adduced in his previous work: *Összehasonlító polgári jog [Comparative Civil Law]*, Budapest, 1975, 85, and the following pages, and Chapter VI., on the basis of the conclusions drawn from the law of Western market economies, at the same time, challenges the relations of planned economy.

under Community law entail the mandatory application of criteria pertaining to relations under public law by the Hungarian jurisdiction, and that is exactly what the rule of implementation provides for. Consequently, the rule *violates the constitutional requirement that a democratic state under the rule of law* (Para. 1 of Art. 2) prevails, and therefore, it is unconstitutional. According to the Constitutional Court, the violation consists in the fact that these criteria *are not promulgated* under a domestic statute (ABH 1998, 233).

dc) The complicated nature and the intricate technical legal difficulties of the argument reveals that the Constitutional Court—with its reference to 53/1993 (X. 13.) ABH and 4/1997 (I. 22) ABH—made a renewed attempt without avail to clarify the relationship between domestic law and international law. The case could have exposed a specifically problematic aspect of the relationship between Community law and domestic law (n.b. not the domestic law of a member state), if the Decision of the Constitutional Court had recognised it at all.

dd) The solution reached finally, i.e., the enumeration of the sources of Community law that contain the Community law criteria to be applied under Act X of 2002, is in accordance with a casual phrase of the decision (... “without the respective criteria following from ... a domestic source of law”). This phrase, however, *contradicts the overall purpose of the decision*, since, if the application of foreign law in relations under “public law” is inadmissible as pursuant Para. 1 of Article 2 of the Constitution, then this, in principle, is inadmissible even if these criteria are specified under a separate statute. Namely, *the Constitution does not contain a provision, which stipulates the conditions of the transfer of sovereign rights*. Therefore, the transfer of sovereign rights or of the exercise of powers, which in the present case hides in the background of the issue of the domestic application of statutes adopted by foreign legislation, *is deemed as inadmissible*.

The doctrine that Hungary shall be a democratic state under the rule of law as pursuant to Para. 1 of Article 2 does not entail that if the criteria of the application of foreign “public law” is proclaimed under a domestic statute (ABH 1998, 223), then the application of a foreign “public law” rule is constitutional, since this provision *does not constitute* such possibility for exemption or an exception. Para. 1 of Article 2 is a categorical requirement, which allows no exception, therefore *it cannot substantiate* the reference by the Constitutional Court to domestic promulgation in order to qualify the application of foreign “public law” as constitutional.

As a result of this, Act X of 2002 on the grounds of 30/1998 (VI.25) ABH would probably fail to pass the test of constitutionality.

de) Law-Decree Act 13 of 1979 on international private law would also fail to pass such a test, since the argument the decision follows fails to offer an explanation why a constitutionally *bianco* authorisation for the application of a constantly changing foreign legal system can be granted under the norms of “private law”. This is not substantiated or expounded either sufficiently or doctrinally in view of the fact that here “public law” norms and legal relations with ambiguous content and legal constitution are constructed in an isolated manner, detached from the legal system.

df) The *basic problem* is not if the European Agreement pertains to “public law” relations and norms, but whether that international agreement has *priority* over domestic law or not. The decision *does not adequately respond* to the expressly *specific* question in terms of Community law.

#### 1.2. The unsettled character of the transfer of sovereign rights

a) As the argument of 30/1998 (XI. 25.) ABH also pointed out, *a further doctrinal problem lies in the background*. The decision admits that the problem delineates in that direction so far as the limitation of sovereignty, transfer of sovereign rights and of exercise of powers are concerned (ABH 1998, 232), however, it deals with these aspects only in the general context of an “independent, democratic state under the rule of law”. We have to admit that it cannot do otherwise, since the Constitution *does not take a stand point* concerning the transfer of sovereign rights to an international organisation, either.

b) The *content-based* aspect as simplified is that the prerequisite of *international co-operation is the establishment of an open state*, which, however, in a given case facilitates the limitation or transfer of sovereignty. The openness that is indispensable in times of economic and political globalisation positively entails that *norms prescribed by a transnational organisation may enter the Hungarian legal system, which are not necessarily substantiated by Paras. 1 and 2 of Article 2 of the Constitution. Therefore the sovereignty of the Hungarian people will not legitimise them*.

The modern conception of sovereignty, which designates *the people as the depositary of sovereignty*, may make easing to solve the doctrinal problem. The conception of the state as opened by the constitutions in the direction of international co-operation, which is adequately determined as “*kooperativer Verfassungsstaat*” by *Haberle*,<sup>22</sup> as a matter of fact resolves the problem of the democratic “deficit” related to the transfer of sovereign rights, since in such cases it is the constitution of the respective state, which frames the conditions of the transfer and of constitutionality.

<sup>22</sup> Häberle, P.: Kooperativer Verfassungsstaat, in: *Verfassung als öffentlicher Prozess*, 2nd edition, 1996, 407.

c) The *formal* requirement following from the conception of the sovereignty of the people is that it is exclusively the people that can transfer sovereign rights, therefore, the transfer shall be prescribed in the scope of an act by the institution of the representation of the people.

According to that conception, it is the people that *constitutes the international (interstate) organisation* and also endows it with *adequate competence* to comply with its obligations according to the discretion of the representation of the people. When applicable, the transfer will impair the scope of sovereign rights of the representation of the people, while that scope of the international (interstate) organisation shall be constituted, or it increases under a subsequent amendment of an agreement. This, as long as the consequences are concerned, may modify *the constitutional status of the citizens of the respective state*, hence, its settlement is inevitable under an act.

1.3. A special instance of the transfer of sovereign rights: the transfer of sovereign rights to the European Union

The transfer of sovereign rights to the EU construed as the content and the essential element of the accession process *cannot be identified* with the general transfer of sovereign rights to an international organisation. The EU postulates the sovereignty of the member states, since it is not a federation of states and as a consequence of its constantly evolving, developing structure, its framework cannot be determined with legal exactness even on a short-term run. The European Union is constituted on the European peoples, not on an abstracted notion of a single, non-existent people, in which the sovereign rights derive from *the peoples of the member states with the mediation of the member states: the EU develops on an intergovernmental basis*.<sup>23</sup> The legal definition of Europe, which forms the European Union, is a difficult task even for German legal science reputed for its conceptual thought, its *Begriffshimmel*.<sup>24</sup>

As a consequence of the uncertainty of the conceptual definition, the doctrinal challenge is the issue of *the priority of Community law*, which *challenges* the rights of the member states and has been a *conditio sine qua non* of the European Community, which today is the EU. As we noted, (II.1.1.b), the problem is highlighted in the relationship to the Constitutions. The problem can be approached via the doctrine of absolute priority in legal relations and legal branches, however, in the area of the relation to the

<sup>23</sup> Rittner, F.: Az Európai Unió útja a szövetségi állam felé (The Progress of the European Union in the Direction of a Federal State), *Jogtudományi Közöny* (1995) no. 6., 286.

<sup>24</sup> Häberle, P.: Európa mint formálódó alkotmányos közösség (Europe as a Constitutional Community in the Process of Formation), *Jogtudományi Közöny* (2001) no. 10, 432.

constitutions, the priority has been relativised in the legal practice of the Constitutional Courts. In this context, i.e., *in a segment of the relations under constitutional law*, in which the determinant, the “strong core” is the protection of fundamental rights by the constitutions of the member states, the doctrine of the absolute priority does not obtain.

With respect to these, the transfer of sovereign rights to *an interstate organisation, which is vaguely qualified and outlined under international law* and vindicates, by all means, absolute or relative a priority for its *constantly evolving* legal system, can be posited as *a special doctrinal issue*.

The specific explication of that problem as *a third issue* distinct from the previous two ones is deemed as inevitable.

### III. Legal political basis

From the analyses above, around *the three issues dealt* further legal political consequences emerge, and consequently, the following constitutional problems arise.

#### 1. *On the relationship of international law and domestic jurisdiction*

1.1. The lawmaker needs to make a positive legal political decision concerning that on the grounds of which conception the Hungarian legal system “shall be arranged”. In our view, with respect to doctrinal considerations, it cannot be doubted that Hungarian law in the future should follow a scheme, which is based on the *monist conception* with the application of the *adoption-codification technique* and the recognition of the *self-executing character* of international treaties.

1.2. Which necessitates that *the Constitution, instead of the present Para. 1 of Article 7, prescribes* that

- the ratified and promulgated international treaties shall be part of the Hungarian legal system,
- in the event of a collision between these international conventions and domestic Hungarian statutes, the provisions of international treaties shall prevail. In such cases, in case doubt is arisen, the court and other authorities shall enforce the international treaty, which implies that the jurisdiction is entitled to take a decision whether a harmony between all other statutes, except for the Constitution, and the respective international treaty prevails,

— the international treaty incurs a direct obligation for the jurisdiction, which implies that the adoption of a further rule of implementation shall not be necessary.

1.3. The amendment of the Constitution shall obviously not supersede the streamlining of the law on international treaties, since the currently effective Act XXVII of 1982 is completely out-of-date and inapplicable.

1.4. Without the amendment of the Constitution and framing a new statute on international treaties, not only the relationship between international law and domestic law remains unsettled, but we can't take a reassuring stand on the issue of domestic law and Community law in a reassuring manner, either. The two issues are closely related. The issue of the relationship to Community law is preceded by urgency of the constitutional settlement of transfer of sovereign rights with respect to the fact that in that relationship on the one hand the issue of the transfer of sovereign rights, on the other hand, the issue of the priority of Community law are inseparably intertwined.

## 2. *The transfer of sovereign rights to an international, interstate organisation*

2.1. The Hungarian constitution does not take an stand on the transfer of sovereign rights.

a) Para. 2 of Article 6 prescribes the endeavour to co-operate with all people and states of the world, which obviously does not entail that in a given case *any* kind of transfer of sovereign rights and exercise of powers is not unconstitutional with special respect to Para. 1 of Article 2 of the Constitution. The constitutional fate of Article 62 of the European Agreement and the concerning decision passed by the Constitutional Court analysed above is sufficiently indicative. Para. 1 of Article 2 shall have to be supplemented by a provision in the Constitution, which—under certain circumstances—exceptionally facilitates the transfer of sovereign rights and of exercise of powers.

b) The participation of the Republic of Hungary in an international co-operation and international organisations (e.g. NATO) is *de lege lata vaguely* substantiated constitutionally. It is not accidental that e.g. the German *Grundgesetz* addresses the problem in a separate article (Article 24), and so do the French (Article 15 of the Preamble), the Italian (Article 11), the Norwegian (Article 93) and the Spanish constitutions (Article 93). These articles are incorporated into these constitutions irrespectively of separate provisions concerning international treaties. The reason for this duality is that the conclusion of an international treaty does not necessarily incur either the transfer of sovereign rights and of exercise of powers, or the limitation of sovereignty.

c) The urgency of the settlement under the Constitution gains special relevance since the issue of the constitutionality of the transfer always arises *with respect to concrete sovereign rights or powers*, which is primarily not a *par excellence* issue of constitutional law, but an issue that is related to *another branch of law*, behind which, however, *the constitutionality of the transfer* is posited as a *preliminary question*.

From this viewpoint, the frequently quoted *Kehlrinne*-Decision of the German Supreme Court, the *Bundesgerichtshof* (hereinafter: BGH) (BGHZ 102, 118, GRUR 1988. 4. 290-Decision of 3rd of November, 1987) can be construed as an instructive instance.

ca) According to the facts of the case, the defendant is the proprietor of a European patent, which the European Patent Office (hereinafter: EPO) granted in 1977 with an effect to the German Federal Republic. The patent description was submitted in English, whereas, the patent claims were submitted in German, too.

According to the plaintiff, the patent in the German Federal Republic could not have a legal effect, since the patent description was not submitted in German, besides, only the English version had a binding force. According to Article 65 of the European Patent Convention (hereinafter: EPC) any member state has *carte blanche* whether it prescribes in a domestic statute the obligation of the submission of the patent description translated into its official language to the national patent office. The German Federal Republic did not stipulate that as an obligation and the legal *status quo* arisen thereby (which consists in the negligence of the prescription of the obligation to submit the patent description in German language by the GFR) contradicts several provisions of the *Grundgesetz*, especially Article 24 concerning the transfer of public authority, furthermore, also pertains to (restricts) the essential content of fundamental rights as guaranteed under Articles 2, 3, 12 and Para. 2 of Article 103 (the free development of personality, the right to the free choice of profession, the prohibition of discrimination), and finally, it violates the criteria of security in law originating in the rule of law. The competent court thereby rejected the claim, which was remitted to the BGH by reason of the appeal by the plaintiff.

In its appeal, the plaintiff requested the nullification of the patent, partly, because the respective statute, i.e., Article 65 of the EPC, which substantiates it on legal grounds, is unconstitutional in the absence of the German domestic regulation on the subject. Hence, the plaintiff requested the suspension of the procedure and submitted a request of reviewing the case to the German Federal Constitutional Court.



cb) As the BGH established, the patent was submitted and published in English language with the application of Paras. 1, 3 and 7 of Article 14 of the EPC, and it was supplemented with the German translation of the patent claim. Consequently, since the EPO proceeded according to the provisions of the EPC, and since the EPO is not a German institution, it does not exercise either German sovereign rights or German public authority, therefore, a violation of the German statutes cannot obtain in that case. *The EPO, when it grants European patents and exercises transnational sovereign rights, proceeds as pursuant to the EPC relying on the scope of competence transferred to it by the Contracting States.*

Nevertheless, the BGH has to examine *as a preliminary question*, which emerges in the context of constitutional law, if patent law as the object of legal dispute can be considered as validly constituted in the German Federal Republic. Hence, the BGH has powers to decide on the constitutional problem whether those European patents can be generally considered as validly constituted in the German Federal Republic, which are not published in their full text and are inaccessible in German language.

The BGH departed from the fact that concerning the language criteria of European patents in the German Federal Republic, Articles 14 and 70 of the EPC shall be deemed as applicable and governing. With reference to that, the Court did not agree with the plaintiff that the standpoint of the German lawmaker incurred an unconstitutional situation (negligence), when it did not proceed in compliance with the authorisation under Article 65.

cc) According to the BGH, when the German Federal Republic acceded to the EPC, it transferred its sovereign rights in terms of granting European patents *to the European Patent Organisation*, and within that scope to the EPO, in full compliance with Article 24 of the *Grundgesetz*. It is the *Grundgesetz* itself that *defines the limits* of openness in the direction of interstate co-operation, which, according to the BGH are the following: the transfer of sovereign rights in the scope of an international convention shall not affect the foundations of the German constitutional order and the basic structures constituted by that shall not be renounced or emptied out for the sake of international co-operation. The essential content of fundamental rights attached to the bases of the constitutional order as constituted as pursuant to the *Grundgesetz* shall not be affected or made relative by the transfer of sovereign rights (*“nicht relativiert ... werden”*).

Therefore, the BGH did not deem that it was unconstitutional to construct the patent as the object of legal dispute on such a legislative basis and in such a legislative setting, in which the German lawmaker did not take the opportunity

for restrictive language regulation as pursuant to Article 65 of EPC. Therefore, a case of unconstitutional negligence did not obtain.

For Hungary, that decision is *extraordinarily important*, since our country has been invited to join the Contracting Members of the EPC. Our accession to the NATO constitutes also a transfer the exercise of powers to an other major international organisation, which has a broader scope of membership than the EU.

2.2. The settlement of the issue on the level of the Hungarian constitution is furthermore deemed as necessary, because that is the only instrument available for the codification of a doctrinal claim for the establishment of an “open state”, a “*kooperativer Verfassungsstaat*” towards international co-operation.

2.3. It is obvious that a constitutional transfer of sovereign rights cannot be implemented to international organisations in general, but within that scope exclusively to *interstate organisations*—however, both non-interstate organisations and NGOs are excluded from that scope. To make the problem simple, we can assert that the transfer can exclusively be implemented via an international treaty, so that the established organisation is the subject of international law. In that case, the founding forces of international organisations are the states, which are themselves the subjects of international law.

2.4. The transfer, however, is constitutional, since *it is the Constitution itself that frames its criteria, i.e. its limits* in a restrictive sense. These limits, on the grounds of the doctrinal considerations above, would be the following:

- The fundamental limit of the transfer is the principle of *subsidiarity*, which implies that the transfer can be implemented exclusively if
  - it is necessary by the efficient administration of quasi-public duties,
  - it is deemed as inevitably necessary by reason of the occurrence of a problem, which transgresses borders and has an international dimension.
- The transfer *may not affect the fundamental set of values of the constitutional order*, i.e., the structure of the Hungarian Constitution.
- Following the transfer of sovereign rights, *the protection of fundamental rights* guaranteed under the Constitution of the Republic of Hungary and international human rights treaties, constitutive elements of the Hungarian legal system shall be secured on the grounds of the constitutional order.

2.5. The amendment of the Constitution would not imply the annulment of the currently effective Para. 2 of the Article 6, but the new regulation would align *as an adjunct* to this provision.

2.6. It needs to be noted that *Article 10a) of the Czech Constitutional Amendment* as of 18 October 2001 quoted above grants express authorisation—“Certain powers of the organs of the Czech Republic may be transferred to inter-

national organisations or institutions in the scope of international agreements”—with a simultaneous specification of its conditions.

*3. A special sub-category of the transfer of sovereign rights and exercise of powers: Accession to the European Union*

3.1. The accession of Hungary to the EU necessitates the analysis of *three* issues following from the doctrinal questions as explicated above:

a) What is the legal character of the EU?

b) What is the legal character of Community-law (Union law)?

c) Consequently, we are posed with the question whether the requirement of the incorporation of a *special rule* into the Constitution obtains, and if so, what does that requirement consist in. In other words: can the EU-accession be resolved by the settlement of the duality of the relationship between international law and domestic law and of the transfer of sovereign rights, or a separate third provision is deemed as necessary.

3.2. Concerning the legal character of the EU as an organisation three viewpoints have developed.<sup>25</sup>

a) According to one of these viewpoints, the EU is postulated as a federal state, while, according to the other it is classified as a special international organisation among the subjects of international law. Whereas, according to the third viewpoint, a so-called autonomous conception, it is a *sui generis* formation, which cannot be categorised as either of the above.

b) The *third conception* can be construed as a majority viewpoint. Its specific emergence is related to the introduction of the term of the „association of states“ (*Staatenverbund*) in the Maastricht-Judgement of the *German Federal Constitutional Court*. The Maastricht-Judgement denied both that the EU could be posited as a state or as a federal state—the unique situation, according to the Federal Constitutional Court, is reflected in the moment of the introduction of the specific term itself (see, Opinion of Court, C II).<sup>26</sup>

<sup>25</sup> Schweitzer, M.—Hummer, W.: *Europarecht*, 5th Edition, Berlin, 1996. 83–88.

<sup>26</sup> The term of the “association of states” is a novelty only in legal practice, however, besides the terms of the federal state and confederation, it has been established in new German technical literature for a long time. Jellinek, G.: *Allgemeine Staatslehre*, 1917, 738., quoted in: Rittner, F.: Az Európai Unió útja a szövetségi állam felé (The Development of the European Union in the Direction of a Federal State), *Jogtudományi Közlöny*, 6. (1995) 286., note 14., which, in an interesting manner, draws a parallel with the Austrian-Hungarian Empire following the enactment of the *Pragmatica Sanctio*.

With respect to these, the EU is *an unique international institution, an interstate organisation*, which is constantly evolving and is in the process of incessant integration, and, *to which certain sovereign rights have been transferred by the German Federal Republic*.

3.3. Concerning *the legal character of Community law*, there is a debate between traditionalists and autonomists, the latter of whom constitute a majority.<sup>27</sup>

a) *Traditionalists* postulate that Community law falls under the scope of international law.

b) According to *autonomists*, although, *primary law* has been framed via international treaties, this ontological feature shall by no means prejudice the legal character of the legal system. Autonomists emphasise the *dual character* of Community law.<sup>28</sup> Which implies that in its framework *the international legal characteristics* are supplemented by the *peculiarities of constitutional law*, since the EU is constituted on an international treaty. The specificity is contained in the fact that this nature of constitutional law is not linked to a state, but to a specific (*sui generis*) international, interstate organisation.

ba) *The European Court* developed this conception in its *Van Gend en Loos-Decision*,<sup>29</sup> which is considered as a leading case, then somewhat modified it in its *Costa/ENEL-Decision*.<sup>30</sup> While the Van Gend en Loos-Decision was based on an emphasis on the character of international law, the impressively pathetic phrasing of the opinion of the court in the Costa/ENEL-Decision was positively framed in compliance with the doctrine of a *sui generis* legal system and its revoke is not admissible by subsequent unilateral national jurisdiction of the member states.

bb) *Secondary law* shares in the fate of the legal character of primary norms. According to the autonomists, it is neither international, nor national law, since it originates in an autonomous source of law: it is constituted partly on primary law, partly on Community law as a new public authority.

<sup>27</sup> Schweitzer—Hummer: *op. cit.*, 75–82.

<sup>28</sup> See, *Grundgesetz. Kommentar*, note 6., 360 and 366. See, in note 278, the conception of Walter Hallstein and Manfred Zuleeg, according to which, although the founding treaty of the European Economic Community “was framed in the scope of an international agreement, it qualifies as a constitutional document of a community of rights (*Verfassungsurkunde*)”.

<sup>29</sup> Várnay—Papp: *Az Európai Unió joga (The Law of the European Union)*, (note 13), 202.

<sup>30</sup> Vörös, I. *Az európai versenyjogok kézikönyve (The Handbook of European Competition Law)*, Budapest, 1996, 375.

bc) *As a conclusion*, we can state that *Community law precedes the constitutions of the member states*. Therefore, Community law cannot be measured against the norms of the constitutions of the member states, so, conceptually, it cannot be “unconstitutional”. The limits of the autonomist conception are ultimately defined (and made relative with respect to fundamental rights) by the legal practice of the constitutional courts of the member states as analysed above (II.1.1.b).

bd) It needs to be noted that Article 51 of the *EU Charter of Fundamental Rights* has recently introduced the notion of “*Union law*”, without determining its positive content and meaning. As a matter of fact, it is clear that the scope of that notion is broader than that of Community law (law of the EU).

3.4. With respect to the above and to the system of requirements as set forth by Jenő Czuczai,<sup>31</sup> we assume the following legal political consequences:

3.4.1. The issue of the EU-Accession *cannot* be discussed merely in the scope of the relationship between international law and domestic law, since Community law cannot be construed as exclusively a legal material of international law, the issue of the EU-Accession *cannot* be discussed merely in the scope of the transfer of sovereign rights or of exercise of powers. The exercise of sovereign rights opens up the way to the inflow of the norms of a such a legal system, which cannot be measured against the norms of national constitutions (disregarding the terrain of fundamental rights, the relevance of which cannot be underestimated), so that legal system is superior to the constitutions of the member states.

3.4.2. So long as the tripartite hierarchy in the relationship between international law and domestic law is dominated by the national constitution, to which international law is subordinated, whereas domestic statutes are positioned at the bottom of the hierarchy, the EU as an international organisation and its legal system, i.e., Community law (Union law) demonstrate such features, which incur *dual consequences*.

— *On the one hand*, these features exclude its classification as an international organisation or international law, as a consequence of which a potential constitutional provision pertaining to the relationship between international law and domestic law is inapplicable and senseless.

— *On the other hand*, in this case the hierarchy *turns upside-down*: Community law is positioned at the top of the hierarchy, whereas the constitution of the member state (except for fundamental rights) is positioned in the middle, while other domestic statutes are subordinated to these.

<sup>31</sup> Czuczai: The Legal Alignment... *op. cit.*, 33. sqq.

3.5. Following from the above, *a third scope of issues* has to be analysed. Namely, framing *a special constitutional provision, a specific “Europe Clause”* has become inevitable in legal-political terms, as well.

With respect to the EU-Accession, we need to address *all of the three issues* as analysed above, since the Europe Clause cannot be framed without the constitutional settlement of both the relationship between international law and domestic law, and of the problem of the transfer of the exercise of powers. This clause can exclusively be constructed on the grounds of the analysis of the former two problems, although the settlement of these separately, or of the other two combined cannot supersede the settlement of the third one.

It is not accidental that a so-called *Europe Clause*, related to the adoption of the Maastricht Treaty, was incorporated into the *Grundgesetz* in 1992. Since, on the adoption of the Maastricht Treaty it became obvious that Article 24, in itself, providing on the transfer of sovereign rights cannot sufficiently justify an economic and political integration with such depth and character on constitutional grounds. Article 23 designates participation in the advancement of the European Union as a state objective. This has been defined as the constitutional obligation of all state organs: it is an obligation that can be demanded by the Federal Constitutional Court. It is a further issue that the limits of that obligation with respect to the German *Grundgesetz* and the fundamental rights guaranteed under its provisions were determined by the Federal Constitutional Court under its Maastricht- and Solange-Judgements.

3.6. In our point of view, *framing the Europe Clause* will postulate the following legal-political requirements:

— It needs to be asserted that participation in the European economic-political integration is a constitutional *objective of the state*, which needs to be framed in general phrasing first in the Preamble, then also in particular in the Europe Clause by setting forth the conditions. Such conditions, in accordance with Para. 1 of Article 2 of the Constitution, can be, e.g., that the European Union is based on the democratic rule of law, on a commitment to social values as well as on the respect of fundamental constitutional values and the traditions of the member states.

— With respect to the protection of fundamental rights, it needs to be asserted that Community (Union) law shall not have priority until a European Constitution has been adopted, which *as a minimum standard* meets the protection level framed under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

— It needs to be asserted that *certain powers* exercised by the Republic of Hungary may be transferred to the Union in the process of the continuous

advancement of the EU integration. Of course, the word “certain” has ultimate relevance here, to which the Constitutional Court shall render adequate content. Such a provision can only be framed with *bianco-content*. This phrase could guarantee that the constantly evolving and vaguely outlined framework of the integration and its legal system shall not “absorb” the state-formation and the legal system of the Republic of Hungary.

#### IV. Conclusion

1. The relationship between the Constitution and the EU-Accession is a complicated issue, in which *three problems* so far highly disregarded by the Hungarian Constitution are linked. In our view, a “tripod”, *closely and inseparably related regulation, which needs to be codified simultaneously, is an essential precondition* of the accession. Its settlement—or at least its „full preparation“—cannot be further postponed.

2. The proposed amendment of the constitution, however, opens up „a new chapter“ in the history of Hungarian constitutionalism and Hungarian constitutional law and of the constitutional structure of the Republic of Hungary. The amendments would facilitate that the Constitution *constituted a public authority beyond its scope*. By this „opening-up“, the Constitution would have significance beyond itself, because thereby, it would crosscut and make relative the traditional conception of the nation–state monopoly of the exercise of public authority. Therefore, the currently effective Para. 1 of Article 2 of the Constitution would remain in force, but its content and scope, along with the inner structure of the Hungarian Constitution would radically change in the spirit of a 21st century Europeanism.

It is regrettable that the amendment of the constitution as pursuant to Act LXI of 2002 fails address the questions above, besides, the relationship between the constitution and the EU is made even more ambiguous by the incorporation of the amended Article 2/A. Hence, we assume that a further and broad amendment of the Constitution is inevitable.