Use of the Comparative Method by the Hungarian Constitutional Court - Conceptual and Methodological Framework for an Ongoing Research Project[1]

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I. The Relevance of the Comparative Method

From the second half of the 19th century, the comparative method has become a generally accepted, and according to some authors dominant,[2] tool for the legislative. The legislator in its application of the comparative method has followed an increasingly universal approach: it has become commonplace to cross the ever thinner lines between legal families without raising any serious doubts as to the methodological soundness of such an exercise.

In stark contrast to this tendency there is a considerable resistance to the application of the comparative method that characterizes – with some notable exceptions – legal practitioners and the judiciary in particular. In these circles both theoretical and practical reservations are advanced against the recourse to a comparative argument. One of the fundamental principles of the administration of justice is that a judge must base his decision exclusively on the law applicable to the case – which is usually the lex fori – thus legal provisions and jurisprudence of other jurisdictions are irrelevant. It is also frequently pointed out that at the end of the day legislation and adjudication necessarily involves the balancing of conflicting values and interests, and this balancing act always takes place in a

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[2] Varul, Paul: *Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia*, (2000) 5 Juridica International, 104.

national context where the adoption of a solution emanating from a different socio-economic structure might be counterproductive. In addition, a judge when applying the law not only applies legal rules and provisions but also concepts, principles and standards developed by domestic jurisprudence and literature that might be incompatible with foreign solutions. Among the most important practical reservations one might mention the alleged ignorance or superficial knowledge of foreign law by judges due to linguistic barriers or lack of access thus making their references inaccurate or simply wrong.

If one accepts as a starting point the proposition that the comparative method provides not normative but persuasive arguments, the reasons for its wider application become at least as convincing. First of all, it would be very difficult to deny judges the right to resort to legal comparison if the legislator itself applied this method and its sources can be reasonably ascertained from the preparatory legislative materials. The situation is very similar in certain areas of private law where the judiciary is confined to the application of extremely vague principles and general clauses: the legitimacy of rulings in torts or unjustified enrichment as well as in contractual claims based on good faith and fair dealings is most likely strengthened and not diminished by comparative arguments. The concerns related to the knowledge and understanding of foreign law can be tempered by the observation that in most jurisdictions judges under conditions specified by conflict of laws rules must ex officio ascertain and apply foreign law. Behind this fundamental tenet of private international law lies the assumption that courts are – with the assistance of other authorities and experts – generally able to ascertain the content of foreign law and apply it to the case at hand.

The activities of constitutional courts related to the evaluation of constitutional complaints and the exercise of judicial review as a limited and negative form of legislation can be located somewhere in a grey zone between legislation and adjudication. A research and analysis of the objectives, scope and methodology of legal comparison employed by the Hungarian Constitutional Court might provide a meaningful contribution to the ongoing debate on the legitimacy of the comparative method. While the normative relevance of legal comparison is as a rule excluded for regular courts, this presumption is not that straightforward as regards constitutional courts. In Hungary, this issue has become quite topical during and after the adoption of a new Basic Law (Constitution) that provoked a complex debate on the competences of the Constitutional Court, the content of certain fundamental rights as well as the validity of previous

decisions of the Constitutional Court after the entry into force of the new Basic Law.

II. Assumptions and Previous Research Results

Such a research can be built on the assumption that in the practice of constitutional courts, especially as regards judicial review, theoretical and practical reservations concerning the use of a comparative method are less relevant than in the case of regular courts. Civil and political rights are measured against well established international standards that are sometimes codified with identical wordings in international and national legal texts. An even stronger convergence exists among jurisdictions participating in European regional protection systems, therefore making each and every ruling of a European constitutional court relevant for fellow constitutional court judges in other European countries.

An internationally compatible set of concepts and jurisprudence enables a uniform formulation of legal issues at hand and facilitates a meaningful comparison of solutions offered. For example, the validity of identical private law contracts might depend on the existence of a consideration in one jurisdiction, or on the existence of a lawful cause in another or on formal requirements elsewhere. The equivalents of these concepts are difficult to find in other legal systems, thus the mere translation of the legal issues will become a demanding task, not to mention the comparison of the different solutions. In contrast, constitutional courts operating in otherwise quite different legal environments are able to formulate legal problems and argumentations in a compatible format with the help of a universal framework of concepts, principles and standards. This phenomenon makes the use of a comparative method both easier and more consequential.

The practical reservations against the use of a comparative method are also less convincing if raised in connection with procedures conducted by constitutional courts. Professional and linguistic competences of the judges and staff employed at constitutional courts, as well as close bilateral relations and multilateral institutional networks between these bodies aided by comprehensive systems and fora designed for reporting and exchange of information may substantiate a reasonable claim that there are no obstacles to the international flow of constitutional jurisprudence as regards access and availability.

The objective of the research is to contrast these presumptions with the actual practice of the Hungarian Constitutional Court and offer conclusions as to the role of the comparative method throughout the procedures and in the argumentation of decisions. The research is not without predecessors worldwide or in Hungary. Since the mid 19th century, rather heterogeneous research attempts under the heading of 'comparative law' have had as their main objective the comprehensive comparison and classification of legal systems and legal cultures. The comparative study of legislative acts and the study of the use of comparative methods by the legislator have an equally long history. On the other hand, the study of the use of legal comparison by courts can be considered a relatively new field of research. Its late appearance might be explained – besides a lack of scientific interest – by the scarcity of legal materials worthy of analysis. A breakthrough in this matter was achieved by the XIVth Congress of the International Academy of Comparative Law organized in Athens in 1997 devoted explicitly to the use of comparative law by the courts. The French and German country reports submitted to the Congress also dealt with the practice of the respective bodies entrusted with constitutional review.[3]

The borrowing of concepts and the impact of the case law of international and foreign judicial bodies on the Hungarian Constitutional Court has also been subject to analysis before. Zoltán Szente has analyzed the effect of foreign precedents on the decisions of the Hungarian Constitutional Court published in the Official Journal in the period of 1999-2010.[4] The borrowing of general concepts and whole interpretive constructions (e.g. 'the living law' or 'the general personal right' and the 'equal protection of human dignity') has also been studied to some extent.[5] The present research is different from its predecessors as regards both object and methodology.

[3] Drobnig, Ulrich - van Erp, Sjef (eds.): *The Use of Comparative Law by Courts. XIVth International Congress of Comparative Law Athens 1997*, Kluwer, The Hague. 1999.

[4] Szente Zoltán: *A nemzetközi és külföldi bíróságok ítéleteinek felhasználása a magyar Alkotmánybíróság gyakorlatában 1999-2008 között*, Jog, állam, politika, 2010/2, 47-72. In English: Szente, Zoltán: *Hungary: Unsystematic and Incoherent Borrowing of Law: The Use of Foreign Judicial Precedents in the Jurisdprudence of the Constitutional Court, 1999–2010*, in: Groppi, Tania - Ponthoreau, Marie-Claire: *The Use of Foreign Precedents by Constitutional Judges*, Hart, Oxford, 2013. 253.

[5] Dupré, Catherine: *Importing Human Dignity from German Constitutional Case Law*, in: Halmai Gábor (ed.): *The Constitution Found? The First Nine Years of The Hungarian Constitutional Review on Fundamental Rights.* Indok, Budapest. 2000. 215. However, as the jurisprudence of the Hungarian Constitutional Court developed, such borrowing has become rare.

III. Research Object and Methodology

The research examines the use of legal materials that are not part of the Hungarian legal system by the Hungarian Constitutional Court in its decision making procedures and argumentation. International treaties in general do not fall within the scope of research; references to such instruments are relevant from a comparative perspective only if they have not been incorporated into the legal system of Hungary. In its early years, the Constitutional Court made several references to the European Convention on Human Rights (ECHR) even before it was ratified; however, this practice was motivated not by an inclination towards comparative law but simply by the conviction that the ECHR will soon become the law of the land.[6] Alternatively, the reference to interpretations of international treaties by other judicial bodies can be regarded as a clear example of the comparative method and therefore is an important object of analysis. Here one sometimes encounters the interesting phenomenon of double comparison: the decisions of the European Court of Human Rights (ECtHR) frequently based on a wide comparative research themselves become an object of comparison in the argumentation of the Constitutional Court.

The Basic Law of Hungary declares that generally recognized rules of international law form an integral part of the Hungarian legal order.[7] A particular methodology is required to ascertain the content of generally recognized rules of international law that has much in common with the comparative approach but it still is a sui generis endeavour with its own procedural and substantial challenges. Besides, the application of generally recognized rules of international law has become an issue in only a very few cases in the practice of the Constitutional Court,[8] therefore the research will not cover these cases.

Another difficult question of research methodology is the treatment of references to EU law. It is well known that both EU lawmakers and the Court of Justice of the European Union frequently resort to comparative tools in their activities. However, the special nature and status of EU law makes it very difficult to use it as a basis for comparison. Experience shows that in the case law of the Constitutional Court the primary con-

6 Constitutional Court Decision № 30/1992. (V.26.) ABH [1992] 167.

7 Basic Law, Art. Q par. (3): "Hungary accepts generally recognized rules of international law. […]".

8 E.g. Constitutional Court Decision № 30/1990. (XII.15.) ABH [1990] 128.

cern about EU law is its relationship with the Basic Law and the domestic law of Hungary.[9]

Previous research on the use of the comparative method by the Constitutional Court focused on the text of the decisions published in the Official Journal. This approach was based on the implicit double assumption that the comparative method is characteristically utilized in the most important or so-called 'difficult' cases and the conclusions of the legal comparison are usually reflected in the argumentation of the decision. This double assumption has two serious shortcomings.

Such a narrow focus may distort research analysis: it appears that the argumentation of Constitutional Court decisions in most cases lacks comparative references even if extensive comparative research has been conducted in the preparatory phase of the procedure. Arguably preparatory materials of a comparative nature might provide input and orientation for the Constitutional Court without this impact being explicitly acknowledged in the decision itself. Another adverse effect of a narrow focus is the lack of differentiation between the substantial and methodological significance of a case: archive research confirms that procedures yielding methodologically important preparatory documents are often concluded with an insignificant ruling on the merits or a ruling (e.g. a ruling to dismiss) without announcing on the merits.[10]

The research analyses both the use of the comparative method in the procedure leading to the adoption of a ruling or decision by the Constitutional Court and the use of a comparative argumentation in the rulings and decisions themselves. These two forms of legal comparison are closely connected but must be examined from different perspectives and their analysis gives rise to different types of conclusions. The application of the comparative method is a procedure the analysis of which is based on procedural requirements and its legitimacy is independent of its eventual appearance in the final decision. On the other hand, the legitimacy of a comparative argumentation depends, besides the legitimacy of the underlying comparative methodology, on normative, logical and rhetorical requirements levelled against its use as an argumentation. These requirements can be analyzed independently.

[9] See e.g.: Blutman László: *A magyar Lisszabon-határozat: befejezetlen szimfónia luxemburgi hangnemben,* Alkotmánybírósági Szemle, 2010/2, 90.

[10] E.g. procedure 1278/B/1990 [ABH (1994) 867] was closed by a ruling without a decision on the merits, but among the preparatory materials there is a comparative study by Imre A. Wiener on the application of framework dispositions as codification technique in different jurisdictions.

The research uses all published rulings and decisions of the Constitutional Court as documentary sources together with the case files already transferred to the Hungarian National Archives (HNA). According to official protocols, only closed case files can be transferred to the HNA and only after 20 years of the start of the procedure.[11] Thus in 2013, the case files available for research – with the consent of the Constitutional Court[12] – are those that were started before 1993 and are already closed. These documents cover a relatively long period because some of the cases started in 1990 were only closed in 1998. Unfortunately, most of the files are not complete: in some cases comparative studies explicitly referred to in decisions or preparatory materials are obviously missing,[13] in other cases it is unclear whether preparatory materials make a comparative assessment without a proper comparative research or the materials related to such research were simply not archived.[14] Interviews with judges participating in the procedures or consultation with their works published on relevant issues might in part fill in these lacunae.

The usefulness of different sources changes from time to time and according to the issue at hand. Sometimes the quality of a comparative argument can be ascertained solely on the basis of a published decision; however detailed information on the comparative methodology followed in the course of the procedure can be obtained only from the case files. Since there is a considerably long waiting period before case files are made available for public research, recent practice of the Constitutional Court can be discovered only through personal interviews and discussions with judges and staff. In the early period of the Constitutional Court judges enthusiastically published articles and entire books to elaborate on the activities of the Court, but in the new millennium this enthusiasm has

[11] According to Art. 12 (1), (3) of the Law № LXVI of 1995 on Public Documents, Public Archives and the Protection of Materials in Private Archives public documents can be kept on file with public institutions for 15 years but this period can be prolonged for another 5 years. Afterwards they must be transferred to the Hungarian National Archives.

[12] According to Art. 23 (1) of the aforementioned law, if less than 30 years passed since the creation of an official document that is internal or preparatory in nature, the consent of the public institution concerned is required for research.

[13] E.g. Constitutional Court Decision № 9/1992. (I.30.) ABH [1992] 59 refers to a "historical and comparative research conducted by the Constitutional Court in the area of 'review to secure legality' in order to provide for a solid analysis of its current legal background." The case files do not contain such a research document.

[14] E.g. Constitutional Court Decision № 8/1990. (IV.23.) ABH [1990] 42 decision makes a number of references to the contemporary jurisprudence of constitutional courts on general personal right, but the case file does not contain any materials that could serve as bases for such statements.

become markedly weaker – in stark contrast with the constantly rising number of scholarly works on the Court by external experts.

IV. Preliminary Conclusions

1. General Remarks

To begin with, one must emphasize that the use of a comparative method is not a theoretical issue in the practice of the Constitutional Court: it occurs both in the preparatory phase of the decision making procedure and as a type of argumentation in some of the decisions. Even though decisions reflect only a fragment of the comparative aspects raised in the preparatory phase, still around 10% of all published decisions contain some kind of a comparative argument, and this proportion is higher among decisions published in the Official Journal. This level is comparable to that of the German Federal Constitutional Court (BVerfG). A higher proportion is only characteristic of international courts (Court of Justice of the European Union), or in jurisdictions where boundaries of legal systems are blurred and it is not evident whether the courts employ a comparative method or just try to discover rules and standards applicable according to their own law (e.g. in Luxembourg vis-à-vis French and Belgian law, or in cross-references in the practice of the courts of England and Wales, Australia, Canada and New Zealand).

Notwithstanding the relatively frequent use of the comparative method by the Constitutional Court its theoretical background and objectives are not categorically settled. Sólyom László, then President of the Court, made an attempt to address the status and function of legal comparison in his concurring opinion attached to Constitutional Court Decision № 23/1990. (X.31.)[15] decision by declaring it an objective support to the "consciously subjective and historically determined" decisions of the Court with the addition that the evaluation of the contemporary international practice "is part of the allowed political activities of the Constitutional Court." His statements failed to provoke a debate within the Court and there is no information indicating that an exchange of views on the role of comparative law ever made it to the agenda of the Court.

[15] Constitutional Court Decision № 23/1990. (X.31.) ABH [1990] 88.

For the sake of objectivity it must be admitted that a conscious attempt to clarify the theoretical and procedural status of comparative law is extremely rare among courts and there is no real external pressure that would force them to tackle this issue. The heated political debate provoked by comparative arguments of the United States Supreme Court that prompted Congress to adopt a resolution in 2005 voicing its reservations is truly exceptional.[16] The clear and principled statement by the Swiss Federal Court to the effect that it regards the comparative method as equal to the 'traditional' methods of interpretation (historical, purposive, systemic), it follows a flexible methodological pluralism and refrains from establishing a hierarchy among different methods of interpretation is also far from being common in other jurisdictions.[17]

2. Comparative Method

The use of the comparative method in the decision-making procedure of the Hungarian Constitutional Court is rather casual and unprincipled. There is no standard procedural protocol and no organisational unit or personnel designated specifically to perform comparative analysis. It depends mostly on the preferences of the judge responsible for a given case to decide whether and to what extent to engage in comparative law.

Admittedly, recently there is an increasing expectation placed upon the responsible judge to chart an international perspective of the case under discussion. The preparation of this international panorama is the responsibility of the judge's staff and its structure and content vary greatly according to professional interest, professional network and linguistic competences. Occasionally this international panorama may give rise to a debate, irrelevant or unbalanced references to the case law of the ECtHR being the most frequent causes of intervention by other judges. In the early years of the Constitutional Court it was customary to commission external expert opinions on the initiative of the responsible judge. The Court's comparative activities were then usually based on these materials that themselves cited mainly secondary sources.[18] The first actual and direct reference to a judgement by a foreign or international court came

[16] Bismuth, Régis: *L'utilisation de sources de droit étrangères dans la jurisprudence de la Cour Suprême des États-Unis*, (2010) 62 Revue internationale de droit comparé, 105.

[17] Neue Schauspiel AG c. Felix Bloch Erben, 13.01.1998, ATF 124 III 266 = JdT 1999 I 414.

[18] E.g. in the case of 23/1990. (X.31.) AB [Const. Court] decision the application itself was supplemented by a 59-page study by Tibor Horváth, and in addition the judge responsible

only in 1993.[19] As of today, references are predominantly made directly to individual cases.

As regards information on the content of foreign or international law and jurisprudence, in principle the Constitutional Court would be free to approach the competent bodies and request authentic interpretation. This idea has been raised on a few occasions by some judges[20] but eventually no such request has ever been submitted. Consequently, the research for relevant references is done exclusively through public databases as well as personal and institutional networks, including the Venice Commission. As regards the jurisprudence of other constitutional courts and similar bodies, in the early years of the Constitutional Court most of the references were made to the German and Austrian counterparts, but nowadays the United States Supreme Court or the ECtHR are equally important sources and the French Constitutional Council is also being cited from time to time.

3. Comparative Argumentation

Comparative argumentations that appear in various places and forms in decisions of the Constitutional Court practically fulfil two functions. In the first case, the comparative argument is not an integral part of the justification of the decision and the persuasiveness of the justification would remain unaffected should the comparative argument be removed from the text: one might call this a decorative function. In the second case, while the comparative argument is not normative in nature and therefore it is not suitable to provide a legal basis for the decision in itself, it is still relevant in the process of legitimizing and justifying the decision: one might call this a persuasive function. Theoretically, a comparative argument could be used for normative purposes as well when the Court ascertains the content of relevant rules or standards through its use. Even though the Hungarian Constitutional Court has so far refrained from doing so,

(Antal Ádám) commissioned expert opinions from László Korinek, József Földvári and András Sajó.

19 Constitutional Court Decision № 4/1993. (II.12.) ABH [1993] 48, citing Kjeldsen, Busk, Madsen and Pedersen v. Denmark 5095/71; 5920/72; 5926/72 [1976] ECHR 6 (7 December 1976).

20 E.g. the idea was floated to turn to the General Assembly or the Secretary General of the United Nations to request an interpretation of the New York Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others as regards the expressions 'special registration' and 'special document'.

some observations on the possibility and feasibility of this approach will be offered at the end of this study.

The fact that comparative law is used for decorative purposes does not necessarily mean that it is totally dysfunctional. In most cases it only has a rhetorical function.[21] In other decisions the Court presents a snapshot of the positions taken by various constitutional courts in similar cases to indicate its awareness of the different approaches. In drawing such a landscape, the Court always uses a neutral language, refrains from evaluating the various solutions and remains silent on the point whether the analysis of the solutions had any impact on its own conclusions.[22] A peculiar example of a decorative use of a comparative argument is provided by cases where the Court assumes an apologetic stance towards the Constitution – or the Basic Law – and purports to defend or justify its – presumably unpopular or controversial – content by resorting to a comparative analysis. This practice was quite common in the early years of the Court – apparently as an exercise in the education of the public in formerly unknown concepts of rule of law and constitutional jurisprudence.[23] It is interesting to note that this apologetic rhetoric was resurrected by the Court during the drafting process of the new Basic Law with the objective to argue for the retention of a number of provisions of the former Constitution. These arguments were, however, made strictly in non-legal texts and statements (interviews, press releases etc.).[24]

Persuasive functions of comparative arguments can be described as door opening, contrasting or supporting. Door opening arguments intend to give the Court full liberty in picking or designing a solution of its own by enumerating wide ranging and very diverse thus manifestly inconclusive precedents from a number of jurisdictions.[25] Contrasting is done by making references to decisions of other constitutional courts that are based on textually different legal bases therefore justifying the adoption of a diverging approach by the Court.[26] The Court of course also refers to

21 See e.g. the dissenting opinion of Géza Kilényi in Constitutional Court Decision № 57/1991. (XI.8.) ABH [1991] 272.

22 E.g. Constitutional Court Decision № 143/2010. (VII.14.) ABH [2010] 698.

23 See e.g. Constitutional Court Decisions № 28/1990. (XI.22.) ABH [1990] 123; or № 48/1991. (IX.26.) ABH [1991] 217.

24 A press release issued by the Court on 28 October 2010 states that "the competences of the Hungarian Constitutional Court related to the *ex post* constitutional review of legislative acts are identical to those exercised by other European bodies recognized as constitutional courts."

25 Constitutional Court Decision № 53/1991. (X.31.) ABH [1991] 266.

26 Constitutional Court Decision № 31/1990. (XII.18.) ABH [1990] 136, concurring opinion by László Sólyom.

foreign or international case law with a line of reasoning identical to its own so as to affirm its conclusions.[27]

4. Visibility and Transparency

A particular phenomenon in the practice of the Constitutional Court is the issue of 'invisible' comparative law. In its early years, the Court frequently borrowed from decisions of other constitutional courts – frequently literally translating parts of them – without referencing them or applying a critical approach to the text. This method is of course far from being comparative; it is in essence legal borrowing or legal transplant. Besides all its methodological shortcomings, however, it has been indispensable in laying the foundations of a Hungarian constitutional jurisprudence the existence of which was a prerequisite of the application of a genuine comparative approach. Personal interviews with acting and former constitutional judges confirm that they were indeed consciously borrowing from foreign solutions and were aware of the related methodological implications but now consider that these issues 'have become obsolete by the passage of time'. Two remarks need to be added here as to the legitimacy of such legal transplants. The borrowing of legal texts does not pose a legitimacy problem per se since they are not the normative base on which the Court's decisions are founded. However, if the borrowed arguments refer to a textual basis in foreign law that is substantially different from the Hungarian constitutional background – thus could equally be applied as a contrastive argument – legal transplants without a critique of the text actually diminish the legitimacy of the position taken by the Court.

The use of comparative arguments becomes even more problematic when the Court decides to engage in discovering trends of legal development. This approach has been used on several occasions when in the absence of a clear and unequivocal international communis opinio the Court – instead of applying a 'door opening' argument and assuming full responsibility for the advanced solution – tried to position its preferred option as the direction in which global legal development had been generally proceeding. The lack of solid methodological standards proved to be particularly dangerous in this regard. The Court engaged in trend discov-

[27] Constitutional Court Decisions № 8/1990. (IV.23.) ABH [1990] 42; and № 16/1991. (IV.20.) ABH [1991] 58.

ery both in its first and second decision on abortion,[28] and its conclusions were manifestly contradictory even though there has been no conceivable change in international trends during the relatively short period between the adoption of the two decisions – not to mention the uncertainty whether an 'international trend' in this matter exists at all.

In order for the comparative method and argumentation to be able to perform their persuasive functions, besides solid methodological standards, visibility and transparency is also called for. Naturally, it is not suggested that the Court must include comprehensive comparative analysis and arguments in all decisions where comparative law has been a factor during deliberations. But it would be feasible for the Court to separately publish or otherwise make accessible primary and secondary comparative sources that played a part in shaping its conclusions.

V. The Long Road from Persuasive to Normative Comparison

In its letter dated 29 September 2010 and addressed to the National Assembly's ad hoc Committee on the Preparation of the New Constitution the Constitutional Court affirmed that "the new Constitution will also be part of the common European constitutional heritage and this fact to a large extent determines its fundamental values", and "general pronouncements of the Constitutional Court on these values will remain valid regardless of textual changes." In the following paragraphs, an attempt will be made to draw a parallel between the concepts of 'invisible constitution' and 'common European constitutional heritage' with a view to chart the perspectives of normative comparison in the framework of constitutional review in Hungary.

The concept of 'invisible constitution' was introduced into Hungarian constitutional jurisprudence by László Sólyom and its most comprehensive description can be traced back to his concurring opinion attached to Constitutional Court Decision № 23/1990. (X.31.):[29] "The Constitutional Court must carry on with its task of clarifying the theoretical bases of the Constitution and of the fundamental rights included therein, and to create through its decisions a coherent system that – like an 'invisible con-

[28] Constitutional Court Decisions № 64/1991. (XII.17.) ABH [1991] 58; and № 48/1998. (XI.23.) ABH [1998] 333; for a detailed analysis of the issue in Hungarian see: Tóth Gábor Attila: *A második abortuszdöntés bírálata*, Fundamentum 1999/1, 81.

[29] Constitutional Court Decision № 23/1990. (X.31.) ABH [1990] 88.

stitution' – serves as a reliable benchmark of constitutionality above the Constitution itself that is for the time being often amended for temporary political conveniences; and being such [the invisible constitution] is very unlikely to contradict the new Constitution or any future constitutions. The Constitutional Court enjoys significant liberty in this process as long as it remains within the conceptual boundaries of constitutionalism."

The essential conceptual elements of the 'invisible constitution' can be reconstructed as follows: (a) claiming a certain autonomy in interpretation or keeping a distance from the text of the constitution; (b) while refraining from an interpretation that is manifestly contrary to the text, (c) in order to ensure stability, coherence and theoretical soundness of constitutional jurisprudence. The concept – that has been very successfully applied in practice in a quite challenging historical context – has been subject to severe criticism due to its allegedly activist and subjective nature therefore has never been adopted as an official policy of the Court. Even László Sólyom began to use a more cautious vocabulary and stopped referring to the concept as 'invisible constitution'.

The question is whether the concept of 'common European constitutional heritage' could fulfil a function similar to that of 'invisible constitution' and if so, whether it could develop into a legitimate and efficient tool for the Court.

A preliminary issue here is the dilemma whether there is a need or necessity that would require the Court to assume an attitude calling for the creation of such a concept. Does the Court consider it today his duty to bring stability, coherence and theoretical soundness into contemporary constitutional jurisprudence in Hungary; and if so, is the Court convinced that it is possible only through keeping a certain distance from the text of the Basic Law? The answers to these questions are not only legal; they have serious political and institutional implications.

If the Court answers both questions in the affirmative, then it must address theoretical and technical issues related to the concept of 'common European constitutional heritage'. From a technical point of view, this concept might provide a more objective framework than the 'invisible constitution' under the condition that its content will be ascertained in a transparent and methodologically consistent way and it will be subject to regular and conscious revisions. In this regard, its legitimacy might exceed that of the 'invisible constitution'.

In other aspects, however, the concept of 'common European constitutional heritage' must face serious challenges. To begin with, why is it expected from the legislator (or the assembly entrusted with the power to

adopt the constitution) to adhere to a common European constitutional heritage? The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) are not conclusive on this matter,[30] and even if one would be inclined to interpret them accordingly, it is doubtful whether this requirement could be enforced in areas falling outside EU competences or against the Constitution itself. Moreover, the application of the concept of 'common European constitutional heritage' brings additional political sensitivity to the discussion. While in the case of 'invisible constitution' the issue was nothing more than a simple distancing act in the interpretation of the text of the Constitution, the concept of 'common European constitutional heritage' inevitably transforms the situation into a conflict between domestic law or the Basic Law on the one hand and EU law or the Treaties on the other. This conflict also has the potential to develop into an institutional standoff between the Constitutional Court and the ECtHR or the Court of Justice of the European Union.

Regardless of the risks outlined above, the 'common European constitutional heritage' might play an important role in the case law of the Court related to the new Basic Law, especially in the Court's efforts to maintain the continuity of its jurisprudence notwithstanding changes in the relevant normative text. As long as the Court manages to stay in safe proximity of the text of the Basic Law, related theoretical and methodological questions will not become an issue of contention. However, this comfortable environment will inevitably change if the Court decides to depart from a conservative attitude in interpretation. Technical objections can be dealt with through the development and application of strict methodological standards. Unfortunately, there are no easy answers to the theoretical reservations. But one of the functions of the Constitutional Court in the Hungarian constitutional framework is to find a solution to such 'difficult questions'.

[30] The preamble of TEU confirms the attachment of Member States to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law. On the other hand, the TEU also makes it clear that the limits of EU competences are governed by the principle of conferral (Art. 5) and its accession to the ECHR and the adoption of the Charter of Fundamental Rights shall not affect the EU's competences (Art. 6). With this in mind, it is difficult to see how Art. 2 TEU could be used to bring any extension in the competences of the EU. According to Art. 2 TEU the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities are common to the Member States.