

Hungary: Constitutional (R)evolution or Regression?



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Abstract Since 2010, Hungarian constitutionalism has turned in a direction that has widely been regarded as illiberal and has attracted criticism from European and international organisations and other Member States. Central to the change was the adoption of the new Fundamental Law in 2011. The Hungarian report explores the post-2010 period in the context of EU and international law. Whilst the Hungarian

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Constitutional Court in 2012 affirmed the ‘constitutional continuity’, in that the interpretations that had been used prior to the new Fundamental Law would be applied, this was overruled by a subsequent constitutional amendment, which has reinforced concern that the governing majority is ignoring the constitutional traditions of the last two decades. Since this amendment, the Constitutional Court adds reasoning if it refers to the former case law. In the rulings related to international law and EU law, the constitutional practice did not change significantly, although it became somewhat ambiguous until 2015. An Editorial Note has been added to the country chapter to explain that before the illiberal turn in 2010 and in the aftermath of the post-communist constitutional reforms, the Hungarian constitutional system had in fact been widely acclaimed in Europe for the particularly extensive safeguards for the rule of law and human dignity established by the Constitutional Court. For instance, the Hungarian Constitutional Court during that period represented a robust approach to the principles of legal certainty and non-retroactivity as part of the doctrine of the rule of law, which was invoked frequently as the basis for annulment of legislation.

Keywords The Hungarian Fundamental Law 2012 · The Hungarian Constitutional Court · Illiberal constitutionalism · Decline in the rule of law · Venice Commission Constitutional amendments regarding EU and international co-operation European Arrest Warrant · Data Retention Directive · Privatisation of public services

1 Constitutional Amendments Regarding EU Membership

1.1 *Constitutional Culture*

1.1.1–1.1.2 In Hungary, no new constitution was formally approved during the change of regime (1989–1990). The Constitution of the Republic of Hungary was a derivative of Act XX of 1949, which was comprehensively revised by Act No. XXXI of 1989 (in force until 31 December 2011; hereinafter 1989

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Constitution).¹ With regard to content, new acts emerged not through revolution, but via a parliamentary process of constitution-making that accompanied the regime change in 1989–1990. These proposed and approved amendments were fully compatible with the requirements of democracy and the rule of law. From then until 2011, the Constitution was under continuous revision, with several acts amending it. The most comprehensive amendment was carried out in December 2002 in connection with the anticipated accession of the country to the EU. In 2010, the parliamentary elections resulted in a two-thirds majority, which enabled the right-wing governing party alliance to write a new constitution (however, this ambition was not articulated during the campaign). The new constitution – the Fundamental Law of Hungary (FL) – was adopted in April 2011 and came into force on 1 January, 2012.²

In 2010, in parallel with the constant – altogether more than 10 – amendments of the 1989 Constitution reflecting ad hoc political interests, the governing parties announced the creation of a new constitution. The constitution-making procedure was criticised by the European Parliament and Venice Commission for the absence of pluralistic social debate.³ While the FL contains the basic principles and institutional system that had become crystallised through democratic constitution-making (like the principles of rule of law, democracy, division of powers, protection of human rights), they do not fully prevail, primarily because of the rules of interpretation referring to the ‘historic constitution’ of the ancient Hungarian kingdom and the restriction of constitutional jurisdiction. This is particularly true in cases where the FL itself grants exemptions from the implementation of fundamental principles. Although the catalogue of fundamental rights in the FL is more modern in some parts than that of the 1989 Constitution, the system of fundamental rights protection as a whole represents a step backward compared to the 1989 Constitution. It is undoubtedly the greatest weakness of the FL that it does not ensure the possibility of a comprehensive review of and remedy for violation of the constitution by the legislature. This is because the FL reduces the scope of action of the Constitutional Court and maintains the procedural and material restrictions introduced in 2010 for an uncertain period. More specifically, the FL lays down that with regard to *ex post* norm control and constitutional complaint procedures, the Constitutional Court is prohibited from reviewing the content of or annulling acts on public finances, with the exception of four ‘protected fields of fundamental

¹ Available at (with the amendments of 2010/11) http://www-archiv.parlament.hu/angol/act_xx_of_1949.pdf.

² All translations are from the official English translation of the Fundamental Law (consolidated version after the Fourth Amendment) available at <http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARY\mostrecentversion01102013.pdf>.

³ See Venice Commission Opinion No. 614/2011, Strasbourg 28 March 2011, and Opinion No. 621/2011 on the new constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17–18 June 2011) points 29, 34. Many Hungarian scholars also criticised the tight time limits for the drafting, and the restricted possibilities for open political and social debate. See Arato et al. 2011, pp. 3–7.

rights', as long as the state debt exceeds half of the gross domestic product. A regulation adopted on 16 November 2010 that essentially corresponds to the content of Art. 37(4) of the FL which restricts the Constitutional Court's right of review and annulment, also fails to accord with the principles of European constitutional development, the traditions of Hungarian constitutionalism developed since 1989–1990 and democratic political culture. It violates the constitutional principles of the rule of law, legal security and separation of powers. As a result of the restriction of the procedure of the Constitutional Court, numerous fundamental rights (especially, for example, the right to property, social rights, the freedom of enterprise and the right to a profession) became 'defenceless'.

Parliament has modified the FL five times since 2011,⁴ and has, *inter alia*, cemented the model of limited constitutional judicial review, attempted to break constitutional continuity, to restrict the exercise of the right to vote and freedom of expression and perpetuated the practice of overruling the Constitutional Court's decisions. The Constitutional Court has tried, sometimes with greater, sometimes with less determination, to protect the FL, with a varying degree of success. European bodies have followed this process with great interest: the Venice Commission of the Council of Europe continues to provide opinions on the significant amendments to the FL and on the cardinal laws,⁵ and the European Parliament has adopted several resolutions as well. The sharpest criticism has been raised with regard to the fourth amendment to the FL, with which

- *lex specialis* rules were introduced in contrast to the fundamental principles of the rule of law, democracy and the protection of fundamental rights;
- regulations (e.g. relating to student contracts, the acknowledgement of churches, the concept of family) evading or bypassing Constitutional Court rulings were enacted, substantially reducing the space for constitutional protection;
- a specific procedural review and a new limit on interpretation were imposed with regard to constitutional judicial review (excluding substantial review of amendments to the FL, repealing Constitutional Court decisions adopted before the FL); and
- open infringement of EU law (limitation of election campaigns, possibility of special taxation as an indirect result of court rulings)⁶ was also risked.

The European Commission has initiated several infringement proceedings as well, on the basis of which the Court of Justice of the European Union (CJEU) has issued important judgments with direct constitutional implications: one on the subject of a radical lowering of the retirement age of judges and another on the

⁴ See the amendments in Sonnevend et al. 2015, pp. 45–70.

⁵ Cardinal laws are Acts of Parliament that can be adopted or amended with a two-thirds majority of votes of the MPs present.

⁶ As the European Commission expressed its serious concerns about the conformity with EU law of the new article on CJEU judgments entailing payment obligations, the fifth amendment repealed this rule.

subject of bringing to an end the term served by the Data Protection Supervisor. Hungary was held to have infringed EU law in both cases.⁷

The European Court of Human Rights (ECtHR) has also heard Hungarian cases which have arisen due to the elimination of the previous constitutionalism and from the arrangements based on the new FL – such as the recognition of churches, dismissal from employment without reason, lifetime imprisonment without compulsory review, premature termination of the mandate of the President of the Supreme Court and a ban on the parliamentary right of expression.⁸ The ECtHR has found that the State of Hungary infringed the European Convention on Human Rights (ECHR) in every case.

There is no room here to provide a comprehensive analysis of all of the issues which have arisen and been debated at European forums;⁹ however, expeditiously we can diagnose that the developments of the last 3–5 years question the commitment to liberal constitutional values such as the rule of law, democracy and individual freedom. The Constitutional Court still has some margin of appreciation on the basis of the constitutional text to safeguard the achievements of liberal constitutionalism and disregard political expectations, but the quality of reasoning and the decisive arguments of the Court have given rise to a very specific ideational framework that cannot be interpreted under liberal values of rule of law.¹⁰

1.2 *The Amendment of the Constitution in Relation to the European Union*

1.2.1 The amendment of the Hungarian Constitution related to EU accession was passed by Parliament in December 2002 (Act LXI of 2002), and introduced a new Art. 2/A into the text of the Constitution:

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. The ratification and promulgation of the treaty referred to in subsection (1) shall be subject to a two-thirds majority vote of the Parliament.¹¹

⁷ Case C-286/12 *Commission v. Hungary* [2012] ECLI:EU:C:2012:687; Case C-288/12 *Commission v. Hungary* [2014] ECLI:EU:C:2014:237.

⁸ *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, ECHR 2014 (extracts); *K.M.C. v. Hungary*, no. 19554/11, 10 July 2012; *László Magyar v. Hungary*, no. 73593/10, 20 May 2014; *Baka v. Hungary*, no. 20261/12, 27 May 2014; *Karácsony and Others v. Hungary*, no. 42461/13, 16 September 2014.

⁹ See e.g. Vörös 2014, pp. 1–20; Zeller 2013, pp. 307–325; Vincze 2013, pp. 86–97.

¹⁰ Szente 2015, p. 185.

¹¹ The English translation of the former Hungarian Constitution is available at http://www-archiv.parlament.hu/angol/act_xx_of_1949.pdf.

Thus, in 2002, an authorisation was added permitting the signing of the Treaty of Accession, and a commitment to European unity was declared. Additionally, the rules on cooperation between the National Assembly and the Government in matters of EU integration were determined (for the wording see Sect. 1.4), and the constitutional definition of the National Bank of Hungary was modified. In addition, the rules on voting rights were changed in anticipation of European parliamentary and European local elections.¹² The relevant provisions provide as follows:

Art. 32/D(1)

The National Bank of Hungary shall define the country's monetary policy in accordance with the provisions of specific other legislation.

Art. 70(2)

All adult Hungarian citizens residing in the territory of the Republic of Hungary and all adult citizens of other Member States of the European Union who reside in the territory of the Republic of Hungary shall have the right to be elected in local ballots for the election of the representatives and mayors; they shall have the right to vote, provided that they are in the territory of the Republic of Hungary on the day of the election or referendum, and furthermore to participate in local referendums or popular initiatives.

Art. 70(4)

All adult Hungarian citizens residing in the territory of the Republic of Hungary and all adult citizens of other Member States of the European Union who reside in the territory of the Republic of Hungary shall have the right to be elected and the right to vote in elections for the European Parliament.

The second amendment to the 1989 Constitution in relation to EU membership took place in December 2007 before the ratification of the Lisbon Treaty (Act CLXVII of 2007). It was an embarrassing amendment and a surprise for experts, as it was not communicated by the Government and the amending process was very rapid. The aim of the amendment was to create constitutional authorisation for criminal law cooperation under the Area of Freedom, Security and Justice (AFSJ) provisions of the EU Treaty. The following text was inserted into Art. 57(4) – the *nullum crimen* rule – of the 1989 Constitution:

No one shall be declared guilty and subjected to punishment for an offense that was not considered – at the time it was committed – a criminal offense under Hungarian law, or the laws of any country participating in the progressive establishment of an area of freedom, security and justice, and to the extent prescribed in the relevant EU legislation with a view to the mutual recognition of decisions, without any restrictions in terms of major fundamental rights.

The EU provisions in the FL broadly follow the above amendments, and are cited in Sect. 1.3.1.

1.2.2 The constitutional amendment procedure is provided in Art. S) of the FL. An amendment may be initiated by the President of the Republic, the Government, any parliamentary committee or any Member of the National Assembly. The adoption

¹² Chronowski 2005, pp. 190–199.

of a new FL or the amendment of the FL requires the votes of two-thirds of all the Members of the National Assembly. The amendment has to be signed by the President, who may refer the matter to the Constitutional Court if the President finds that any procedural requirement laid down in the FL with respect to adoption of the FL or amendment of the FL has not been met.

In the 1989 Constitution the rules were the same except for the possibility of *ex ante* constitutional review.

1.2.3 The Constitutional Court played a significant role in the wording of the 2002 amendments. The Constitutional Court proclaimed its jurisdiction for posterior review of the constitutionality of statutes (and other legal instruments implementing international treaties) in a decision in 1997.¹³ In that decision the Court declared that a statute implementing an international treaty – and the international treaty – may be subjected to subsequent constitutional review. The reasoning of the Court is noteworthy:

The Constitutional Court emphasizes that the constitutional review of international treaties forms part of the practice of the constitutional courts of countries applying the dualistic-transformational system as a general rule, also in respect of international treaties becoming part of the domestic law by this technique. For instance, Article 59 of the German Basic Law prescribes the dualistic-transformational system. The German Federal Constitutional Court, despite its lack of jurisdiction for preventive norm control, has extended its practice to the control of international treaties prior to their ratification. ... It becomes clear from these decisions that in addition to ‘naturally’ exercising the competence concerning posterior norm control, the German Constitutional Court cannot fail in performing all parts of its duty to safeguard the constitution – especially in respect of the European Union treaties. ... On this ground, the [Hungarian] Constitutional Court keeps the subordination to Community law under its continuous supervision – besides examining the implementing acts.¹⁴

Thus, in 1997, the Court was ready to examine the constitutionality of Community law. In this respect, Decision 30/1998 (VI. 25.),¹⁵ assessing the constitutionality of a provision of Act I of 1994 on the Implementation of the Europe Agreement, is equally notable. Here, the Court treated the agreement as a traditional international treaty. In theory, it was correct in doing so, as Hungary was not then an EU Member State, although the agreement also had some supranational features. The decision declared that the Hungarian Parliament – in the absence of constitutional authorisation – is not entitled to act beyond the principle of territoriality in fields of law within the scope of the exclusive jurisdiction of state authority, nor may it amend the Constitution in a disguised manner by adopting and promulgating an international treaty. Thus, Decision 30/1998 had a significant impact on the drafting of the 2002 authorising provision (Art. 2/A, the so-called ‘Europe Clause’) of the Hungarian Constitution.

¹³ Constitutional Court Decision (hereinafter CC Decision) 4/1997 (I. 22.) AB.

¹⁴ Ibid.

¹⁵ CC Decision 30/1998 (VI. 25.) AB.

1.3 *Conceptualising Sovereignty and the Limits to the Transfer of Powers*

1.3.1 Article E(1) as the basis of European and Union cooperation essentially follows word by word the Art. 6(4) of the 1989 Constitution. Thus, the frame of interpretation remains unchanged;¹⁶ this objective expresses the commitment to European (international or supranational) cooperation. FL Art. E) provides as follows:

- (1) In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity.
- (2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union.
- (3) The law of the European Union may, within the framework set out in Paragraph (2), lay down generally binding rules of conduct.
- (4) For the authorisation to recognise the binding force of an international treaty referred to in Paragraph (2), the votes of two-thirds of the Members of the National Assembly shall be required.

Article E) paras. (2) and (4), with some simplification, adopts the rules of Art. 2/A of the 1989 Constitution; however, the formulation differs in one aspect. The difference is that the two distinct clauses of Art. 2/A(1) [‘exercise certain constitutional powers jointly with other member states ...; these powers may be exercised independently and by way of the institutions of the European Union’] have been merged in Art. E(2) [‘jointly with other Member States, through the institutions of the European Union’]. However, according to the legal understanding, the Member States do not exercise their competences ‘jointly’ in the Union legislative processes, rather these are exercised by the institutions. Art. 2/A defined the ‘way of institutions’ as one form of joint exercise of powers in the EU. Yet in Art. E) of the FL, the exercise of powers ‘through the institutions’ is referred to as a joint exercise. While the Lisbon Treaty abolished the so-called pillar system and created a single institutional system, the supranational (i.e. Community) method has not become automatically dominant. The Lisbon Treaty intended to integrate the perspectives of supranational and intergovernmental methods, e.g. by respecting the constitutional identity of the Member States, the effective involvement of national parliaments and the consolidation of Member States’ initiative in respect of some competences. Strictly speaking, the joint exercise of powers is not the same as exercise through the institutions.¹⁷

¹⁶ See also Bragyova 2012, pp. 335–338; Blutman and Chronowski 2011, p. 329; Bárd 2013, p. 457.

¹⁷ The Constitutional Court has also respected the relevance of the difference of exercising powers jointly and by the way of institutions. See CC Decision 143/2010. (VII. 14.) AB on the Act promulgating the Lisbon Treaty; press release is available at http://www.mkab.hu/letoltesek/en_0143_2010.pdf.

Article E) contained originally only one new rule compared to Art. 2/A of the 1989 Constitution. In its para. (3) it states that '[t]he law of the European Union may ... lay down generally binding rules of conduct'. From the domestic legal viewpoint, the ground for the constitutional validity of Union law becomes clearer than it used to be; however, this paragraph still does not solve the problem of primacy, i.e. that a domestic legal act conflicting with an EU legal act is not applicable. The duty of the courts of law to ensure the consistency of domestic and Union law still stems from the EU Treaties (i.e. by way of requesting preliminary rulings) and not from the Constitution itself.¹⁸

The National Assembly inserted a new sentence into Article E) para. (2) in 2018, by the seventh amendment to the Constitution, creating a solid basis for the Constitutional Court to protect the so-called national constitutional identity:

The exercise of powers under this Paragraph must be consistent with the fundamental rights and freedoms set out in the Fundamental Law, and it must not be allowed to restrict Hungary's inalienable right of disposition relating to its territorial integrity, population, political system and form of governance.

There are further provisions with regard to fair trial in the context of the EU's Area of Freedom, Security and Justice, which are cited in Sects. 2.3.1–2.3.2.

1.3.2–1.3.3 Contrary to expectations and the activism of the Constitutional Court in 1998, the Constitutional Court succinctly explained the meaning of Art. 2/A after EU accession. Article 2/A 'defines the conditions and the framework of the membership of the Republic of Hungary in the European Union, and the status of Community law in the system of the sources of Hungarian law'.¹⁹ Only in 2008 was the authentic interpretation of the authorising provision further enriched. The Constitutional Court highlighted the function of Art. 2/A in Decision 61/B/2005 AB:

The purpose of including this provision in the Constitution was to establish the conditions and the framework of the participation of the Republic of Hungary in the European Union. The cited provision of the Constitution authorises the Republic of Hungary to conclude an international treaty under which certain of its competences deriving from the Constitution may be exercised jointly with the other Member States of the European Union and the joint exercise of competences may be implemented through the institutions of the European Union.

The Court clarified the limitations on the exercise of competences within the Union as follows:

Competences may be exercised jointly to the extent required for the exercise of rights and fulfilment of obligations stemming from the founding treaties of the European Union; only the joint exercise of certain concrete competences deriving from the Constitution is authorised, in other words, the scope of competences exercised jointly is limited.

In respect of the exercise of jurisdiction of the Constitutional Court, this decision for the first time expressly rejected the examination of a collision with EU law: 'The

¹⁸ Chronowski 2012, p. 111.

¹⁹ CC Decision 1053/E/2005 AB, judgment of 16 June 2006.

[Act on the Constitutional Court] contains no competence authorising the Constitutional Court to examine a collision with community law. Pursuant to the rules of community law, this questions falls within the competence of the organs of the European Community, ultimately the European Court of Justice.’ It also follows that a collision with EU law does not in itself serve as a ground for alleging unconstitutionality. As regards the position of EU law within the Hungarian system of sources of law, the Constitutional Court widened the meaning of the authorising provision by identifying it as the ground for the constitutional validity of EU (Community) law: ‘Under Article 2/A of the Constitution, community law applicable in Hungarian law is just as valid as is law adopted by Hungarian legislation.’ This interpretation opens the way for the possible examination by the Court of collisions between EU law and Art. 2/A.²⁰

In its decision of 143/2010. (VII. 14), the Constitutional Court ruled that the Act of Promulgation of the Lisbon Treaty is constitutional. According to the Court, Art. 2/A of the Constitution cannot be interpreted in a way that would deprive the constitutional provisions on sovereignty and the rule of law of their substance. It referred to its former decisions on the limitation of the exercise of sovereignty and came to the conclusion that although the reforms introduced by the Lisbon Treaty were of foremost importance, Hungary remained a sovereign and independent state with a prevailing rule of law.²¹

In Decision 22/2012 (V. 11.) AB on the interpretation of paras. (2) and (4) of Art. E) of the FL, the Court stated that Art. E(2) contains a provision identical to that of Art. 2/A. The Constitutional Court held that the interpretation of Art. 2/A of the previous Constitution, which was provided in the Decision 143/2010 (VII. 14.) AB, is also valid for the interpretation of Art. E) of the FL. In that decision of 2010, the Constitutional Court clarified the question whether the requirement of qualified majority was only applicable to the Accession Treaty or to other treaties as well. The Court found that the qualified majority ‘is necessary for every treaty that leads to transferring further competences of Hungary, specified in the FL, through the joint exercise of competences by way of the institutions of the European Union’. The Court continued:

Provided that it is based on an international treaty, the requirement of qualified majority is also applicable to the implementation of the founding treaties and their supervision: it means that the implementing measures based on the founding treaties (adoption of secondary legal acts) are not sufficient any more, and therefore the implementation tools need to be amended, or new tools are needed. It is not a condition, however, that the treaty specify itself as the European Union’s law, and neither is it a requirement that it should belong to the founding treaties of the EU.

1.3.4 EU law has been regarded as a separate legal system by the Constitutional Court and the courts of law since accession. As such, the supremacy and direct applicability of EU legal acts are recognised; in most cases the courts ensure the

²⁰ CC Decision 61/B/2005. AB, judgment of 29 September 2008.

²¹ See the press release on CC Decision 143/2010 (VII. 14.) AB, *supra* n. 17.

effectiveness of Community/Union law.²² References to the principles of direct effect and supremacy are rather automatic;²³ See also Supreme Court Decision Kfv. I.35.052/2007/7, which referred to *Costa v. ENEL* and *Van Gend en Loos*. The courts follow the well-known textbooks on EU law or utilise the ministerial explanations attached to the bill of the applicable Hungarian law. The Curia (former Supreme Court) seems to be willing to establish the triangular relationship of EU law, the ECHR and domestic law, and interpret harmonised Hungarian legal acts in the light of the ECHR, if the implemented EC directive provides a minimum standard.²⁴

So far, the Constitutional Court has established two principles marking the boundaries of future constitutional practice. First, it will not treat the founding and amending treaties of the European Union as international law for the purposes of constitutional review,²⁵ thereby setting up a three-tier system of legal rules applicable within Hungarian legal practice that distinguishes between national, international and EU law. Secondly, in the absence of jurisdiction to review substantive (un)constitutionality (as opposed to procedural constitutionality), the Constitutional Court does not regard a conflict between domestic law and EU law as a constitutionality issue,²⁶ and this mandates the ordinary courts to resolve such conflict of a sub-constitutional nature.²⁷

1.4 Democratic Control

1.4.1 Article 19 of the FL provides:

The National Assembly may request information from the Government on the government position to be represented in the decision-making procedures of the intergovernmental institutions of the European Union, and may take a position on the draft placed on the agenda in the procedure. In the course of the decision-making of the European Union, the Government shall act on the basis of the position taken by the National Assembly.

Through a scrutiny procedure regulated in Act XXXVI of 2012 on the National Assembly, the National Assembly takes part in the decision-making process

²² See Dezső and Vincze 2012, pp. 208–209.

²³ See e.g. the Decision of Szabolcs-Szatmár-Bereg County Court 5.K.20. 631/2010/4.: ‘... the Community Treaty has the highest rank in the hierarchy of legal norms. ... [T]he relationship of EU law and national law is determined by the principle of primacy, as the Supreme Court stated in principle: national law shall be interpreted in a way that is appropriate to fulfil (i.e. implement) Community law (EBH 2006/1568).’

²⁴ The Supreme Court established that only refugees are covered by the scope of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ 251/12; however, in the light of Art. 8 of the ECHR, domestic law may recognise this right of other protected persons as well. The Supreme Court emphasised that Member States may maintain or introduce more favourable provisions than those laid down by the Directive. Supreme Court Kfv.III.37.925/2009/7.

²⁵ CC Decision 1053/E/2005. AB

²⁶ CC Decision 72/2006. (XII. 15.) AB.

²⁷ Blutman and Chronowski 2011, pp. 329–348.

indirectly, as the Government and the National Assembly cooperate according to special rules in formulating the national position regarding EU draft legislation. The National Assembly also monitors the activities of the Government in EU affairs. The instruments that already existed before accession have remained intact (such as interpellation, questions, committee hearings, parliamentary debates and committees of inquiry), and these instruments can also be used with regard to EU affairs. In addition, Art. 69 of the Act on the National Assembly defines further obligations for the Government in informing the Assembly.

Tasks stemming from subsidiarity checks are carried out by the Committee on European Affairs by virtue of Act XXXVI of 2012 on the National Assembly and Parliamentary Resolution 10/2014 (24 February 2014) on Certain Provisions of the Rules of Procedure. With regard to the *ex-ante* control of subsidiarity, if the Committee considers that a draft Union legislative act fails to comply with the principle of subsidiarity, it submits a report to the plenary on the adoption of a reasoned opinion. The adopted reasoned opinion is sent by the Speaker to the Presidents of the European Commission, the European Parliament and the European Council as well as to the Government of Hungary. With regard to the *ex-post* application of the subsidiarity principle, the Committee is entitled to propose to the Government that it bring an action before the CJEU on the grounds of infringement of the principle of subsidiarity in accordance with Art. 263 TFEU.

1.4.2 The referendum on accession to the EU was held on 12 April 2003, and 83.76% of the citizens who participated voted yes. This was 38% of all the electors. Of the 8 million citizens entitled to vote only 3.66 million voted, which means a participation rate of 45.6 %.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.3 As mentioned earlier, a Constitutional Court finding was of considerable significance in respect of the 2002 amendment of the 1989 Constitution. This amendment was based on a wide consent of the parliamentary parties of that time, and a special parliamentary committee discussed the questions of constitutional authorisation and the accession referendum. The prime minister established a so-called ‘council of wise men’ composed of former ministers of justice and constitutional court judges. The bill on the amendment was also sent to universities and other academic institutions, which provided expert opinions upon the request of the Government.

However, before the 2007 amendment no such public debate took place.

In the course of the constitution-making in 2010/11, no specific attention was devoted to the Europe Clause or the experiences of the application of EU-related rules in the 1989 Constitution. The entire drafting of the constitution was a closed and almost secret process, and thus public debate or expert advice did not influence the content of the FL.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 *The Position of Constitutional Rights and the Rule of Law in the Constitution*

2.1.1 Under the title ‘Freedom and Responsibility’ the FL lists the catalogue of fundamental rights (Articles II–XXIX) in 28 articles. These articles include constitutional rights (including new rights such as the right to good administration, some social rights of employees and the right to self-defence), prohibitions (including the new prohibitions *ne bis in idem*, non-refoulement and biomedical prohibitions) and principles (including the new principles of equality before the law and social responsibility for property). In the field of social solidarity, however, the FL is restricted to constitutional objectives instead of rights (protection of the elderly and persons with disabilities, striving to provide decent housing).

It is worthwhile to add that during the drafting of the Hungarian constitution in 2011 the question arose – and the Hungarian Government inquired from the Venice Commission – whether and to what extent it was necessary to incorporate the EU Charter of Fundamental Rights (Charter) into the national constitution. The adopted FL originally contained more or less the same rights as the Charter in its relevant Chapter (‘Freedom and Responsibility’), and some sentences of the Charter were ultimately incorporated; however, compared to the Charter, the content of the rights enumerated in the FL is less detailed and the text leaves the possibility for a wider limitation of rights. It is also worth referring to the preamble of the FL, according to which ‘individual freedom can only be complete in cooperation with others’. The Charter applies a completely different approach, with emphasises in its preamble that the Union ‘places the individual at the heart of its activities’. The Charter addresses individual responsibility only in connection with the enjoyment of rights.²⁸ Whereas the approach of the FL – considering also the numerous basic obligations – is communitarian and nationalist, the Charter focuses on the philosophy of individual freedom and supports pluralism.²⁹ The difference is not accidental. In the last decade, Hungarian society has become increasingly closed, exclusive and disunited, and discrimination, segregation, xenophobia and hate speech have become part of everyday life with the support of political populism. In the field of the most important human values, the FL has legalised and reaffirmed unprecedented solutions based on unacceptable societal practice.

²⁸ Charter Preamble: ‘Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.’

²⁹ This difference is also pointed out in European Commission For Democracy Through Law (Venice Commission) Opinion No. 621/2011, Strasbourg 20 June 2011, Opinion on the New Constitution of Hungary, point 57.

2.1.2 Article I(3) provides as follows:

The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of such fundamental right.

2.1.3 Article B) of the FL supports the most important principles of the 1989 Constitution – the rule of law and democracy. Art. C(1) of the FL explicitly provides the principle of division of powers. It is worth mentioning, however, that the division of powers should also be reflected in the rules on state organs in the FL and in constitutional practice.

An extremely alarming issue concerning the basic principles of the FL was that the Transitional Provisions supporting the entry into force of the FL (hereinafter TP-FL) undermined some rules of the FL itself.³⁰ The Constitutional Court declared that all provisions of the TP-FL that lack transitory character are invalid.³¹ As a response, in 2013 the governing majority adopted the fourth amendment of the FL, which incorporated into the Constitution most of the abolished articles, and overrode several earlier Constitutional Court decisions. The Venice Commission expressed its serious concerns about the systematic shielding of ordinary law from constitutional review. The reduction (budgetary matters) and in some cases complete removal (constitutionalised matters) of the competence of the Court to review ordinary legislation on the one hand undermined the rule of law – as the constitutional protection of the standards of the FL became limited; and, on the other hand, infringed the democratic system of checks and balances – as the Constitutional Court lost its influence and is no longer able to provide effective control.³²

Before the fourth amendment, some hope was given regarding ‘constitutional continuity’, in that the Constitutional Court seemed to be willing to refer to its jurisprudence and recall its previous argumentation where the formulation of text of the FL was the same as the wording of the Constitution. According to the Court’s judgment in 2012:

In the new cases the Constitutional Court may use the arguments included in its previous decision adopted before the Fundamental Law came into force in relation to the constitutional question ruled upon in the given decision, provided that this is possible on the basis of the concrete provisions and interpretation rules of the Fundamental Law, having the same or similar content as the provisions included in the previous Constitution. ... The

³⁰ On the TP-FL and other cardinal acts read more in Halmai and Scheppele 2012.

³¹ The Constitutional Court annulled approximately half of the articles of the TP-FL in its decision of 28 December 2012 (CC Decision 45/2012. (XII. 29.) AB).

³² Opinion No. 720/2013 of the Venice Commission, point 87.

conclusions of the Constitutional Court pertaining to those basic values, human rights and freedoms, and constitutional institutions, which have not been altered in the Fundamental Law, remain valid.³³

However, the fourth amendment of the FL repealed the decisions of the Constitutional Court delivered prior to the entry into force of the FL. This new regulation has reinforced the concern that the governing majority is ignoring the constitutional traditions of the last two decades.

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 This issue has not been addressed in Hungarian judicial practice.³⁴ As indicated earlier, the Hungarian Constitutional Court has declined to recognise any formal competence to examine the compatibility of national legislation with EU law.³⁵ This excludes one of the main avenues in Hungarian law for contesting the order of priority of fundamental rights and fundamental economic freedoms.

The only, rather indirect indication of how Hungarian courts would approach the Court of Justice's balancing between fundamental rights and fundamental freedoms follows from an early judgment in the *Dog Breeders Association* case. In its ruling, the Budapest Metropolitan Court accepted that the fundamental rights jurisprudence of the Court of Justice is binding on Hungarian courts.³⁶ The judgment relied on Title I Article F(2) of the Maastricht Treaty and included citations from

³³ CC Decision 22/2012. (V. 11.) AB, paras. 40–41.

³⁴ There are examples of legislation establishing a balance favouring local, assumedly value-based considerations against fundamental freedoms, see the regulation of student contracts in Sect. 110 (1)23 of Act 2011: CCIV and Government Regulation 2/1012 requiring students in state higher education to enter into employment in Hungary. In the related judgment of the Constitutional Court in Decision 32/2012 of 4 July 2012, it was deemed necessary to take the rights provided by the free movement of persons in EU law into account in determining the appropriate level of legal protection available in Hungarian constitutional law. In contrast, the dissenting opinions, with a different degree of robustness, emphasised that the majority interpretation put the communitarian values of the new Fundamental Law in jeopardy and considered the individualistic fundamental economic rights in EU law to be in conflict with local social values.

³⁵ See, for instance, CC Decision 1053/E/2005 of 16 June 2006 where the claim that the 1997 Act on Gambling, which prohibited the sale and advertising of gambling activities organised abroad, breached Art. 56 TFEU, was refused, as the Constitutional Court had no jurisdiction to examine the compatibility of domestic legislation with the EU Treaties.

³⁶ Case No. 3.K-30698/2006/33. The issue was not addressed in the judgment of the Supreme Court, Case No. Kfv.IV.37.256/2008/14. In Case No. 5.K.20.155/2010/13, the reference to Case 44/79 *Hauer* [1979] ECR 03727, and its detailed discussion was *obiter* and, ultimately, EU law, despite the insistence of the first instance judge, was irrelevant in the case.

Internationale Handelsgesellschaft,³⁷ *Nold I*³⁸ and *Rutili*.³⁹ The impact of the judgment was considerably weakened by the fact that it failed to clarify whether EU jurisprudence was relevant in the case and whether the case fell within the scope of EU human rights law.

2.3 *Constitutional Rights, the European Arrest Warrant and EU criminal law*

2.3.1–2.3.2 The presumption of innocence; *nulla poena sine lege*

As was seen in Sect. 1.2.1, the 1989 Constitution was amended with regard to the EU AFSJ. Further provisions on this were included in the FL, where Art. XXVIII (4)–(6) provides as follows:

- (4) No one shall be held guilty of or be punished for an act which at the time when it was committed did not constitute a criminal offence under Hungarian law or, within the scope specified in an international treaty or a legal act of the European Union, under the law of another State.
- (5) Paragraph (4) shall not prejudice the prosecution or conviction of any person for an act which, at the time when it was committed, was a criminal offence according to the generally recognised rules of international law.
- (6) With the exception of extraordinary cases of legal remedy laid down in an Act, no one shall be prosecuted or convicted for a criminal offence for which he or she has already been finally acquitted or convicted in Hungary or, within the scope specified in an international treaty or a legal act of the European Union, in another State, as provided for by an Act.

The *principle of nullum crimen sine lege* is and was the focal element of the constitutional legality of criminal law in Hungary. According to the Constitutional Court, it is not just a state obligation but the right of the individual that a person be found guilty and sentenced only according to law. Reference to EU law first appeared on the constitutional level at the time of the ratification of the Lisbon Treaty. The former Constitution had already been amended (see Sect. 1.2.1) to enable judicial cooperation in criminal affairs. A new element in the FL is that the text – as an exception to the rule – explicitly refers to an ‘act, which was, at the time when it was committed, an offence according to the generally recognised rules of international law’. However, this is not completely new, since the Constitutional Court in 1993 stated that war crimes and crimes against humanity are to be punished even in the absence of Hungarian criminalisation at the time of commitment.⁴⁰ The explicit formulation of the principle of *ne bis in idem* is also a new

³⁷ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 01125.

³⁸ Case 4/73 *Nold* [1974] ECR 00491.

³⁹ Case 36/75 *Rutili* [1975] ECR 01219.

⁴⁰ CC Decision 53/1993. (X. 13.) AB.

element in the FL compared with the 1989 Constitution; however, this was previously guaranteed by the Constitutional Court under the principle of the rule of law. A definite novelty is that foreign judgments can be recognised not only on the basis of EU law but also on the basis of international treaties.⁴¹

Under the 1989 Constitution neither the Framework Decision on the European Arrest Warrant⁴² nor the implementing law were subjected to a constitutional challenge.

The Framework Decision was transposed into Hungarian law by Act CXXX of 2003, which was later replaced by Act CLXXX of 2012.

Unlike in other Member States, the prohibition of the extradition or surrender of own nationals is not constitutionally entrenched. Although the prohibition of extradition of Hungarian nationals as a general rule is laid down in Act XXXVIII of 1996 on international legal assistance in criminal matters, the law of CLXXX of 2012 prevails on the basis of the principle *lex posterior derogat legi priori*.

A more difficult question arises in the case of a potential constitutional challenge against the 2012 Act. First, the former Art. 69 of the 1989 Constitution and Art. XIV of the FL currently in force on the prohibition of expelling Hungarian citizens from the territory of Hungary, or the statement that Hungarians always have the right to return to Hungary, may be interpreted as encompassing the prohibition of extradition or surrender of Hungarian nationals.

Secondly, the other ground-breaking novelty of the European Arrest Warrant, the departure from the principle of double criminality, may also be challenged on the basis of the Constitution or may be disputed in light of the FL. Since there are potential clashes between EU law and the Constitution/FL of Hungary, the matter is more delicate. However, these issues have not yet been raised in front of the Constitutional Court.

In Decision 32/2008. (III.12.) AB, the first case in relation to the European Arrest Warrant (EAW), it was not the implementing domestic law but a related piece of legislation, the Hungarian law promulgating the Convention on the surrender procedure between the European Union on the one hand and the Republic of Iceland and the Kingdom of Norway on the other (hereinafter EUIN), which became the subject of constitutional scrutiny in March 2008. Using his constitutional right of veto, the President of the Republic initiated the constitutional review of the law promulgating the EUIN, which had been approved by the Hungarian legislature on 11 June 2007. The EUIN Convention extended the jurisdiction of the Framework Decision to the above-mentioned two non-EU members, Iceland and Norway. Therefore, the Convention forms neither part of the primary nor of the secondary legal sources of the EU.

⁴¹ Jakab 2011, p. 229.

⁴² Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

In Decision 32/2008. (III.12.), the Constitutional Court ruled that certain passages of the challenged law were unconstitutional. The Constitutional Court examined the correspondence of both Art. 2 of the Constitution, whereby ‘Hungary is a sovereign, democratic state’, and Art. 57(4), which enshrined the legal principles of *nulla poena sine lege* and *nullum crimen sine lege* in the 1989 Constitution. The Court was of the opinion that the turn of phrase ‘according to Hungarian law’ in Art. 57(4) was primarily meant to refer to the Criminal Code, but it also covers obligations that become part of the Hungarian sources of law through the ratification of an international convention, thus making allowance for possible exceptions to the principle of *nullum crimen sine lege*, and therefore also including the possibility of retrospective legislation.⁴³ Therefore, Art. 7 of the 1989 Constitution on international law complements Art. 57(4), and the two should be applied in parallel. According to the Constitutional Court’s decision, however, the EU *acquis* does not qualify as international law. The Union can promulgate an article of international law only within the framework of the third pillar, but according to the Constitution these conventions do not become ‘part of Hungarian law’. In light of the above, the Constitutional Court reviewed the various articles of the EUN Convention and came to the conclusion that several sections of the Act ratifying the Convention were in fact in contradiction with the Constitution.

In Decision 3144/2013. (VII. 16) AB, the applicant challenged Act CXXX of 2003 (replaced by Act CLXXX of 2012 by the time the decision was delivered) implementing the EAW Framework Decision in the form of a constitutional complaint. According to the Act, execution of an EAW has to be refused if the criminal prosecution or punishment of the requested person is barred by statute under Hungarian law, provided that the act in question falls within the jurisdiction of Hungary.⁴⁴ Justice Miklós Lévay wrote the decision rejecting the complaint for the court unanimously. He emphasised that mutual trust and cooperation were the basis of surrender according to the EAW. This, however, does not mean an unconditional or unverified acceptance of the issuing authority’s evaluation of the case. According to Art. 11(1) of the implementing Act, the Budapest-Capital Regional Court shall hold a hearing where the requested person has the opportunity to challenge the existence of circumstances which might affect the conditions of his or her surrender. Should the Budapest-Capital Regional Court not be able to decide on surrender based on the available data and facts provided by the issuing authority, it may request, by way of the responsible minister, that the issuing authority in an urgent procedure provide it with additional information, with special regard to data that might lead to a possible refusal to execute the EAW, including data on the statute of limitations. Should the Hungarian judicial authority ultimately come to the conclusion that the statute of limitations has expired, it will deny the execution of the EAW.

⁴³ CC Decision 2/1994. (I. 14.) AB.

⁴⁴ Article 4 of Act CXXX of 2003 and Art. 5 point c) of Act CLXXX of 2012.

In Constitutional Court Decision 3025/2014 (II. 17.), the judge of an ordinary court referred a constitutional issue in an on-going case to the Constitutional Court. The judge challenged Art. 15(3) of Act CXXX of 2003 implementing the EAW according to which, once located, the person requested has to be automatically arrested, i.e. the competent authority is not granted judicial discretion to opt for less rights-intrusive measures in lieu of arrest. The Constitutional Court's majority – in an opinion authored by Justice Mária Szívós – rejected the complaint.

The majority held that the regulation under review corresponds to the constitutional and international requirements on the limitation of fundamental rights. The limitation is prescribed by law. The limitation serves the aim of exercising state powers of criminal prosecution. In order to make the exercise of these powers efficient, the state organs need to have effective tools which by necessity severely limit certain rights. The necessity of employing these tools can be justified by the nature of criminal acts, which endanger or violate other persons' fundamental constitutional rights. The efficient enforcement of EAWs ensures the successful exercise of the state powers of punishment and necessarily involves rights infringing measures, such as arrest and detention.

Justice Miklós Lévay authored a dissenting opinion, joined by Justices Elemér Balogh, András Bragyova and László Kiss. In their view the Constitutional Court should have conducted a complex constitutional scrutiny (as opposed to examining surrender for the sake of execution of a sentence only) and it should have determined a violation of the FL. The dissenting opinion clarified that a Constitutional Court review conducted upon the initiative of a judge is an abstract review of the challenged provision. Often the Constitutional Court does not limit the scope of constitutional scrutiny to the subject or object of the case at hand, but reviews all elements of the attacked provision.⁴⁵ In the view of the dissenting judges, the only limitation is that the Constitutional Court must stick to the constitutional review of the provision to be invoked in the actual case at issue. Therefore, the majority Justices – in the opinion of the dissenting Justices – engaged in 'negative judicial activism' with regard to the scope of the constitutional scrutiny. In their view, a full constitutional analysis of the whole challenged provision should have been conducted. Neither the EAW Framework Decision nor the implementing domestic law differentiates between procedures conducted for the sake of a criminal proceeding and for the enforcement of a custodial sentence or detention order, which is a further reason to not limit the scope of constitutional review. In the view of the dissenting Justices, had the majority reviewed the whole provision, it would have come to the conclusion that the implementing legislation was, while necessary, disproportionate to the aim to be pursued and therefore unconstitutional.

In order to underpin his point, Justice Lévay also invoked EU law. He noted that the Constitutional Court must interpret domestic law – as far as possible – in line

⁴⁵ See e.g. CC Decision 37/2013. (XII. 5.) AB.

with the Framework Decision.⁴⁶ Although Art. 12 of the EAW Framework Decision leaves it primarily up to the Member States to decide whether a requested person should remain in detention after arrest, the main aim of this rights-infringing measure is the prevention of absconding. This provision thus does not oblige Member States to detain all requested persons. Quite to the contrary, in his view, severe doubts are raised regarding the compatibility of the Hungarian measures with EU law, with due regard to Art. 6 of the EU Charter of Fundamental Rights on the right to liberty and security of person.

2.3.2.1 Decision 32/2008. (III.12.) evoked harsh criticism among legal scholars who immediately reacted to the Constitutional Court's ruling.⁴⁷ It is quite telling that a Constitutional Court judge, Péter Kovács, authored one of the scholarly articles,⁴⁸ thereby departing from the well-established practice that constitutional court justices do not explain their decisions, and judgments shall speak for themselves. The majority of the experts in the field seem to agree with Justice Bragyova and have criticised the application of the *nullum crimen* principle to the law under scrutiny. As Krisztina Karsai and Katalin Ligeti have proved, whether and to what extent constitutional and other guarantees apply to procedures conducted in the framework of legal assistance depends on the branch of law. As the professors have rightly pointed out, the Constitutional Court entirely omitted such analysis and took it for granted that legal assistance in criminal matters belongs to the branch of criminal law,⁴⁹ although the various parts of an extradition procedure are characterised by their patchwork nature: on the one hand a certain duality between international and domestic law can be traced, and on the other the procedure has both criminal and administrative law elements. Compliance with a request for extradition or surrender is an administrative law decision, and cannot be regarded as an act where the criminal power of the requested state is being manifested, even if – like in the case of surrender – the principle of direct request applies, since the objective of the procedure is neither the establishment of criminal liability nor the imposition of sanctions.⁵⁰

Although the rulings declaring the unconstitutionality of the domestic law giving effect to the international treaty which extended the ambit of the EAW to Iceland and Norway have created some difficulties, the overall situation is not as bad as it seems: in the day-to-day practice, this legal instrument more or less does the job. The overall experience indicates that in the face of all the constitutional worries, one-fifth of all arrest warrants end in effective surrender in the EU.⁵¹

⁴⁶ Cases C-105/03 *Pupino* [2005] ECR I-05285; C-397/01 *Pfeiffer and Others* [2004] ECR I-08835; C-282/10 *Dominguez* [2012] ECLI:EU:C:2012:33.

⁴⁷ Karsai and Ligeti 2008, pp. 399–408.

⁴⁸ Kovács 2008, pp. 409–413, commenting on the article by Karsai and Ligeti.

⁴⁹ Karsai and Ligeti 2008, pp. 399–408, 400.

⁵⁰ *Ibid.*, pp. 401–402.

⁵¹ See the aggregate number of EAWs issued and resulting in effective surrender between 2005–2013, <http://www.europarl.europa.eu/EPRS/140803REV1-European-Arrest-Warrant-FINAL.pdf>.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 The expert has come across and is aware of a number of cases that raise doubts with regard to *in absentia* judgments rendered in other Member States decades ago, but these cases have not yet been heard by the courts.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1–2.3.4.2 Although constitutional issues did not directly arise in the following complex set of decisions, let us mention the perhaps best known EAW surrender case which has been extensively covered by the Hungarian and Irish media. The Tobin case illustrates the difficulties of the implementation of the EAW by the Member States.⁵²

The case confirms that the European criminal justice that used to operate along the lines of intergovernmentalism was inefficient. A field of law that develops slowly on a case-by-case basis is not suitable for remedying the negative side-effects of an expanded freedom of movement.

Out of fear for loss of national sovereignty over criminal law, the Member States opted for mutual recognition-based instruments rather than harmonisation. However, mutual confidence has still not been fully achieved among the Member States. As long as certain states are worried about their citizens' basic rights and respect for their procedural guarantees due to different fundamental rights standards, they will leave shortcuts in their legislation to avoid the enforcement of EU law; they will interpret EU law in a restrictive way or even *contra legem*. Irish Justice Hardiman's opinion speaks volumes in this regard; he straightforwardly rejected the idea of mutual trust.⁵³ Had he adhered to the basics of EU criminal law, neither his devastating opinion about Hungarian criminal procedure nor his ignorance about the Hungarian legal system should have mattered. The fact that Hungary would not have extradited its own citizen but rather would have offered to execute the punishment itself should also have been irrelevant, since the EAW does not operate on the basis of reciprocity, but rather on the basis of confidence among the Member States.

Had the Member States not guarded their national sovereignty over criminal so jealously, a Luxembourg decision in the framework of a preliminary ruling procedure would have clarified how to interpret Irish law in conformation with EU law so as to correspond to the Framework Decision. Had the third pillar operated along the lines of supranationalism, the Commission or another Member State, including Hungary, could have initiated an infringement procedure for the wrongful

⁵² Buda Surroundings District Court, case number: 2.B.1308/2000/20, 7 May 2002., Pest County Court as court of second instance, case number: 2. Bf. 740/2002/6, 10 October 2002, High Court, *Minister for Justice Equality & Law Reform v. Tobin*, [2007] IEHC 15, 12 January 2007, Supreme Court of Ireland, *Minister for Justice, Equality & Law Reform v. Tobin*, [2008] IESC 3, 3 July 2007., High Court, *MJELR v. Tobin*, [2011] IEHC 72, 11 February 2011, Supreme Court of Ireland, *Minister for Justice Equality and Law Reform v. Tobin*, [2012] IESC 37, 19 June 2012.

⁵³ Supreme Court of Ireland, *Minister for Justice Equality and Law Reform v. Tobin*, [2012] IESC 37, 19 June 2012.

implementation of the Framework Decision. Had the Court of Justice had more powers, it could have condemned Ireland for disrespecting the maximum 90-day deadline applicable for the determination of a request for surrender, and the length of proceeding argument would not have arisen.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 The dissenting opinion of Justice Lévy to the EUIN decision, which clarified what procedural and substantive safeguards need to be available for the constitutional operation of the EUIN, seems to have embraced the necessity of mutual recognition and trust under the European framework for criminal cooperation. The separate opinion of Justice Bragyova, however, suggested that even though the *nullum crimen sine lege* principle may not constitute a constitutional limit to the EUIN, other constitutional principles, such as the right to asylum, the prohibition on the extradition of own nationals, the equal treatment principle, the right to a fair trial or the prohibition of the death penalty may offer sufficient constitutional grounds for the potential refusal of EU criminal cooperation measures.

The *EAW Transfer Detention* decision of the Constitutional Court⁵⁴ – reported above at Sects. 2.3.1–2.3.2 – was also not particularly critical of the mutual recognition principle. It merely took notice that criminal cooperation under the EU framework represented a closer system of cooperation among the Member States, and that the obligations of national criminal justice systems under the mutual recognition principle can be scrutinised domestically when the grounds for the execution of an EAW are examined by national courts. A more critical position was formulated in the dissenting opinion of Justice Lévy and others, arguing that the domestic implementation of the Framework Decision, which prescribed the mandatory detention of the person being transferred under an EAW and which did not regulate the possibility of using other alternative instruments, represented a disproportionate interference with the right to personal freedom. The EAW Framework Decision interpreted together with Art. 6 EU Charter contributed to the conclusion by the dissenting judges that the domestic regulation of mandatory detention following a mandatory arrest under an EAW was unconstitutional, as it represented a violation of the right to personal freedom by making the decision automatic and not subjecting it to a test of justification in the light of the circumstances of the individual case.

2.3.5.2 The Expert is not aware of any debates regarding the transplantation of mutual recognition from internal market to criminal law in Hungary.

Technically, the mutual recognition principle is an effective principle for the governance of large and diverse areas. It ensures that without engaging in politically treacherous and legally risky harmonisation, private and public activity across

⁵⁴ CC Decision 3025/2014 (II. 11.) AB.

borders between the participating states can be secured, and conflicts between the different participating regulatory systems are settled. It places emphasis on horizontal cooperation and communication, and conflicts are settled in a bilateral framework. It creates an essentially decentralised framework for governance which, in harmony with the principle of subsidiarity, favours local discretion. Its safe operation, however, requires that exemptions from the obligation of mutual recognition be available. Mutual recognition, because of increased horizontal cooperation and communication between the participating states, may lead to voluntary harmonisation through the conduct of the individual participants.

2.3.5.3 The Expert is not aware of any such concerns raised with regard to the role of courts.

In the Expert's view, the mutual recognition principle assumes the approaches of both trust and cooperation and of protection. While there is pressure to cooperate horizontally and to safeguard the effectiveness of the overall governance framework, it is possible to protect locally formulated considerations in what is an essentially decentralised system. The sensitive issue is how these functions may be reconciled, and to what extent the protection function is allowed to be exercised in light of the inherent pressure to secure the effective operation of the governance framework. Again, this is a question of gradation.

In the Expert's view, a conflict between the different functions exercised by national courts is likely to arise in the area of cooperation in family matters. National courts are likely to be conflicted by their obligations to protect the rights of the child and to secure the effective execution of court orders issued in a foreign jurisdiction, in particular when the parents have initiated parallel proceedings concerning child custody in different jurisdictions.

2.3.5.4 In the Expert's view, it first needs to be considered whether the current safeguards available in the EU measures concerned enable effective protection in all circumstances and whether through the extension of the relevant safeguards at the EU level any hiatuses can be remedied. When the introduction of further nationally driven safeguards beyond these possibilities is considered, how they would affect the regulatory objectives of the relevant EU measures and whether they are liable to reproduce the procedural and other problems the relevant EU measures were intended to resolve in the first place needs to be taken into account. The Expert considers that while a reintroduction of judicial review could increase the level of protection of individuals, it is difficult to foresee the cross-border implications of such a solution. It must not be ignored that the effective resolution of cross-border matters is also in the interest of the individuals concerned.

Locally engineered responses could also raise the issue of different standards of protection being available to individuals in different Member States. It is not only questionable that the same institutions of judicial protection could be introduced in the different Member States in the different areas where the mutual recognition principle applies, but it is also unclear whether the relevant judicial remedies would have the same scope and intensity. These differences could reflect deeper divergences between the different legal systems and therefore, introducing a uniformly

applicable solution at the national level may be problematic not only as a matter of competences, but also substantively. Revisiting the rules of the existing EU measures in light of the experiences of the past year may offer a more easily achieved solution.

2.4 *The EU Data Retention Directive*

2.4.1 The implementation of the Data Retention Directive⁵⁵ did not raise constitutional issues in Hungary. The Hungarian Civil Liberties Union filed a petition with the Constitutional Court in 2008 against several articles of Act C of 2003 on electronic communications,⁵⁶ alleging that beyond the violation of several fundamental rights (e.g. right to privacy, right to protection of personal data, right to property) the domestic legislation also infringed Art. 2/A of the 1989 Constitution by implementing an ultra vires EU act. However, the Constitutional Court did not address the petition, and when the 1989 Constitution was repealed by the FL, the petitioner was unable to re-initiate the procedure as a constitutional complaint under the new legal conditions.

2.5 *Unpublished or Secret Legislation*

2.5.1 The principle of loyalty does not require the Member States to overlook the principles governing the legality of domestic administrative action completely, and it does not prevent the Member States from observing domestic legal requirements in the execution of EU measures, provided that the effectiveness of EU law is not placed in jeopardy. The Hungarian approach was placed under the scrutiny of the Court of Justice in its 22 May 2014 judgment in the *Érsekcsanádi Mezőgazdasági Zrt.* case.⁵⁷ The Court of Justice, as a matter of the formal requirements of EU law, confirmed the Hungarian practice by accepting that the adoption of national administrative decisions and administrative opinions for the execution of Commission Decisions are not excluded by those decisions.⁵⁸ This, however, does

⁵⁵ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

⁵⁶ Petition of the Hungarian Civil Liberties Union: http://tasz.hu/files/tasz/imce/Eht_AB_vegleges.pdf.

⁵⁷ Case C-56/13 *Érsekcsanádi Mezőgazdasági Zrt* [2014] ECLI:EU:C:2014:352.

⁵⁸ The Court of Justice paid no attention to matters arising in domestic law relating to the adoption of national measures for the execution of Commission Decisions – specifically, the use of an administrative opinion as opposed to an administrative decision to decide on the rights and

not mean that as a matter of national law, and provided that EU law requirements are not violated, national courts cannot demand that the domestic requirements of administrative law be met.⁵⁹ This is particularly important in circumstances where the legality of administrative action, for example the choice of administrative instrument (here administrative decisions and a formally non-binding administrative opinion) restricting the rights of and imposing obligations on individuals, is questionable under domestic law. Arguably, the Court of Justice implied, whilst denying that it had competence to rule on the issue, that the lawfulness of the executing national measures may also depend on their meeting domestic legal requirements.⁶⁰ This follows from the fact that the questions referred to the Court of Justice were aimed at clarifying whether not providing compensation for damage caused by national executing measures is an acceptable practice in general considering, especially, the requirements following from EU law.

See also the *György Balázs* case in Sect. 2.8.1.

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 It has been suggested that the declaration by the Constitutional Court that a domestic executing/implementing measure is unconstitutional could be considered as an indirect constitutional criticism towards EU market regulation, although formally it would have no effect on the legality of any EU instruments, and the Constitutional Court has always been cautious to indicate that its decisions do not involve an assessment of EU legislation.⁶¹

The *Agricultural Surplus Stock* decision⁶² offers a clear image of the hesitant approach of the Constitutional Court, which placed more emphasis on domestic conundrums of constitutional adjudication than on investigating the potential for

obligations of individuals, and it was only interested in the effective execution of the Commission decisions, which did not specify the rules of their domestic implementation (paras. 40–43).

⁵⁹ This question was not put to the Court of Justice, and it is likely that the Court may not have jurisdiction to answer the question in its entirety.

⁶⁰ See paras. 47–49, 51–56, and 62–65 of the judgment. The Court of Justice held that in the absence of explicit requirements in EU law, it is exclusively for the national legislature to decide whether a system of compensation for any damage caused by the executing national protection measures should be established. In the relevant questions referred to the Court of Justice, the referring court wanted to clarify whether the principles of EU law would require the Hungarian state to set up a system of compensation, or liberate it from any such (European and domestic) obligation.

⁶¹ Fazekas 2014, p. 53.

⁶² CC Decision 17/2004 (V. 24.) AB. Annotated in Albi 2009, pp. 46–69; Sajó 2004, pp. 351–371 and Uitz 2006, pp. 41–63.

diverging constitutional standards of economic regulation at the European and the national level. The main limitation of the decision is that, unlike the Estonian Supreme Court and the Czech Constitutional Court,⁶³ the Constitutional Court refused to acknowledge that it is necessary to examine matters under EU law. Therefore, only the domestic implications of the relevant EU regimes were examined on the basis of domestic constitutional law. This enabled the Hungarian court to avoid the constitutional controversies of addressing the constitutional deficits of EU regulation and of giving precedence to EU law over the Hungarian Constitution.

The Court claimed that that ‘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 the EU regulations themselves. This meant that the act was reviewed on the basis of the standing jurisprudence of the Constitutional Court on the principle of legal certainty, which resulted in a declaration that several provisions of the act were unconstitutional. The Constitutional Court confirmed, in particular, that the payment obligations were introduced retroactively, and that the temporal complications of implementing the EU regulations in the first half of 2004 compromised the constitutional principle of legal certainty. The Commission regulations were subjected – albeit indirectly – to the control offered by Hungarian constitutional requirements.⁶⁴ Although the intention to uphold core domestic constitutional requirements, such as the rule of law, was evident,⁶⁵ it is far from certain that this was inspired by the suspected more relaxed demand for legal certainty in EU law. Similarly, the Constitutional Court did not specify whether the decision might be regarded as a challenge to the supremacy of EU law (of the Commission regulations) over the Hungarian Constitution.⁶⁶

There is perhaps a clearer indication of what the Constitutional Court thinks of the standard of fundamental rights protection at the EU level in the jurisprudence in which the protection of rights as offered by EU legislation is contrasted indirectly with national requirements.⁶⁷ As noted in the Hungarian commentary, these cases reveal a more receptive attitude towards the EU dimensions of constitutional

⁶³ EU legislation on transitional agricultural measures also caused constitutional problems immediately after EU accession in Estonia and the Czech Republic. See Albi 2009.

⁶⁴ Fazekas 2014, p. 53.

⁶⁵ As Fazekas noted, it is unclear ‘whether legal certainty was given precedence because it was one of the most significant constitutional principles of the democratic Hungarian state based on the rule of law, or other provisions of the constitution would also be treated in this way’. Ibid., p. 53.

⁶⁶ Fazekas argued that the Constitutional Court, first among the constitutional courts of the new Member States, was under considerable pressure to avoid a solution which would have represented a limitation of state sovereignty and independence, and of the constitutional values of Hungarian democracy. Fazekas 2014, p. 55.

⁶⁷ The *Lisbon Decision* made it clear that the Charter of Fundamental Rights binds the Member States and they are subjected to the jurisdiction of the Court of Justice under the Charter. It also accepted that the Lisbon Treaty reinforced fundamental rights protection in the EU.

disputes than the cases – discussed above – that deal with more visible conflicts between national and EU constitutional law.⁶⁸

There are several cases where EU law has enhanced the protection of employees and equal treatment on the grounds of gender.

Finally, it needs to be considered that recent jurisprudence from the Constitutional Court concerning the constitutional benchmarks of economic regulation by the Hungarian state under the FL seems to be pursuing a rather reduced constitutional agenda. The rulings, which aimed to lay down the foundations of economic constitutionalism under the FL, recognise a particularly broad discretion for the legislature to interfere with the economy, and they, therefore, seem to contradict any expectation that EU economic regulation may fall below Hungarian constitutional benchmarks, as now regulated under the FL. Nevertheless, the relevant decisions may serve as a source of conflict between EU economic regulation and Hungarian constitutionalism. While they do not represent an outright denial that the economic constitution under the FL follows the idea of a market economy,⁶⁹ their conclusions are based on explicit – if rather misunderstood – criticisms of global and regional market integration, and on concerns for the devastating consequences of unregulated markets. They also recognise the global fiscal and economic crisis as a ground for curbing back the market and expanding the influence of the state. This, in the interpretation of the recent jurisprudence, entails that normal rule of law requirements may be accorded lesser relevance and that the right to property and the freedom of enterprise may need to tolerate more robust interventions by the state. At this point, it must be noted that there is no evidence that the examination of the individual grounds by the Constitutional Court has actually been affected by these considerations. Beyond general declarations, the decisions in question have all failed to establish a link between the crisis/regulatory failure/globalisation and the legal provisions in question.

The June 2014 decision in the *Cooperative Banking Restructuring* case⁷⁰ indicated that in matters of economic policy and regulation, the Constitutional Court is prepared to trust the judgement of the Government. It also made it clear that the right to property and the freedom to pursue an economic activity represent a rather undemanding constitutional limitation on government discretion, and it seems to have set the benchmarks for justifiability, rationality and necessity applicable to economic regulation comparably lower than in the jurisprudence under the 1989

⁶⁸ Fazekas 2014, pp. 65–68.

⁶⁹ In Art. M), the Fundamental Law holds that the Hungarian economy is based on value-producing work and on the freedom of enterprise, and that Hungary ensures the conditions of fair and undistorted competition in the market. Contrast this with Art. 9(1) and (2) of the 1989 Constitution, which holds that the Hungarian economy is a market economy in which the equality of private and public ownership are guaranteed, and that Hungary recognises and supports the freedom of enterprise and the freedom of competition in the market.

⁷⁰ CC Decision 20/2014 (VI. 30.) AB.

Constitution.⁷¹ The decision was allegedly influenced by the exigencies of post-crisis economic and fiscal recovery. The Court was anxious to make the general point that global and regional market integration and the governance of global and regional markets have proved to constitute a risk for the Hungarian social and economic order, but without any elaboration on how this might actually affect constitutional standards.

The socially and politically highly controversial November 2014 *Foreign Currency Consumer Loan* decision⁷² ruled that Act XXXVIII of 2014 implementing the ‘uniformity decision’ by the Curia (uniformity decision in civil law 2/2014) concerning the fairness of foreign currency consumer loan contracts delivered on the basis of the *Kásler* judgment of the EU Court of Justice,⁷³ did not constitute a violation of legal certainty, the prohibition of retrospective legislation or the right to a fair trial. The Act had sought to alleviate the exposure to currency fluctuations of individuals affected by foreign currency mortgages. In setting the premises, the Constitutional Court claimed that the contested legislation needed to be interpreted in the light of the commitment of the FL to protect vulnerable individuals, in particular poor and vulnerable consumers. While this in principle is unproblematic, there is no evidence that the assessment of the Constitutional Court of the individual grounds was influenced by such commitment.

Concerning the requirement of legal certainty, the Constitutional Court held that the extremely limited amount of time available between the adoption and the entry into force of the act in question – although it was recognised as unusually short – cannot be regarded as unconstitutional, as in the circumstances of the case the financial institutions affected by the legislation were in fact able to make the necessary preparations. Fundamentally, it argued that the Act contained nothing new which the financial institutions affected would not have known from judicial practice or from other pieces of legislation, and that the Act, although it introduced considerable negative consequences for the financial institutions affected, did not contain provisions which would have required lengthy preparations.

Regarding the claim relating to retrospective legislation (and in this connection to legal certainty), the Constitutional Court stated that the conditions of contractual fairness as regulated by the Act – although not as explicitly as made out in the Act – had in fact been part of the Hungarian legal system before the introduction of foreign currency consumer loans in the Hungarian market. It argued that the fairness of consumer contracts have always been regulated clearly and unambiguously in Hungarian law and that the explicit conditions of the Act on contractual fairness,

⁷¹ See, also CC Decision 3194/2014 (VII. 7.) AB on the regulation of the sale of tobacco products, which by examining only the manifest unreasonableness of the regulatory instrument in light of its general objectives has created an extremely low constitutional benchmark for economic regulation, aiming to re-regulate and re-partition entire sectors of the economy. The generally applicable benchmarks, such as transparent and non-discriminatory regulation, and the adequate regulation of the discretion made available to the public body concerned, were ignored.

⁷² CC Decision 34/2014 (XI. 14.) AB.

⁷³ Case C-26/13 *Kásler and Káslerné Rábai* [2014] ECLI:EU:C:2014:282.

which followed directly from the judgment of the EU Court of Justice in *Kásler* interpreting Directive 93/13/EC, have been part of Hungarian law since the implementation of the directive into Hungarian law. In reaching this conclusion, the Constitutional Court was not disturbed by the fact that until the judgment in *Kásler*, the uniformity decision 2/2014 and the adoption of the Act, the particular meaning of contractual fairness as specified in length by the Act had not been defined at all in Hungarian law or in Hungarian judicial or other practice. It seemed satisfied that the vulnerable position of consumers and the information deficit favouring financial institutions should have been sufficient to allow for an interpretation of fairness in consumer contracts as determined in legislation in 2014.

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1 There is no evidence that any constitutional discussions on the Treaty Establishing the European Stability Mechanism (ESM Treaty) have taken place in Hungary, which is not a eurozone country and has not ratified the ESM Treaty.

The Constitutional Court decision dealing with the constitutionality of the Treaty on Stability, Coordination and Governance (TSCG) dealt with the interpretation of the ‘Europe clause’ (Art. E(2) and (4) of the FL).⁷⁴ It focused, in particular, on the issue of whether the binding nature of the TSCG, which regulates policy and institutional matters relating to the EU framework, should be considered under Article E of the FL, which requires a two-thirds majority in the Hungarian Parliament in the ratification process. The technical reasoning of the decision, which did not address the substantive legal and policy consequences of the TSCG, examined under these premises whether the TSCG should be classified as a treaty constituting the European Union, or as a treaty modifying or supplementing the rights and obligations laid down in the treaties constituting the European Union. Ultimately, it found that if the TSCG does not affect the transfer of constitutional competences under the EU framework, the provisions of Art. E(2) and (4) need not be applied. The reasoning is far from clear, and the use of the conditional in the conclusion (‘if’)⁷⁵ was not particularly helpful for the legislator in determining whether the TSCG in fact required a two-thirds majority for ratification by Parliament. The refusal of the Constitutional Court to look into the substance of the TSCG was based on the fact that its review powers were limited by the application

⁷⁴ CC Decision 22/2012 (V. 11.) AB.

⁷⁵ On the basis of EU constitutional law and as indicated in Art. 3(1) of the TSCG, the TSCG cannot be regarded as constituting a transfer of competences for their exercise under the EU framework, and the TSCG (therefore) was not adopted as a modification of the Founding Treaties. There are, nevertheless, TSCG provisions which affect – beyond explicit EU legal obligations – the fiscal sovereignty of its signatories (Arts. 3(1)a, 3(1)e, 3(2), and 11), which should justify its recognition as a treaty falling under Art. E) of the FL.

in the given case, which did not touch upon substantive issues. The Court nevertheless indicated that it was prepared to examine the substance of the Hungarian legislation incorporating the TSCG in light of the FL, provided that it receives an admissible application in that matter.

2.7.2 There have been no constitutional discussions regarding Eurobonds in Hungary.

2.7.3 As seen earlier, the constitutional order established after 2010 in Hungary went particularly far in guaranteeing unrestrained discretion for the Government to tackle the economic and social impact of the financial and economic crisis. The partial suspension of the jurisdiction of the Constitutional Court in reviewing economic regulation enabled the Government to make the necessary reforms through legislation. This is reflected in the constitutional case law dealing with the admissibility of petitions against fiscal and economic legislation aimed – supposedly – at managing the crisis, which despite inventing the potentially useful instrument of interpreting the right to human dignity together with the non-discrimination principle have left Governmental discretion untamed. However, the fact that these constitutional provisions were left in force in 2015 and that they are potentially of unlimited temporal applicability begs the question of whether their aim was ever to guarantee effective crisis management by the Government, and it is extremely controversial that these immunities apply to the non-crisis related re-regulation and re-partitioning of different markets in Hungary. More importantly, the essence of these constitutional changes has never been the reinforcement of democratic controls, rule of law requirements, transparency or the adequate balancing of rights with regard to Government austerity/bail out/emergency and other nationalisation measures. Conversely, their intention was to exclude any form of potential control over Government policy-making.

This, necessarily, can be explained by some form of new government philosophy regarding the post-crisis role of the state in the market and by a newly found emphasis on solidarity and social rights in fiscal and economic regulation, as attempted in the previously commented recent case law of the Constitutional Court. The FL is also available to provide a potential communitarian interpretation of these changes, with the argument that the interest of the community of Hungarian people should enjoy priority over the rights and interests of individuals, economic operators or particular social groups. Nevertheless, there is no convincing evidence available that these interpretations of the Hungarian social order comprehensively influence government policy-making and regulation, and that austerity and other crisis management measures have been introduced to satisfy citizens' demand for control, transparency and accountability. It is a more likely interpretation that liberal constitutionalism has been suspended while the Government is 'at work'.

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1 The Expert is aware only of one instance in which the invalidity of the relevant EU measure was raised and the respondent petitioned for a reference for a preliminary ruling to this end.⁷⁶ It was claimed that Art. 5(3j) of Directive 2001/29/EC⁷⁷ – governing one of the exceptions and limitations to EU copyright law – violated Arts. 50 and 95 EC, without clarifying the grounds of that claim. The regional appeal court refused to refer the case to the CJEU. It indicated that the directive was irrelevant for the facts of the case and that the Treaty provisions cited were wrongly raised in the case.

There were two other cases in which this matter was addressed, although very indirectly. The question in *GSV* was whether the Common Customs Tariff was enforceable against individuals when its Hungarian version, containing an obvious mistake, supported the legal position of the individual in question.⁷⁸ In a preliminary ruling, the Court of Justice held that the linguistic discrepancy ‘is not liable to entail the annulment (of the tariff classification under EU law) made by the customs authorities on the basis of all the other language versions (of the Common Customs Tariff and the related regulations).’⁷⁹ In *György Balázs*, a question was put to the CJEU in a preliminary reference on whether the unavailability of legal measures in the national language had an impact on the lawfulness of their application under the relevant EU legislation (Directive 98/34/EC⁸⁰) by domestic public authorities.⁸¹

2.8.2 The Expert has found no evidence of discussion on the standard of review by the EU courts in Hungary. The focus of all actors – the ordinary courts, the Constitutional Court and the administration – has been on ensuring that EU law is given effect in a manner required by the relevant principles of EU law and as it follows from the FL and the accession documents. The main indication that the scope and effectiveness of judicial review may actually matter for the political and constitutional order under the FL is the notorious delimitation in the constitutional text of the competences of the Constitutional Court in questions of fiscal policy and of the related economic policies. In the instances where in the Expert’s view the effective application of EU law has not been adequately ensured, the cause of non-enforcement must be sought in individual professional incompetence rather

⁷⁶ Budapest Regional Appeal Court 8. Pf. 21.417/2011/6.

⁷⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ L 167/10.

⁷⁸ Case C-74/13 *GSV* [2014] ECLI:EU:C:2014:243.

⁷⁹ *Ibid.*, para. 53.

⁸⁰ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, [1998] OJ L 204/37.

⁸¹ Case C-251/14 *György Balázs* [2015] ECLI:EU:C:2015:687.

than in conscious resistance against expanding, strictly enforced but judicially inadequately controlled EU law. Nonetheless, considering the increasingly critical approach of the Constitutional Court to global and regional economic integration, it is not excluded that it will strike a more critical tone with regards to the legality and the impact of EU economic regulation. Although it is bound to obey EU law under domestic constitutional law and it would be extremely reluctant to contradict a formal obligation laid down in law, it is not completely excluded that the Constitutional Court – in circumstances where Hungarian interests are gravely affected, relying on the social and communitarian values of the FL as a rather thin veil hiding its true intentions – would question the applicability of EU law based on this or other gaps in EU constitutional law.

Considering that with the introduction of the FL and the recent jurisprudence on the economic constitution in Hungary the availability of judicial review against domestic economic and social legislation has been considerably reduced, arguments comparing the standard of judicial review before EU Courts and before the Constitutional Court do not appear particularly convincing. Both avenues of judicial review seem to acknowledge and defer to the discretion of the legislator, and both are prepared to annul legislative provisions in the case of a manifest breach of the requirements of legality. Since the examination by the EU Courts – in terms of the justification, regulatory design, balancing of competing objectives and the availability of sufficient regulatory and other safeguards – seems better executed than that of the Constitutional Court, compared to the current state of Hungarian jurisprudence, the judicial review carried out by the EU Courts appears to have a more solid legal footing.

2.8.3 As a necessary disclaimer to the assessment of Hungarian jurisprudence, a clear dividing line must be drawn between the approach of the ‘old’ and the ‘new’ Constitutional Court. Because of the new approach taken in recent years – predominantly following considerations of political nature – towards the constitutional limits and controls of legislative action, the jurisprudence cannot be conceived as having developed in a linear fashion under more or less constant institutional supervision.⁸²

2.8.4 See also the answer in Sect. 1.3.4.

In Decision 61/2011 (VII. 13.) AB, as a direct continuation of the thoughts first quoted, the Court adjusted the domestic level of constitutional protection of fundamental rights to the international level, not on a hierarchical basis, but as a consequence of the *pacta sunt servanda* principle:

In case of certain fundamental rights, the Constitution defines the substance of the fundamental right in the same way as it is in some international treaty (for example the Covenant on Civil and Political Rights and the European Convention on Human Rights). In these cases, the level of protection of fundamental rights provided by the Constitutional Court may in no instance be lower than the level of international protection of rights

⁸² Szente 2015, p. 186.

(typically elaborated by the Strasbourg Court of Human Rights). As a result of the *pacta sunt servanda* principle [Section 7(1) of the Constitution, Article Q(2)-(3) of the FL], the Constitutional Court is required to follow the Strasbourg jurisprudence and the level of protection of fundamental rights defined therein, even if they did not necessarily arise from its own previous case law.⁸³

Later, the Court broadened the international determination of the level of protection of fundamental rights to include the stipulations of EU law; moreover, it considered the above quoted conclusion to be ‘even more true’ for the law of the European Union, having regard to Art. E(2)–(3) of the FL (compared to the rules of the Constitution, however, it did not elaborate in detail the meaning of the new Article E(3)).⁸⁴

2.8.5 The Expert is not aware of concerns about the standard of review by the CJEU having been raised in Hungary. As indicated earlier, the discussions have focused on the adequate and effective implementation and application of EU law as it follows from the formal legal provisions which bind the relevant national actors in EU matters.

In the Hungarian context, there is a more directly damaging gap in judicial protection under EU law, which follows from the above-mentioned refusal of the Constitutional Court to assume jurisdiction to examine the compatibility of national legislation with EU law, which forces individuals to seek redress in litigation before ordinary courts.

The Expert understands the practical rationale for presuming equivalent standards of review in an environment characterised by the overlap of multiple constitutional jurisdictions. The Expert also understands that the threshold for the rebuttal of the presumption of equivalent standards was determined at such a high level in order to avoid disagreement between the affected courts on minor issues concerning the balance established between the policy aims pursued and the fundamental rights protected, or concerning the right combination of safeguards available for the protection of rights, and to confine inter-systemic constitutional conflicts to matters where there is a manifest breach of requirements or a fundamental backsliding in the standard of protection offered.

Considering that the presumption of equivalence is rebuttable as established in *Bosphorus* (and in the jurisprudence of national courts), the resulting gap in judicial protection does not seem as threatening and damaging as perhaps suggested by the question. Although the different assessment of EU legislation on fundamental rights grounds by different courts is not excluded, it does not seem likely that genuine fundamental rights concerns would be overlooked by one court and declared as vital by another. The state of the Strasbourg jurisprudence itself indicates that the protection of human rights by courts is not a task that could not be fulfilled by other courts within their jurisdiction, and that adequately prepared legislative measures, which duly incorporate the legal signposts indicated by human rights law, would

⁸³ CC Decision 61/2011. (VII. 13.) AB.

⁸⁴ CC Decision 32/2012. (VII. 4.) AB.

not have much to fear in Strasbourg or Luxembourg. With intensive cross-fertilisation between the Strasbourg and the Luxembourg jurisprudence, the potential for divergent judicial treatment of EU legislation and a gap in judicial protection does not seem particularly high. It is also unclear whether the Strasbourg court because of its institutional position as a transnational court would not guarantee the same, or even greater, deference to the intention of the EU legislator in matters of policy as expressed in an otherwise adequately drafted and designed piece of EU legislation. It must not be overlooked that the Strasbourg jurisprudence regards international cooperation and effective transnational governance as a significant common objective of European states which, as expressed in *Bosphorus*, must be given some form of recognition in the judicial control of EU or other transnational legislation.

2.8.6 The Expert is not aware of concerns regarding the equal treatment of citizens falling under the scope of EU law and falling under the scope of domestic law having been raised in Hungary. The Expert notes that similar concerns have been raised in the academic literature regarding the legal treatment of individuals in the Member States that qualify and do not qualify as EU citizens. In the Expert's view, this has less to do with the constitutional credentials of EU legislation and more with the political willingness and unwillingness of the Member States to address the situation at the European and at the national level.

2.9 Other Constitutional Rights and Principles

2.9.1 The Hungarian case regarding surplus sugar stocks noted in the Questionnaire has partly been explored above in Sect. 2.6.1.

2.10 Common Constitutional Traditions

2.10.1 In the Expert's view, the common constitutional traditions of the Member States as sources of EU constitutional law have indeed failed to fulfil the role(s) assumedly intended for them in previous jurisprudence. The concept – with a few exceptions – has proved to be unworkable and impractical in judicial practice, and a substitute was found in the more practical and workable law of the ECHR. In other instances (e.g. the fundamental rights guarantees in EU competition enforcement procedures), a genuinely European solution needed to be found, as the common constitutional traditions of the Member States appeared to be unable to provide workable legal principles, and they would not have been able to offer legal solutions suiting the particular context. The doctrinal, conceptual and other differences in that particular area in the then developing national legal orders were irreducible, and there was no common approach which would have satisfied both the constitutional

demands and the interests of the effective administration of EU policies. Furthermore, judicial practice showed that principles of EU law could be developed and then applied on a whim, without taking into account their origins and workability as common constitutional traditions. Nevertheless, this does not mean that they have not influenced EU legislation and EU Treaty reform. The Treaties do in fact recognise – mainly, at the level of declarations – a number of shared constitutional norms and values, and the EU now seems unable to legislate without having regard to requirements recognised in national constitutions and also in European treaties governing the human rights dimension of human activity (e.g. the autonomy and informed consent of patients, the value of human life and human biological material).

In other words, the listing of common constitutional traditions depends on what normative content is expected to be expressed and how that normative content is expressed. In the case of *nulla poena sine lege*, finding common ground among the Member States as to its normative content – also considering that its guarantees have been subject to dilution – does not seem particularly problematic. However, establishing consensus regarding how that normative content may be regulated, especially in the European setting, may be more difficult, as the potential technical rules/arrangements and safeguards provided, as in the EAW, may not satisfy all expectations. Regarding the German expectation of citizens' private lives not being recorded, the fundamental question is how its assumed normative content can be expressed in EU legislation. If it can find expression in a limitation or exceptions clause agreed by the Member States, then within that framework it can be recognised as a common constitutional tradition of the Member States. In a similar manner, the requirement under legal certainty in Central and Eastern European Member States that adequate time must be afforded to enable preparations for the application of tax measures, as it emerged in the sugar quotas affairs, can be expressed in the shared, neutral requirement that the EU legislative process must have regard to the exigencies of the domestic implementation of EU instruments.

2.10.2 As noted earlier, the exploration of common constitutional traditions could be impractical and unworkable, it could lead to a downscaling of the protection offered or it could entail technical difficulties in expressing the qualifications, reservations, exceptions, etc., that could be attached to common requirements. These problems apply mainly with regard to the judicial recognition of common constitutional traditions. Their expression in EU legislative or other processes may be less problematic, although examples show that finding common constitutional ground can delay the adoption of EU legislation considerably (e.g. Directive 98/44/EC on biotechnological inventions). The democratic and other credentials of a judicial exploration of common constitutional traditions may also be problematic, as it may contradict the different conceptions in the different Member States of the extent and of the role of judicial power, and also because the method and the execution of a comparative exercise leading to the establishment of common constitutional traditions – as discussed in the academic literature on the difficulties and distortions of such comparative exercises – are not foolproof.

Furthermore, unless it is carried out with the purpose of highlighting that in a particular Member State a particularly high standard of protection is applicable, urging EU Courts to develop their judgment on the basis of a genuine exploration of common constitutional traditions may not be particularly relevant. Arguably, it may be more important to direct EU Courts towards the right assessment and the right balancing of considerations relevant in the legal appreciation of the case than to develop a legal test or legal formula genuinely shared among the Member States, which could be deduced from EU or ECHR law. For example, in the classic judgment in *Hauer*,⁸⁵ a thorough comparative analysis regarding the constitutional protection of property rights would not have added much to the legal formula that was available through less complicated sources or to the final assessment of the interference with focus on its justifiability and on the availability of safeguards/compensation.

2.11 Article 53 of the Charter and the Issue of stricter Constitutional Standards

2.11.1 There is very little evidence that the issue of the ECHR setting a minimum floor influences deliberations and decisions in the Hungarian courts. Borrowing from foreign jurisdictions and from ECHR law has always been standard practice in Hungarian constitutional law; therefore, the ECHR predominantly represents a standard to adhere to, and not a standard adherence that should be criticised.

In the Expert's view, Art. 53 of the Charter needs to be interpreted together with the actual provisions of EU law in relation to which the application of a right or freedom included in the Charter is raised. As demonstrated by *Omega* and *Schmidberger*,⁸⁶ the structure made available for the application of the fundamental freedoms of the Single Market enables – as reinforced by judicial deference to the national level by the EU Court – the application of higher national standards in a scenario in which the Charter is clearly applicable. Also, EU legislative instruments, such as Directive 98/44/EC on biotechnological inventions, through their clauses that allow for derogations from the main obligations in the protection of national constitutional values (e.g. human dignity), can ensure the enforcement of higher national standards under the scope of the Charter. Finally, there are EU measures in the case of which the standard of rights protection will depend on the conduct of national authorities in the implementation and enforcement of the measure in question.⁸⁷ In such instances, it is the responsibility of the national public authorities to provide at least the minimum protection demanded by EU law.

⁸⁵ Case 44/79 *Hauer* [1979] ECR 03727.

⁸⁶ Case C-36/02 *Omega* [2004] ECR I-09609 and Case C-112/00 *Schmidberger* [2003] ECR I-05659.

⁸⁷ See, for example, Joined cases C-411/10 and C-493/10 *N.S.* [2011] ECR I-00865.

Therefore, the scenario envisaged by the question could only arise in circumstances where the structure developed for the application of EU law does not allow for the vindication – in one way or another – of domestic constitutional concerns. Arguably, *Melloni* represented such an occasion, as the preliminary reference by the Spanish Constitutional Court was returned with the EU Court refusing to give effect to higher national standards. That judgment, however, must be interpreted in light of the fact, also indicated by the EU Court, that the regulation of the EAW reflects a ‘consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons’.⁸⁸ This implies that in the EU Court’s interpretation, the Member States, in the interest of the effective operation of a system for administering cross-border justice based on mutual trust and recognition, have waived their entitlement to enforce their higher national constitutional standards.

2.12 *Democratic Debate on Constitutional Rights and Values*

2.12.1–2.12.3 These points are not relevant in the context of Hungary’s recent constitutional developments.

In the Expert’s view, when important constitutional issues have arisen and have been referred to the Constitutional Court at the stage of implementing EU law, the present system and the preliminary ruling procedure allow sufficient space for democratic deliberation at the EU level. In the Hungarian context, the problem is that the Constitutional Court has not clarified its position on the relationship between EU law and the constitutional protection that had been controversially developed in the previous jurisprudence. It also does not seek formal contact, in the form of requests for a preliminary ruling, with the CJEU; this would have been possible not only in the case of the retirement of judges but also in the review of the Hungarian regulation on the implementation of the EAW. In the latter case, it could have inquired about the harmony of the rules with the Charter, thus contributing to development of the protection of fundamental rights at EU level. The Constitutional Court also did not invoke the procedural bond between the ordinary courts and the CJEU, i.e. the procedure of a preliminary ruling with constitutional emphasis on the interpretation of the right to a legitimate judge to establish if EU legal conditions have been met.⁸⁹ According to the permanent jurisprudence of the German Federal Constitutional Court, the CJEU may also be a ‘legitimate judge’ by virtue of Sentence 2 of Art. 101(1) of the German Basic Law. Namely, if a German judge

⁸⁸ Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107, para. 62.

⁸⁹ CC Order 3110/2014. (VI. 17.) AB; reinforced by CC Order 3165/2014. (VI. 23.) AB. The petitioners argued in both cases that the court had not fulfilled the request to initiate a preliminary ruling in the base case and Art. XXVIII(1) of the FL had therefore been infringed.

fails to request a preliminary ruling even though the relevant EU conditions are met, then reference may be made to the infringement of the right to a legitimate judge within a constitutional appeal procedure.⁹⁰ According to the Hungarian Constitutional Court, this is not a constitutional issue but a technical legal issue falling within the scope of the judge of the proceedings. Although the Constitutional Court does not refuse or endeavour to actively participate in the network of cooperative constitutionalism, it might nevertheless emphasise the importance of a Europe-friendly interpretation of the Fundamental Law in a political environment in which rejection of an otherwise constructive European criticism, questioning of the decisions of Strasbourg and Luxembourg and a generally anti-EU rhetoric are typical. It appears that the political circumstances do not favour an extensive and activist constitutional judicature.

2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law*

2.13.1 The Expert has not found evidence of EU law – unquestionably, systematically or fundamentally – having affected the protection of constitutional rights or the rule of law in a negative manner.

When addressing the standard of the EU's performance, it must not be ignored that EU constitutional requirements have been developed for a collective of different states in an environment characterised by a high degree of diversity. Finding common ground in such circumstances entails finding what could be expressed as optimum requirements which go beyond the minimum but which may not reach the maximum expectations. A certain degree of levelling out is necessary to be able to provide workable constitutional rules for a polity such as the EU. As a result, it is arguable that the development of common requirements cannot exclude the lowering of standards as recognised in individual Member States. This circumstance is particularly important when claims concerning the negative impact of EU law on the protection of constitutional rights and rule of law requirements are considered.

2.13.2 As stated earlier, the levelling out of standards could be necessary for the legal order of a collective polity such as the EU to develop common standards of protection of constitutional rights. The Expert also believes that while the protection offered in individual instances could be open to criticism, it would be controversial to formulate general conclusions concerning the performance of EU law in this domain on this basis. The Expert is willing to accept the argument that any levelling out of standards in EU law has been necessary to establish a collective polity and a collective system for the enforcement of common rights and obligations.

⁹⁰ *BVerfGE* 73, 339, 366 ff.; 75, 223, 233 ff.; 82, 159, 192 ff.; 126, 286, 315 ff., latest in 2010: *I BvR 1631/08* http://www.bundesverfassungsgericht.de/entscheidungen/rk20100830_1bvr163108.html.

Nevertheless, in frameworks establishing essentially horizontal systems of governance among the Member States, which aim to negotiate between the benefits of mutual trust/recognition and the fundamental rights implications of the regulated activity, because of the weaknesses of these governance structures, the guarantees offered by EU law may not be satisfying in all circumstances.

2.13.3 In the Expert's view, the responsiveness of the EU Court and also of national courts to national constitutional concerns depends primarily on the ethos of the different institutions, and also on individual factors, such as the preparedness, sensitivity, etc., of individual judges. Courts of law – national and international – seem quite satisfied to present themselves as special adjudicatory agencies with the task of resolving legal disputes and matters of legal interpretation in a continuously growing number of cases. They are keen to explore avenues to increase administrative efficiencies, and are likely to have an interest in getting involved in the cases before them only to the extent necessary. The prevailing institutional culture – e.g. decision by consensus, lack of dissenting or other opinions, etc. – may also dictate a reserved approach to matters of broader relevance. In their everyday operation as agencies, the understanding of matters of context, of local priorities, of the anticipation of individuals of their decisions, or of the potential and often controversial domestic implementation of their rulings could be limited. Unless the national constitutional concerns are adequately presented – by the referring national court which is assumed to be aware of them, or by the intervening governments – their relevance can be lost in such an institutional environment.

A strict reading of the jurisdiction of the EU Court – certainly before the Treaty changes commencing in the 1990s – could exclude any responsiveness from the EU Court towards national constitutional concerns. Its mandate covers interpreting and upholding the law developed in the collective enterprise among European states that is the EU polity. On the other hand, its institutional position and legitimacy as a transnational court, and its role in governing the participation of national administrative and judicial systems in the enforcement of EU law make it absolutely necessary to pay attention to concerns raised at the domestic level on constitutional grounds. The overall image of its jurisprudence indicates that national constitutional concerns – directly or indirectly – have been taken on board. This, however, does not mean that in individual, often very significant cases, the EU Court does not follow a strict reading of its mandate under the Treaties and sidelines the constitutional dilemmas raised by particular Member States. The attitude of the EU Court might, however, be changed by Art. 4(2) TEU on the protection of national (constitutional) identities, which has made the commitment of the Member States to conserve their positions in EU integration explicit. Nevertheless, it is still unclear how Art. 4(2) might influence the adjudication of Member State compliance before the EU Court, and whether the principle might represent a categorical departure from the EU as a collective enterprise and legitimate Member State particularism beyond the traditional constitutional remits.

The references for a preliminary ruling from the Hungarian courts have not raised national constitutional concerns in a manner that would have affected the EU Court's judgments.⁹¹

2.13.4 In the Expert's view, the possible institutional, procedural and substantive instruments are already available at the national level. Constitutions are rather explicit about the mandate of national constitutional organs, and also about the constitutional values and principles which should be safeguarded by them. National courts, although they are bound to apply EU law on the terms of the EU Court as it follows from national law, are not prevented from raising constitutional concerns regarding the application and interpretation of EU law in a particular case. National parliaments have been granted the right under national law to control their government's action in EU decision-making, in the course of which they are not prevented from raising their own constitutional concerns. Provided that national actors approach these matters with appropriate individual and institutional attitudes, it seems rather difficult, and perhaps unnecessary, to develop further instruments for safeguarding national constitutionalism at the national level. This may even be true for Member States which have experienced a recent regression in constitutionalism and constitutional protection. The Expert holds the view that if adjustments are indeed necessary at the national level, they must focus on attitudes, knowledge and understanding instead of rules and institutions.

3 Constitutional Issues in Global Governance

3.1 *Constitutional Rules on International Organisations and the Ratification of Treaties*

3.1.1 The conduct of international co-operation is governed by Art. Q(1) of the FL: 'In order to establish and maintain peace and security and to achieve the sustainable development of mankind, Hungary shall endeavour to co-operate with all peoples and countries of the world.' The provision is modelled on the text of Art. 6(2) of the 1989 Constitution,⁹² but unlike its immediate predecessor, it explicitly mentions two objectives of international co-operation: the establishment and maintenance of peace and security, and the achievement of the sustainable development of humanity. These objectives were most likely incorporated into the text for exemplificative purposes. This constitutional clause is supplemented by a declaration in the National Avowal of the FL, which expresses the intention of members of the

⁹¹ The reference in Case C-328/04 *Vajnai* [2005] ECR I-08577 would have raised significant issues of national constitutional law; however, the EU Court ruled – correctly – to decline its jurisdiction since the case fell outside the scope of EU law.

⁹² 'The Republic of Hungary shall endeavour to co-operate with all peoples and countries of the world.'

Hungarian nation to strive to co-operate with every nation of the world. Although the wording of the provisions concerned is extremely broad, a comprehensive interpretation reveals all the essential details of international co-operation, including the potential partners, the scope of discretion, the primary objectives and the relevant limitations.⁹³

The Rome Statute of the International Criminal Court, although it was ratified as early as 30 November 2001, has yet to be promulgated in Hungary. There was an unsuccessful attempt to promulgate the Rome Statute at the time of ratification, but the relevant bills were subsequently withdrawn. It has been assumed by members of the scholarly community that the long-awaited promulgation of the instrument would probably necessitate the amendment of the FL. The previously planned promulgation of the Rome Statute would also have required the amendment of the Constitution to permit the criminal prosecution of the President of the Republic by an international judicial organ. A new bill on the promulgation of the Rome Statute was submitted to the National Assembly in 2016, but at the time of writing, it has yet to be adopted.

The expression of consent by Hungary to be bound by an international treaty is governed by the FL and Act L of 2005 on the Procedure Relating to International Treaties (hereinafter APRIT). The authorisation to express consent to be bound is granted either by the National Assembly for treaties falling within its functions and powers,⁹⁴ or by the Government for all other treaties (Art. 1(2)(d) FL; Art. 7(1) APRIT). The authorisation itself is contained in the law promulgating the treaty (Art. 7(2) and Art. 10(1)(a) APRIT). Following the adoption of the promulgating law, the minister of foreign affairs must immediately initiate the expression of consent to be bound by the President of the Republic, if the authorisation has been granted by the National Assembly, or if the treaty provides that the consent to be bound must be expressed by the head of state. The consent to be bound by the treaty is then expressed by the President of the Republic, and the related instrument is exchanged or deposited, or the required notification to the other party or parties is provided by the minister of foreign affairs (Art. 9(4)(a) FL; Art. 8(1)–(2) APRIT). The consent to be bound by all other international treaties is expressed, as appropriate, by the minister of foreign affairs, or if the treaty provides that the consent to be bound must be expressed by the head of government, by the Prime Minister. The exchange or deposit of the related instrument is likewise performed by the minister of foreign affairs (Art. 8(4) APRIT).

3.1.2 The constitutional provisions on treaty ratification and international co-operation were, without exception, introduced by the adoption of the FL, and were designed to replace the corresponding provisions of the 1989 Constitution. Nevertheless, there is a close textual resemblance between the old and new provisions, and the former apparently served as a model in the formulation of the latter.

⁹³ Sulyok 2013a, pp. 464–489.

⁹⁴ Treaties in the field of EU cooperation (pursuant to Art. E(2) of the FL); the subject matter of the treaty is already regulated by an Act of Parliament or pursuant to the FL, it shall be regulated in a cardinal or other Act of Parliament; the treaty influences other matter belonging to the competence of the Parliament on the basis of Art. 1(2) (a)–(c) and (e)–(k) of the FL.

In the preliminary stages of the making of the FL, selected state organs, representative bodies, social organisations and the scholarly community were requested to submit proposals regarding the future constitution. The few submissions that touched upon the provisions concerned include the detailed proposals presented by the Institute for Legal Studies of the Hungarian Academy of Sciences.⁹⁵ The actual impact of these proposals is largely unknown: some were manifestly disregarded; others may have been accepted.

3.1.3 In spite of occasional criticism by members of the scholarly community, amendment of the provisions concerned, to our knowledge, has not been seriously raised since the adoption of the FL. Previously, in the period between the political transition and the entry into force of the FL, the 1989 Constitution was amended, *inter alia*, upon Hungary's accession to the North Atlantic Treaty Organization⁹⁶ and to the European Union.⁹⁷ The unsuccessful attempt to promulgate the Rome Statute of the International Criminal Court, as has been mentioned, would also have required the amendment of the Constitution.

3.2 *The Position of International Law in National Law*

3.2.1 The application and position of international treaties in the domestic legal system are governed by the FL and APRIT. The second sentence of Art. Q(3) of the FL provides that '[o]ther sources of international law shall become part of the Hungarian legal system by promulgation by law'. This provision can only be interpreted in the light of the first sentence of the same paragraph, which concerns the generally recognised rules of international law, including customary international law, the general principles of law and the peremptory norms of international law.⁹⁸ Hence the scope of the second sentence covers the other sources of international law: international treaties, binding decisions of international organisations, judicial decisions and unilateral acts of states.

International treaties become part of domestic law by promulgation by law. The detailed reasoning of Bill T/2627 on the FL of Hungary placed special emphasis on the requirement of promulgation: 'Accordingly, the Bill expresses that other rules of international law binding on Hungary, including above all international treaties, only become part of the Hungarian legal system and applicable in the procedure of

⁹⁵ Magyar Tudományos Akadémia Jogtudományi Intézete (2010), *Javaslatok a Magyar Köztársaság Alkotmányának szabályozási koncepciójához* [Proposals for the Regulatory Concept of the Constitution of the Republic of Hungary], pp. 16–21.

⁹⁶ Act XCI of 2000 on the Amendment of Act XX of 1949 on the Constitution of the Republic of Hungary. See also CC Decision 5/2001. (II. 28.) AB.

⁹⁷ See supra n. 11. See also CC Decision 30/1998. (VI. 25.) AB.

⁹⁸ 'Hungary accepts the generally recognised rules of international law.'

Hungarian law enforcement agencies by promulgation by law'.⁹⁹ Earlier, the Constitutional Court had also pronounced that ensuring harmony between international law and domestic law demands the promulgation of international treaties, including self-executing treaties, and the inadequate or incomplete promulgation of treaties does not meet the constitutional requirements.¹⁰⁰

The detailed rules of promulgation are laid down by APRIT. The Act, as amended in 2011 in the wake of the adoption of the FL, provides that treaties falling within the functions and powers of the National Assembly must be promulgated by a Parliamentary Act; other treaties must be promulgated by Government decree.

Similarly to the 1989 Constitution,¹⁰¹ Art. Q(2)–(3) of the FL do not determine the position of promulgated international treaties in the domestic hierarchy of sources of law. Their position may nevertheless be explored by recourse to a range of related provisions. The provisions of the FL on the competences of the Constitutional Court and the provisions of Act CLI of 2011 on the Constitutional Court relating to procedures that may promote harmony between international law and domestic law, contain particularly useful guidelines.¹⁰² The same holds true for the case law of the Constitutional Court. These guidelines indicate that the position of international treaties in the domestic hierarchy formally corresponds to the level of the promulgating law. However, promulgated international treaties function differently than, and have precedence over, ordinary sources of domestic law. This precedence is largely based on procedural factors.

The requirement of faithful observance of international treaties, in addition to the relevant rules in international law, may be derived from several interrelated constitutional provisions. These provisions include Art. B(1) and Art. Q(2)–(3) of the FL on the constitutional principle of the rule of law,¹⁰³ on ensuring harmony between international law and domestic law,¹⁰⁴ and the domestic incorporation of norms of international law, respectively. The Constitutional Court has also pronounced that

⁹⁹ Bill T/2627 on the Fundamental Law of Hungary, Detailed reasoning to Art. P, 38.

¹⁰⁰ CC Decisions 30/1998. (VI. 25.) AB; 54/2004. (XII. 13.) AB; 7/2005. (III. 31.) AB; 30/2005. (VII. 14.) AB.

¹⁰¹ 'The legal system of the Republic of Hungary accepts the generally recognized rules of international law, and shall ensure harmony between obligations assumed under international law and domestic law.' 1989 Constitution, Art. 7(1).

¹⁰² FL Art. 24(2)–(3); Act CLI of 2011 on the Constitutional Court (hereinafter ACC), Art. 23–25, 32, 37–38, 40–42, and 46. The provisions of the FL prohibiting conflicts between various sources of law also offer guidance. FL Art. T(3), Art. 15(4), 18(3) 23(4) 32(3), 41(5).

¹⁰³ 'Hungary is an independent, democratic rule-of-law State.' FL Art. B(1).

¹⁰⁴ 'In order to fulfil its obligations under international law, Hungary shall ensure harmony between international law and Hungarian law.' FL Art. Q(2). The Venice Commission welcomed the incorporation of the provision into the Fundamental Law. European Commission for Democracy through Law, *Opinion on the New Constitution of Hungary*, CDL-AD(2011)016, 10, para. 42.

[t]he implementation of an international commitment ... is a duty originating from [the constitutional provision] containing the rule of law, including the fulfilment in good faith of obligations under international law, as well as from [the constitutional provision] demanding the harmony of international law and domestic law that exists from the moment from which the international treaty binds (in the sense of international law) Hungary. ... Those obliged by international treaties are, as a general rule, the states parties to the treaty. It is the duty of these states to ensure the implementation of the treaty.¹⁰⁵

3.2.2 The relationship of international law and domestic law traditionally ranks among the most problematic issues of Hungarian constitutionalism. The first constitutional clause to explicitly regulate the matter, Art. 7(1) of the 1989 Constitution, received a tremendous amount of criticism for its infamously imprecise and vague wording which left room for conflicting interpretations. The Constitutional Court ultimately pronounced that the provision established a dualist system,¹⁰⁶ but even this authoritative interpretation could not put an end to the debate. Following several failed initiatives, the drafting of the FL offered an opportunity to remedy the theoretical and practical shortcomings by introducing a progressive new provision. However, Art. Q(2)-(3) of the FL were formulated on the model of their predecessor, the text of which seems to have been simply rearranged, partly rephrased and modestly supplemented. Due to the close resemblance of the two provisions, the early commentators of the new regulation mostly observed that essentially nothing had changed.¹⁰⁷ The FL is authoritatively interpreted so as to maintain the dualist tradition, wherein the generally recognised rules of international law and other sources of international law become part of domestic law by general transformation and by special transformation, respectively. The possibility of conflicting interpretations nevertheless remains.

3.3 *Democratic Control*

3.3.1 Parliamentary involvement in the initial negotiation of international treaties is rather limited in Hungary. The FL at present does not contain detailed provisions on the early phases of treaty-making, leaving the regulation of the process to Act L of 2005 on the Procedure Relating to International Treaties (APRIT). This Act assigns the relevant functions and powers to the Government in order to reduce the workload of the National Assembly.¹⁰⁸ Hence the conclusion of international treaties is initiated and arranged by the competent minister, with the consent of the minister of foreign affairs, and in observance of the foreign policy principles laid

¹⁰⁵ CC Decision 7/2005. (III. 31.) AB. (Inserts added).

¹⁰⁶ CC Decision 53/1993. (X. 13.) AB.

¹⁰⁷ E.g. Blutman 2014a, p. 30; Kovács 2011, pp. 75–76; Molnár 2013, p. 60; Sulyok 2013b, pp. 48–49.

¹⁰⁸ Molnár 2013, p. 117.

down by the National Assembly and by the Government (Art. 4(1) APRIT). The authorisation to adopt the text of the treaty and to designate the person representing the state in the process is granted by the Government, or in exceptional cases, between two sessions of the Government, by the Prime Minister. The granting of authorisation is initiated by the minister who has proposed the conclusion of the treaty, with the consent of the ministers of foreign affairs and justice (Art. 5(2) APRIT). If the treaty falls within the functions and powers of the National Assembly, the resolution authorising the adoption of the text of the treaty and the available text of the treaty must be forwarded to the competent parliamentary committee (Art. 5(3) and 7(1) APRIT). The National Assembly is certainly not precluded from expressing its political opinion on a treaty, and may even request or endorse the Government in a resolution to adopt the text of a treaty.¹⁰⁹ The National Assembly, therefore, may discuss various issues related to international treaties. Parliamentary discussion is most likely to take place upon the granting of authorisation to express consent to be bound by/promulgation of a treaty, or at any later stage following the promulgation.

3.3.2 Similarly to Art. 28C(5)(b) of the 1989 Constitution, Art. 8(3)d) of the FL explicitly prohibits the holding of a national referendum on ‘an obligation arising from an international treaty’.¹¹⁰ This provision only applies to existing international treaty obligations and does not prohibit the holding of referendums before the assumption of such obligations. These referendums may pursue several interrelated objectives, such as to consult the public in the preliminary stages of decision-making or to enhance the legitimacy of outstandingly important foreign-policy decisions. National referendums were indeed held prior to Hungary’s accession to NATO on 16 November 1997 and to the European Union on 12 April 2003. Both referendums were valid and conclusive. The Constitutional Court later pronounced that the holding of a referendum on the accession to NATO did not entail that a similar referendum could also be held on the question of withdrawal.¹¹¹ More recently, two politicians of the opposition initiated a national referendum on the planned expansion of the Paks Nuclear Power Plant, the only nuclear power station in Hungary, but the initiative was rejected by the National Election Commission on 17 February 2014.¹¹² The Commission pointed out that the initiative was incompatible with the constitutional prohibition concerned, as it would have affected existing international obligations arising from the Convention between the Government of Hungary and the Government of the Russian Federation on the Conduct of Co-operation in the Field of Peaceful Use of Nuclear Energy.

¹⁰⁹ *Ibid.*, pp. 117–118.

¹¹⁰ See also Act CCXXXVIII of 2013 on the Initiation of a Referendum, the European Citizens’ Initiative, and the Referendum Procedure. For more details, see Csatlós 2014, pp. 337–346.

¹¹¹ CC Decision 35/2007. (VI. 6.) AB.

¹¹² National Election Commission Decision 91/2014. The decision was upheld by Curia Order Knk.IV.37.178/2014/3, and the subsequent constitutional complaint was rejected by Constitutional Court Order IV/938/2014.

3.4 *Judicial Review*

3.4.1 National courts are not in a position to perform a review of promulgated international treaties or binding decisions of international organisations; they are only expected to apply them appropriately.¹¹³ Recent investigations have nevertheless exposed considerable reluctance on the part of the judiciary to invoke international law, particularly when ordinary domestic provisions are equally sufficient to decide a given case.¹¹⁴ Domestic judges are further expected to turn to the Constitutional Court upon encountering conflicts between international law and domestic law. The Constitutional Court has several procedures in its inventory in which international treaties may be subjected to scrutiny. (The provisions of Act CLI of 2011 on the Constitutional Court do not explicitly mention the binding decisions of international organisations.) These procedures include the *ex ante* review of conformity with the FL (preliminary norm control),¹¹⁵ the *ex post* review of conformity with the FL (posterior norm control but of the domestic promulgating law rather than of the treaty),¹¹⁶ the judicial initiative for norm control in concrete cases¹¹⁷ and the examination of conflicts with international treaties.¹¹⁸

3.5 *The Social Welfare Dimension of the Constitution*

3.5.1 As noted earlier, over the summer of 2014 the Hungarian Constitutional Court made an attempt to develop the bases of a new economic constitution under the FL, which would reinstate the roles and the power of the Hungarian state as stabiliser, regulator and provider. The relevant decisions either build on a fervent criticism of economic regionalisation and globalisation, or they rely on the social provisions of the FL and the resulting social obligations of state actors.¹¹⁹ As criticised earlier, these observations are often rushed and wrong, and they never surpass the crude level of detail of simple declarations. More importantly, they do not seem to have affected the actual scrutiny of the Constitutional Court beyond accepting the discretion of the Government and rolling back the usual standards of constitutional

¹¹³ E.g. Blutman 2014b, pp. 167–179; Chronowski and Csatlós 2013, pp. 7–28.

¹¹⁴ E.g. Chronowski et al. 2011, p. 278.

¹¹⁵ ACC Art. 40(3).

¹¹⁶ FL Art. 24(2)e); ACC Art. 24(1).

¹¹⁷ FL Art. 24(2)b); ACC Art. 25(1).

¹¹⁸ FL Art. 24(2)f); ACC Art. 32.

¹¹⁹ See also CC Decision 3062/2012 (VII. 26.) AB on price regulation in the district heat market, where the Constitutional Court accepted that, inter alia, the impact of the global financial and economic crisis necessitated the local reregulation of the public and private law framework available for determining prices in the sector, despite legitimate expectations for the previous framework to remain in place.

control of Governmental economic governance. The Constitutional Court seems to be prepared to support the Government's efforts by failing to question the legitimacy and validity of the purpose of Government action, and by refusing to investigate the suitability and the necessity of the relevant measures. The Constitutional Court is satisfied with a rather relaxed circumregulation of the discretion made available to the responsible bodies under the measures in question, it raises no issue with the rather low standards of legal safeguards and remedies, and it is rather untroubled by the actual impact on individuals of the measures in question and by the potential for the application of the measures in question to lead to further violation of constitutional guarantees. Overall, the new economic constitutionalism in Hungary emerging in the wake of the crisis is less concerned with transparency, classical state roles in capitalist markets, and with issues of solidarity and social protection than with assisting the restructuring of the market in Hungary following undisclosed (or rather well-known but not openly advertised) economic policy priorities. Having regard to the apparent exclusionist, protectionist and possibly chauvinist economic policies of the Government, the anti-globalisation and anti-regionalisation agenda of the Constitutional Court seems to support a very particular transformation of the economy and society in the final years of the decade after the crisis.

Hungarian economic and social policies¹²⁰ and the erosion of the constitutional environment available to keep Government policies under control in light of social protection or other policies indicates that the states are equally responsible for the demise of the social dimension of constitutions. Following Bartolini, it may not seem controversial to suggest that the threat of globalisation and regionalisation on local social regulation and on local systems of social protection has resulted from conscious decisions by local political elites to transfer sensitive decisions of economic and social policy to the transnational level in order to avoid the confines of national constitutions and the control of national parliaments and courts.¹²¹ Furthermore, while pressures for deregulation, privatisation and liberalisation may come top-down from the global and/or regional level, states – the economies of which seem to benefit from these changes – are not prevented from compensating for any negative impacts of these transformations. Often, in structures of social governance favouring subsidiarity, they are even urged to make autonomous choices as to the compensatory measures or regarding the suitable extent and intensity of these changes in the particular domestic environment. The responsibility for failing to exploit these opportunities to level out the negative social effects of economic policies must be borne by states and their governments.

The Expert, therefore, would be very reluctant to argue that the social welfare dimension of constitutions is threatened only by global and regional governance,

¹²⁰ E.g. a flat income tax rate, tax benefits to high earners, the increase of VAT, the deregulation of employment law, the reduction of social benefits, an export driven exchange rate for the domestic currency, financing public debt through high premium sovereign bonds, etc.

¹²¹ Bartolini 2005, p. 405.

and that attempts by states to safeguard their social constitutions are thwarted by the binding rules of global and regional economic regulation. States can pursue economic, social, fiscal, etc., policies which are known to compromise social protection and social regulation.

3.5.2 Hungary participated in a post-crisis bailout programme administered jointly by the World Bank, the IMF and the EU¹²² including an IMF Stand-by Arrangement,¹²³ but with the change of Government in 2010, this participation was reconsidered. It is suspected that the Government insisted on excluding these international partners because it aimed to regain control over matters of domestic economic policy in order to bring about the restructuring of markets and the rechanneling of market based income without being confined by demands of transparency, accountability, sustainability and balanced rationality. It is likely that the fairly obvious plans of the Government for the Hungarian public and private economy would have been thwarted if they had been carried out under the close supervision of an international agency.

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¹²² <http://www.imf.org/external/pubs/ft/survey/so/2008/car102808b.htm>.

¹²³ <http://www.imf.org/external/np/sec/pr/2008/pr08275.htm>.

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