

# ÚSTAVNÍ SOUDY RAKOUSKA, ČESKÉ REPUBLIKY A MAĎARSKA NA EVROPSKÉ KŘÍŽOVATCE

## THE CONSTITUTIONAL COURTS OF AUSTRIA, THE CZECH REPUBLIC AND HUNGARY AT THE EUROPEAN CROSSROAD

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### **Abstrakt**

Tento příspěvek se zabývá problematikou rozhodování ústavních soudů Rakouska, České republiky a Maďarska v souvislosti s nutností zajistit jednotnou a účinnou aplikaci komunitárního práva.

### **Klíčová slova**

ústavní soud, národní právo, komunitární právo, mezinárodní právo, jednotná aplikace komunitárního práva

### **Abstract**

This contribution deals with the question of decision-making of constitutional courts of Austria, Czech Republic and Hungary in relation to the uniform and effective application of Community law.

### **Key words**

Constitutional court, national legal order, supranational legal order, international legal order, uniform application of supranational legal order

### **Introduction**

At the intersection of domestic, supranational and international legal orders constitutional courts are called upon safeguarding constitutional rights and values and at the same time to enforce the European Rule of law in order to guarantee the uniform and effective enforcement of the supranational legal order. To an extent unprecedented, MS have found themselves

locked into this supreme regime. According to *Weiler* the courts of the MS seemed, by and large, to accept the new constitutional regime "imposed" by the ECJ with a large measure of equanimity - and diagnoses a veritable "quiet revolution."<sup>1</sup> Is it really a "revolution" that took place considering that occasionally, constitutional courts of some of the MS entered into confrontation with the ECJ? How and in which institutional setting did frictions occur in the past?

Basically, there are two types of constitutional courts. First, a Supreme Court with universal competence deciding – inter alia – upon constitutional questions acts functionally as a Constitutional Court.<sup>2</sup> The prototype is the Supreme Court of the US.<sup>3</sup> The second model is closely linked with the name of Hans Kelsen and provides for a special court that primarily deals with constitutional questions. Such a Constitutional Court was established for the first time by the Austrian Federal Constitution 1920.<sup>4</sup>

After World War II this model was introduced in numerous constitutions of European countries.<sup>5</sup> Germany and Italy adopted new constitutions which provided for Constitutional Courts equipped with the power of judicial review. In both countries these courts have been active instruments for the promotion of democratic regimes<sup>6</sup> and gained importance in policy-making.<sup>7</sup> Although France had written constitutions since the French Revolution, judicial review of the constitutionality of legislation has always been rejected in France. The Constitution of 1958 confers to the Conseil Constitutionnel "preview"-powers to declare statutes and administrative acts unconstitutional.<sup>8</sup>

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<sup>1</sup> *Weiler*, A Quiet Revolution: The European Court of Justice and its Interlocutors, *Comparative Political Studies*, 1994, 510 et seqq.

<sup>2</sup> *Shapiro – Stone*, Introduction: The New Constitutional Politics of Europe, in *Comparative Political Studies*, 26, 1994, 400 "Any judge of any court, in any case, at any time, at the behest of any litigating party, has the power to declare a law unconstitutional".

<sup>3</sup> In *Marbury vs Madison* (1803) the US Supreme Court referring to Hamilton declared its competence with regard to the final and binding interpretation of the Constitution. Admittedly, in the US every judge is entitled under specific circumstances to declare a statute unconstitutional. See: *Hamilton*, the Federalist Papers, Essay No 78 quoted in: Hutchins, *Great Book of the Western Worlds*, Vol 43 (1952) 29; *Stourzh*, *Alexander Hamilton and the Idea of Republican Government* (1970).

<sup>4</sup> Shortly before that Czechoslovakia established a Constitutional Court according to the preparatory works of Kelsen's friend *Weyr* (Brno) which did not take up its operational work though. (See: *Lachmund*, *Verfassungsgerichtsbarkeit in der Tschechoslowakei 1920 – 1939* (2005) in: <http://www.collegium-carolinum.de/vera/boht2005/2005-04-Lachmund.pdf>. The State Court of the Principality of Lichtenstein was established in 1921 ([www.stgh.li](http://www.stgh.li)).

<sup>5</sup> *Adamovich*, *Der Verfassungsgerichtshof der Republik Österreich: Geschichte – Gegenwart – Visionen*, JRP 1997, 1.

<sup>6</sup> *Shapiro*, *Courts – A Comparative and Political Analysis*, 1981, 155.

<sup>7</sup> *Stone Sweet* in: *Shapiro – Stone Sweet*, *On Law, Politics & Judicialization*, 2002, 184.

<sup>8</sup> *Shapiro*, *Courts – A Comparative and Political Analysis*, 1981, 154.

After the break-off of dictatorial regimes in the 70ies of the last century Spain, Portugal and Greece established Constitutional Courts and so did Central and Eastern European Countries after the fall of the communist regime.

The article will in its first part locate these Constitutional Courts in the domestic trias politica<sup>9</sup> and reveal their form and function in general. In a second step the article will look more closely at these courts in the contemporary world, embedded in a multi-level system where the constitutional legal orders interplay horizontally but also vertically at the interface of international, supranational and domestic (including federal) law. Based on an empirical study of Constitutional Courts' decisions referring to Community law the third chapter will address the questions of ultimate jurisdiction, constitutional reservations and co-operative constitutionalism. My final observations are dedicated to the gradual evolution in constitutional practise.

### **1. Locating the Constitutional Courts in the domestic constitutional order**

The constitutional order provides for the playground on which political and judicial interaction takes place. Whereas parliamentarians debate and determine constitutionality, constitutional courts control, amend, veto and even draft legislation and thus participate in the “policy-making” process.<sup>10</sup> *Stone Sweet* analyses the judicialisation of policy-making and identifies this judicialisation as an empirically verifiable phenomenon which is characterised neither by being permanent nor uniform but by sector specific dynamism. Abstract judicial review may serve oppositions as a compensatory means following the legislative process and provides the CC opportunities to construct constitutional law by developing creative techniques of control which consequently may generate a corrective legislative process.<sup>11</sup>

The growing influence of constitutional courts, especially when judicially reviewing legislation is easily perceptible in each of the three constitutional systems examined in this article. The main common characteristic of these systems is that the final say on the compatibility of domestic legislation with constitutional provisions is not left to parliament, but to a judicial body. When exercising judicial review Constitutional Courts decide about the

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<sup>9</sup> The classical division of powers is the point of reference here, irrespective of the fact whether this model can still be considered contemporary.

<sup>10</sup> *Stone Sweet* in: Shapiro – Stone Sweet, *On Law, Politics & Judicialization*, 2002, 185.

<sup>11</sup> *Stone Sweet* in: Shapiro – Stone Sweet, *On Law, Politics & Judicialization*, 2002, 189.

conformity of higher ranking norms with derivative norms. Constitutional Courts are entitled to invalidate legislation and thus to interfere with the legislative function. Constitutional Courts are sometimes called the “negative legislator” and do not always clearly fit under the judicial branch which is settling legal conflicts according to the applicable law. In principle, European - as opposed to the American - judiciaries do not possess jurisdiction over the constitution.

### 1. 1. The Constitutional Court of Austria

The provisions on the judiciary are anchored in art 82 – 94 B-VG whereas those on the competences of the Constitutional Court of Austria are laid down in Chapter 6 on the Guarantees of the Constitution and Administration (art 137-148 B-VG)

The Constitutional Court (VfGH) controls the compliance with the Constitution. It is appointed to efficiently enforce and safeguard the rule of law by exercising its tasks as a Fundamental Rights Court and by controlling norms.

Its competence ranges from pronouncing on pecuniary claims, on conflicts of competence, on whether ordinances or treaties are contrary to law or laws are unconstitutional, on the unlawfulness of promulgations, upon challenges to elections, on suits which predicate the constitutional responsibility of the highest authorities, to (after all legal remedies have been exhausted) rulings by administrative authorities for infringement of a constitutionally guaranteed right or the infringement of personal rights on the score of an unlawful or unconstitutional legal act. Judicial reviews and the individual complaints are the most eminent and most frequently used means of safeguarding the constitution. Therefore, light will be shed especially on these procedures in order to gain comparative conclusions.

#### 1.1.1. Norm control

The Constitutional Court upon application by a court, an independent administrative panel or the Federal Procurement Authority decides, whether ordinances issued by a Federal or Land authority are contrary to law, but ex officio in so far as the Court would have to apply such an ordinance in a pending suit. It also pronounces on the application by the Federal Government or the municipality concerned as regards the incompatibility of ordinances with law. It pronounces furthermore whether ordinances are contrary to law when an application alleges

direct infringement of personal rights if the ordinance has become directly applicable without the delivery of a judicial decision or the issue of a ruling. The Constitutional Court may rescind an ordinance (to the extent it has been expressly submitted for rescission<sup>12</sup>) as contrary to law.

The Administrative Court, the Supreme Court, a competent appellate court, an independent administrative panel or the Federal Procurement Authority are entitled to file an application regarding the unconstitutionality of a (Federal or Land) law. Apart from that a Regional Government (Landesregierung<sup>13</sup>) or one third of the National or Federal Council may lodge an application. An individual person may file an application claiming the unconstitutionality of a law should the law have become directly operative and directly infringe her personal rights.

#### 1.1.2. Individual constitutional complaint

The Constitutional Court has jurisdiction over rulings by administrative authorities (including the independent administrative tribunals) in so far as the appellant alleges an infringement by the ruling of a constitutionally guaranteed right or the infringement of personal rights on the score of an illegal ordinance, an unlawful promulgation, an unconstitutional law, or an unlawful treaty after the exhaustion of all available remedies. The complaint may be filed within six weeks after the decision of the last instance and has no suspensive effect, but the Constitutional Court may issue the suspensive effect, unless it would be contrary to mandatory public interest and after consideration of all interests affected.

In its finding the Constitutional Court specifies whether the applicant's constitutionally guaranteed rights have been infringed by the challenged ruling or whether an unlawful regulation has been applied, or a publication is contrary to the law on the re-notification of a statute or treaty, or a statute or a treaty are contrary to law, and in the affirmative case the Constitutional Court repeals the challenged ruling. In that case, the administrative authorities

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<sup>12</sup> Should the Constitutional Court reach the decision that the ordinance has no foundation in law, was issued by an incompetent authority or published in a manner contrary to law it may rescind the whole ordinance as illegal with the exception of such case where the rescission of the whole ordinance manifestly runs contrary to the legitimate interests of the litigant filing the case or whose suit has been the occasion for the initiation of proceedings ex officio.

<sup>13</sup> The Constitution of a Land (Landesverfassung) may entitle one third of the members of the Landtag (Regional parliament) to submit an application, too.

are obliged to immediately establish the legal situation corresponding to the legal opinion of the Constitutional Court.

If the Constitutional Court refuses to hear a case or dismisses the complaint and if a respective request is filed within two weeks, then the Constitutional Court pronounces that the complaint is being assigned to the Administrative Court if the matter is not explicitly barred (art 133 B-VG) from the competence of the later.

## 1.2. The Constitutional Court of the Czech Republic

The Constitutional Court of the Czech Republic is tied to the judiciary and thus represents the judicial body responsible for the protection of constitutionality. Chapter 4 of the Constitution of the Czech Republic on the judicial power contains the respective provisions (art 83-89) on the constitutional court.

By virtue of art 87 the Constitutional Court has jurisdiction to annul (provisions of) statutes conflicting with the constitutional order as well as legal enactments in conflict with the Constitution or a statute. It rules over constitutional complaints against unlawful encroachment by the state and against final decisions or other encroachments by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms, over specific electoral questions, constitutional charges brought against the President of the Republic. The Constitutional Court is called upon to settle conflicts of competence and to dissolve a political party. Furthermore, the Constitutional Court disposes over remedial actions against a decision of the President declining to call a referendum on the Czech Republic's accession to the EU and determines whether the manner in which an accession referendum was held is in compliance with the Constitutional Act on the referendum and its' implementing statute.

Prior to the ratification of a treaty transferring powers to an international organisation or institution or treaties requiring the assent of both the chambers of Parliament (art 49) the Constitutional Court adjudicates on the conformity of the treaty with the constitutional order. Prior to its judgement the treaty may not be ratified.

A statute may provide that the Supreme Administrative Court instead of the Constitutional Court may have jurisdiction to annul legal enactments inconsistent with a statute and to

decide jurisdictional disputes between state bodies and self-governing regions. Such a statute empowering the Supreme Administrative Court has never been enacted, this provision may thus be considered obsolete.<sup>14</sup>

### 1.2. 1. Norm control

The Act on the Constitutional Court contains detailed provisions on the respective proceedings. Proceedings pursuing the annulment of a statute can be initiated by the president, a group of deputies or senators, a panel of the court involved in deciding a constitutional complaint, the government and anyone submitting a constitutional complaint. As regards the annulment of an enactment the government, a group of deputies or senators as well as the court panel sitting on a constitutional complaint, an individual submitting an individual complaint, representatives of a region or municipality<sup>15</sup>, the Ombudsman, ministers<sup>16</sup> are entitled to submit a respective petition. Furthermore, the head of a county office may submit a petition for annulment of a municipal enactment. According to art 95(2) of the Constitution courts coming to the conclusion that a statute they are supposed to apply in a pending case conflicts with the constitutional order are authorised to submit the matter to the Constitutional Court. If the Constitutional Court comes to the conclusion that a norm contravenes the Constitution or a statute it declares the norm annulled. Should there exist implementing regulations based on the annulled norm, then the court states which implementing provisions share the fate of losing force and effect simultaneously with the statute.

### 1.2.2. Constitutional Complaint

Any natural or legal person alleging the infringement of her constitutionally guaranteed fundamental rights and basic freedoms as a result of a final decision, a measure or some other encroachment by a public authority may submit a constitutional complaint within 60 days of the delivery of the decision in the final procedure.

## 1.3. The Constitutional Court of Hungary

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<sup>14</sup> *Holländer*, interview with the author on September 25th 2006.

<sup>15</sup> Municipal representatives are entitled to submit petitions proposing the annulment of a legal enactment of a region within the territory where the municipality lies.

<sup>16</sup> The Interior Minister with regard to petitions proposing the annulment of a generally binding regulation of a region or the capitol city of Prague or the annulment of a legal enactment of a municipality and the competent minister, in cases proposing the annulment of orders of a region or the capitol city of Prague.

The Constitution of the People's Republic of Hungary of 1949 was reformed by several acts in 1987 (e.g. the Act XI/1987 on the Legislature enhances substantially the role of Parliament by detaching it from the Communist Party and establishes fundamental rights of citizens) and underwent a comprehensive revision in 1989. As a consequence, again a number of accompanying laws were enacted.<sup>17</sup> Although the amendments were supposed to be of transitional character and a new constitution should be elaborated and adopted by a once freely and democratically elected parliament, the revised constitution is still in force today. The constitution can be regarded as a pact between the communist party and the newly established opposition. There was a smooth and continuous transition and systematic transformation from the authoritarian system to a democratic order governed by the rule of law.<sup>18</sup>

After the promulgation of the Act XXXII/89 on the Constitutional Court on October 30<sup>th</sup> 1989 the Constitutional Court began its operation on January 1<sup>st</sup> 1990. The genesis of the Constitutional Court of Hungary does not correspond to the ones in Austria or the Czech Republic. Peer State powers did not exist, the rights of the individuals were underdeveloped. Hence the Constitutional Court forms a counterbalance to the Parliament and controls the Constitutional order.

### 1.3.1. Norm control

The ex post control of norms is laid down in §§ 37 et seq of the Act on the CC. According to § 21 (2) anyone can initiate the abstract control of legal or administrative acts. Legislative and administrative acts can be partially or fully be annulled upon petition. Noting the unconstitutionality of a norm in an ordinary court procedure the judge hearing the case suspends it and lodges a request at the CC.

An ex ante control is provided by §§ 34 et seqq Act on the CC. According to the respective provisions the President may submit such a petition after adoption of an act by the parliament and prior to its promulgation. With regard to international treaties this competence is additionally vested in the Parliament and the Government.

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<sup>17</sup> The former Deputy Secretary General of the Hungarian Academy of Sciences, Professor Kálmán was appointed minister of Justice and the deputy minister, Professor Kilényi referred to comparative studies elaborated by the Hungarian Academy of Sciences while promoting the constitutional reform.

<sup>18</sup> Spuller, *Das Verfassungsgericht der Republik Ungarn*, 1998, 11.



### 1.3.2. Individual complaint

According to § 48 Act on the CC anyone may lodge a constitutional appeal with the CC for the violation of her rights guaranteed by the Constitution of the injury is consequential to the application of the unconstitutional provision and she has exhausted all other possible legal remedies. The complaint has to be lodged within 60 days of the delivery of the resolution that can not be appealed. A constitutional appeal can also be based on unconstitutional omissions (by the legislator).

It is interesting to note that the rules of internal procedure of the CC could still not be enacted due to missing majorities.

### 1.4. A Brief Comparison of the CCs' Functions

When comparing the CC of A, CZ and H one perceives strong similarities but significant differences, too. The CC of A and CZ have been established at the beginning of the last century, the Hungarian CC only after the fall of the Iron Curtain. The exclusive and final constitutional jurisdiction is located in each of the three countries under scrutiny of a CC. Whereas the CC of Austria and the Hungarian CC do not form part of the judicial branch strictu sensu, its Czech counterpart does so.

The CC of A, the CZ and H are called upon the settlement of constitutional conflicts (i.e. judicial review, protection of constitutionally guaranteed rights, conflicts of competence, compliance with international law).

The actio popularis in Hungary established in order to claim the unconstitutionality of legal or administrative acts sets an incomparable sample since it reaches much further than in the other two countries under scrutiny, where the access to constitutional justice is more restricted.

Comparison shows that the Hungarian CC enjoys broader competences with regard to the preventive norm control. Some authors<sup>19</sup> argue that not only laws before promulgation but

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<sup>19</sup> Spuller, Das Verfassungsgericht der Republik Ungarn, 1998, 49.

even bills and amendments to bills<sup>20</sup> may be controlled by the CC of H. A preventive judicial norm control does neither exist in Austria nor in the Czech Republic.

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<sup>20</sup> The widening of the constitutional preview to bills is controversial, though. In the absence of a second parliamentary chamber this would sustain the role of the parliamentary opposition in the law-making process.



## 2. Locating the Constitutional Courts in the supranational constitutional order

Constitutional courts find themselves at several crossroads. On the horizontal level, they get inspired by various constitutional models and the constitutional practice of other countries. In federal structures like Austria the regional constitutions (Landesverfassung) constitute a point of reference on the vertical level in procedures on the control of norms. When adjudicating for instance on human rights the sphere of international law including the Strasbourg case law is to be taken into consideration.<sup>21</sup> Some EU-Member States, like Luxembourg and the Netherlands accept the primacy of international law, others consider the domestic constitution on the top of the hierarchical setting of norms.<sup>22</sup> In recent decades one of the core constitutional questions for domestic constitutional courts has been whether to accept the claim of the European Court of Justice that EC law enjoys supremacy even over conflicting constitutional provisions. In constitutional theory and practise controversy over the question of the ultimate jurisdiction is still very much alive.<sup>23</sup>

This chapter takes up the concept of “Constitutionalism Beyond the State”<sup>24</sup> (2.2) detaching the discussion of supremacy and constitutional conflict from the hierarchical nation-state framework.

### 2.1. The Ultimate Jurisdiction: An Analysis

Constitutional Courts are guided not only by national but also by the European constitutional principles of the rule of law, institutional balance, limited/implied powers, supremacy, non-discrimination, fundamental rights, loyalty and general principles of law.

The “Constitutionalising process” on the supranational level results from the vertical and horizontal interaction between the jurisprudence of the ECJ and constitutional courts<sup>25</sup> as well

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<sup>21</sup> Some legal systems allow the direct application of the European Convention on Human Rights (e.g. French, Belgian and Dutch), in others the Convention was transposed into national law (e.g. UK), in Austria it was transposed in a constitutional rank.

<sup>22</sup> Hence the article concentrates on the supranational level.

<sup>23</sup> *Kumm*, The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty, ELJ, Vol. 11, No 3, 2005, 263.

<sup>24</sup> *Kumm*, The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty, ELJ, Vol. 11, No 3, 2005, 262 et seqq.

<sup>25</sup> *Weiler/Slaughter/Sweet Stone* call it the “constitutional discourse”.

as from the judicial dialogue between the European and domestic courts.<sup>26</sup> Most of the MS (gradually) started accepting<sup>27</sup> the supremacy of EC law over the national (sub-constitutional) legislation. Lord Bridge commented on *Factortame II* “if the supremacy within the EC of Community law over the national law of the MS was not always inherent to the EEC Treaty it was certainly well established in the jurisprudence of the ECJ long before the UK joined the Community”<sup>28</sup>, it is an implicit part of the *acquis*, is part of the terms of accession, thus its recognition is part of the constitutional preparations for membership! Therefore newly acceding states have a duty to take positive steps towards ensuring the primacy of EC law.

How far does the supremacy doctrine reach? Where to locate the friction zone? Basically, three lines of national constitutional resistance opening the arena of constitutional conflict can be identified: (a) constitutional review, (b) fundamental rights and (c) integrational limits (Kompetenz-Kompetenz).

#### (a) Supremacy and constitutional review

The supremacy doctrine originally evolved out of the dialogue between the Italian CC and the ECJ (*Costa/ENEL*)<sup>29</sup> and consolidated over the years. The ECJ justified this doctrine by the need to ensure a uniform application of EC law and thus to establish a coherent legal order on the supranational sphere. The monist concept of supremacy as understood by the ECJ is absolute and hence evoked numerous critics.

Most prominently, the German Federal Constitutional Court (BVerfG) challenged the idea of the ECJ being the final arbiter of constitutionality with regard to EC law. The ratification of the Maastricht Treaty was challenged by the BVerfG<sup>30</sup> as well as by the Danish Supreme Court.<sup>31</sup> Finally, the highest courts found the Treaty of Maastricht compatible with the respective constitutions. However, the BVerfG insisted on its authority first, to determine whether European institutions acted within their limits and second, to protect the fundamental

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<sup>26</sup> Mayer, *The European Constitution and the Courts*, NYU-WP, 40.

<sup>27</sup> *De Witte*, in: Walker, *Sovereignty in Transition*, Do Not Mention the Word: Sovereignty in two Europhile Countries: Belgium and the Netherlands, 2003, 361f refers to the openness of the Dutch Constitution with regard to the principle of supremacy. However in Denmark this principle was not explicitly recognised by the courts – the Danish legal order, like Irish does not provide for the establishment of a Constitutional Court.

<sup>28</sup> *Factortame II*, xxx.

<sup>29</sup> ECJ 6/64, ECR 1964.

<sup>30</sup> BVerfG 89/155.

<sup>31</sup> Danish SC 6.4.1998, I 361/1997, *Carlson*.

rights. The Danish court pronounced to retain the final authority to determine the constitutionality of EC acts.<sup>32</sup>

#### (b) Supremacy and Fundamental Rights

The ECJ radically, “wisely and courageously”<sup>33</sup> revised the Treaties with regard to the review of fundamental rights. Originally the ECJ declared itself incompetent, later on it ruled that it had a duty to ensure that EC acts conform with fundamental rights and finally stating that it had to review MS acts for fundamental rights violations.<sup>34</sup> This was the reaction to the rebellion of the BVerfG (leading to *Solange I*)<sup>35</sup> challenging EC acts due to an alleged violation of constitutionally guaranteed rights. In *Nold*<sup>36</sup> the ECJ declared it would annul community measures incompatible with fundamental rights which are recognised and protected by the constitutions of the MS. Ever since the ECHR serves as basic source of Community rights and is invoked by the ECJ regularly. Since that time the ECJ ensures the effective protection of fundamental rights which consequently lead to a move in the constitutional jurisprudence in the MS (*Solange II*).

As regards conflicts between primary or secondary EC law and specific domestic constitutional provisions, they have mostly been resolved by constitutional amendments in the past or by ratifying a protocol<sup>37</sup>, which protected the Irish constitutional ban of abortion.<sup>38</sup>

#### (c) Supremacy and constitutional limits to integration

Here the constitutional conflict resides in the question as to who is entitled to judge upon European ultra vires acts. In *Foto-Frost*<sup>39</sup> the ECJ has declared itself competent to do so. Nevertheless the constitutional courts of some MS repudiate the *Foto-Frost* doctrine and reserve the final authority to determine the constitutionality of EC acts for themselves.<sup>40</sup>

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<sup>32</sup> Follesdal, Legitimacy Theories of the European Union, arena, WP 04/15, 4.

<sup>33</sup> Weiler, quoted by Stone Sweet in: Slaughter/Stone Sweet/Weiler, The European Courts and National Courts, Doctrine and Jurisprudence, 1997, 317.

<sup>34</sup> ECJ 5/88, ECR 1991.

<sup>35</sup> ECJ 11/70, ECR 1972, *Int. Handelsgesellschaft*.

<sup>36</sup> ECJ 4/73, ECR 1975, 985.

<sup>37</sup> Protocol No 17 to the Treaty of Maastricht, see also Declaration on Protocol 17

<sup>38</sup> *Kumm*, The Jurisprudence of Constitutional Conflict, ELJ, Vol 11, No 3, 2005, 265.

<sup>39</sup> ECJ 314/85, ECR 1987.

<sup>40</sup> See the Maastricht decision: BVerfG 89/155.

Several constitutional courts view EC law as a species of international law which must either conform to domestic constitutional law or be invalid. The act of assent for the transfer of public powers serves as a bridge between the supranational and the national legal order.<sup>41</sup> EC norms are autonomous, they neither belong to public international nor to the domestic law of the MS. This obviously imposes challenges on the constitutional judiciary. The BVerfG established a double binding of EC act: they have to comply with the domestic constitution and with EC law. The act of assent is reviewed to the extent that it covers a given European act. Hence the European act can be reviewed by the standard of the “domestic constitutional law version” of EC law.<sup>42</sup> According to this interpretation a European ultra vires act would not be binding on the respective MS.<sup>43</sup> At different points of time and by different means the Corte Costituzionale and the Conseil Constitutionnel asserted their power to set national constitutional limits on European integration and thus to locate the Kompetenz-Kompetenz in the MS.

Examining the constitutional dialogues comparatively MS with specialised CC develop problems associated with the Kompetenz-Kompetenz issue. CCs insist on the national constitution mediating the relationship between the domestic and European law. Constitutional judges often weaken integration-friendly provisions by interpreting them into a subordinate relationship to other constitutional provisions and thus constructing an intra-constitutional hierarchy of norms in a non-hierarchical setting. This serves to establish formal limits to the European integration process.<sup>44</sup>

Clearly, the problem of supremacy can not be resolved as long as the CC do not uniformly and fully recognise the principle and constitutional conflict persists. It is in deed a challenge to bring the European principles of a uniform and effective enforcement of EC law (Rule of law) in line with the core constitutional values of democratic legitimacy and the protection of fundamental rights and specific national commitments. In the past MS often adjusted their

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<sup>41</sup> EC law is attributed supremacy by most of the CC (D, CZ, H) only to the extent that the constitution allows a transfer – such transfer may not be unlimited and has to occur within the fundamental constitutional architecture, respecting and maintaining the essential substance of the constitution and its fundamental rights.

<sup>42</sup> *Mayer*, supra note 25, p.24.

<sup>43</sup> Stone Sweet supra note 32, p. 320 et seqq.

<sup>44</sup> Stone Sweet supra note 32, p. 325.

constitutions to conform to central concerns of EC law. A good many times constitutional amendments were made in the course of Treaty ratifications.<sup>45</sup>

## 2.2. Constitutionalism Beyond the State

This approach refers to the questions as to which interpretation of the relationship between the national and the supranational constitution fits best and justifies legal practises in the EU, seen as a whole.<sup>46</sup> *Kumm*<sup>47</sup> suggests the reconciliation of the competing principles at stake to the highest degree possible in cases of constitutional conflicts between the EU and MS level. Consequently, competing principles must, in a contextually sensitive way, be balanced against one another. This aim can be achieved when first identifying which conflict rules that are best calculated to realise the ideals underlying legal practise in the EU and its MS. Second, none of the competing principles is absolute. Third, given the legal and factual constraints the principles in play (principle of legality, subsidiarity, democracy and the protection of basic rights) must be balanced.<sup>48</sup>

How this can be achieved in practise is documented by means of some examples. With regard to the protection of fundamental rights the interplay between the BVerfG and the ECJ shows that the restrictive practise under *Solange I* inspired the ECJ to substantially accelerate the development of case law on fundamental rights. Ultimately, the BVerfG revisited its jurisprudence and performed a shift to the *Solange II* jurisprudence. This exemplifies impressively that the constitutional dialogue promotes and further develops the European *acquis constitutionnel*.

As to the jurisdictional boundaries and the question as to whether the EU enacted ultra vires acts the BVerfG<sup>49</sup> and the Danish Supreme Court<sup>50</sup> already argued they would simply not apply these ultra vires acts. The competence to decide on such a question depends on the nature of institutional safeguards that exist on the European level. If on the one hand the

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<sup>45</sup> See for instance the Irish case (The constitutional duty to save unborn life led to the conclusion of Protocol 17 to the Treaty of Maastricht). In Germany women were constitutionally excluded from serving in the army before the constitutional amendment following an ECJ judgment. See also the opt-out solutions offered by EU law with regard to the EMU and the Schengen Agreement.

<sup>46</sup> *Kumm*, ELJ, 2005, 286.

<sup>47</sup> *Kumm*, ELJ, 2005, 290.

<sup>48</sup> *Kumm*, ELJ, 2005, 299.

<sup>49</sup> BVerfGE 89, 155.

<sup>50</sup> Danish SC I-361/1997.



political and legal safeguards are weak, the MS can argue their competence more convincingly. On the other hand the ECJ<sup>51</sup> began to take its respective competencies more seriously in some instances which would leave to the MS only a subsidiary role.<sup>52</sup> Here again the institutional safeguards provided by the domestic and supranational order have to be balanced.

A third set of examples deals with the defending of specific national constitutional commitments contravening European principles. Commitments such as the constitutional provision opening the military service to men only or prohibiting abortion created conflicts in the past. In order to answer the question whether such commitments should be enforced until the legislator amends the constitution one would argue with the democratic principle: as long as the MS do not fully and explicitly commit themselves to the principle of supremacy and the European level does not provide for an equal democratic legitimisation as the MS and as long as the European public sphere has not developed sufficiently a blanket rule setting aside constitutional provisions would not be democratically legitimate. Therefore, fundamental values of the constitutions are not to be set aside in case of a conflict but specific constitutional rules may remain inapplicable after the balancing test. The clearer, more specific and essential a national, democratically legitimated constitutional provision is, the more important is the commitment to it and the adherence to it. In such cases the democratic principle rules out the European Rule of law.

### **3. How European is the Constitutional Jurisdiction in Austria, the Czech Republic and Hungary?**

In order to know more about the first experiences of the two new MS of the CZ and H and to compare these with the Austrian constitutional practise data was collected and analysed. The aim was to identify the constitutional questions at stake and to discuss them in a broader context. Furthermore the empirical data should serve as point of reference to describe the openness of the respective constitutional orders to the European one. Comparative observations conclude this chapter.

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<sup>51</sup> ECJ C-74/99, *Imperial Tobacco*, ECR I-8599: The ECJ struck down an ultra vires directive.

<sup>52</sup> *Kumm*, ELJ, 2005, 296.

Austria has already more than a decade of experience in applying EC law. Interestingly, the Austrian CC (VfGH) identified various stages of European law influence and formulated its own differentiated approach when addressing European questions depending on the procedure involved.

When exercising norm control EC law matters due to the influence of the principle of supremacy and the leeway conferred to the legislator. As to the leeway left to the domestic legislator, when legislating he is bound in a “double” manner, namely by EC law and within the domestic leeway by constitutional law as well. Thus the constitutional compliance is under control of the VfGH. The control as to the constitutional compliance is irrelevant when domestic rules are manifestly contravening EC law<sup>53</sup> or when an authority has obviously applied the norm without any reasonable ground. The abstract norm control is carried out even if there is a manifest violation of EC law. Individuals applying for a norm control following the violation of rights attributed by EC law are enjoying its supremacy and thus a norm control is refused.

As far as individual complaints following a violation of rights conferred to the individual by EC law are concerned the VfGH takes up the matter and first makes a rough examination as to whether the authority has issued a decision which is obviously violating EC law (without any legal grounding). Is the EC norm not directly applicable the VfGH interprets the respective norm in conformity with European requirements.

The Austrian cases<sup>54</sup> under scrutiny fulfil the European standards by and large. None of the decisions is objectionable as to the result. The Austrian VfGH referred three cases for a preliminary ruling<sup>55</sup> to Luxemburg and applied the follow-up decisions in compliance with the interpretational guidance provided by the ECJ. The questions referred to the direct applicability of secondary rule of the *acquis associatif*, the qualification of energy charges as state aid and the interpretation of the Directive 95/45/EC on the protection of personal data in the light of art 8 (2) of the European Convention.

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<sup>53)</sup> *Griller*, Grundrechtsschutz in der EU und in Österreich, Verhandlungen des 12. Österreichischen Juristentages 1994, Bd I/2, 1995, 56; *Holzinger*, Die Auswirkungen der österreichischen EU-Mitgliedschaft auf das österreichische Verfassungsrecht, JRP 1996, 181.

<sup>54)</sup> VfGH 2.10.1997, B 1620/97; VfGH 26.6.1997, B 877/96; VfGH 5.3.1999, B 3073/96.

<sup>55)</sup> ECJ C\_171/01, C-465/00, C- 143/99.

The constitutional court decisions of the CZ refer to the sugar quotas and the European Arrest Warrant whereas the later decision is not given further consideration in this article since it does not touch upon the supranational character of EC law. In the sugar quota decision<sup>56</sup> the CC clearly states that the impact of EC law is to be taken into consideration while interpreting constitutional law. Art 10a of the Czech Constitution provides for the (conditional) transfer of powers to supranational organs and simultaneously serves as a bridge for opening up the domestic legal order. The CC has annulled specific sections of a Government Regulation (No 364/2004) laying down certain conditions for the implementation of measures of the common organisation of the markets in the sugar sector (i.a. setting of production quotas for sugar). Similar governmental regulations have been annulled before accession on grounds of inequality. The government repealed the regulation and adopted a similar new regulation providing for various methods for calculating individual quotas (No 548/2005). The question was whether the allocation of production quotas complies with the constitution and CAP, especially with Reg. (EC 1609/05). The pronouncement on the double binding reminds the Austrian practise. The CC refers to a judgement of the Italian CC declaring itself not being a court in terms of art 234 EC but also quotes the opposite concept held by the Austrian CC and the Belgian Cour d'Arbitrage. The CC came to the conclusion of being in the position of addressing the relevant EC law question due to a rich case law available on CAP. The CC elaborated the general principles (of MS discretion and limits, proportionality, protection of fundamental rights, legitimate expectations, legal certainty) and came to the conclusion that the government exceeded its authority when adopting the contested provision by asserting its competition to regulate in a field that had been transferred to the European level. At the time of adoption of the contested provisions the individual production quota was determined by the directly applicable Regulation (EC) 1609/05 and consequently the challenged provision was annulled.

In Pl 37/04 an ordinary judge raised doubts as to the constitutionality of § 133a Civil Procedural Code reversing the burden of proof to the defendant in discrimination cases. This provision was introduced in order to implement the Directive 2000/43/EC. The CC-CZ however did not consider the respective provision violating the constitutional right of a fair

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<sup>56</sup> Pl. US 50/04.

trial and found that § 133a can be read in conformity with art 8(2) Directive 2000/43/EC as interpreted by the ECJ in Case 196/02, *Nikoloudi*.

In Pl 36/05 29 senators challenged the constitutionality of parts of the Act governing Public Health Insurance. They argued that the regulation of the Ministry of Health determining those parts of the price which is covered by the public insurance is (a) not made transparent and thus violating Directive 89/105/EEC and art 36 of the Constitution (fair trial) and (b) not providing any legal remedy, consequently infringing the rule of law. The CC-CZ referring to the sugar quota case stated that EC law is not a reference criterion in constitutional review. However, the CC said, the EC and the Czech Republic are legal communities and respect the fundamental requirements of the rule of law. The interpretation of fundamental rights (like the right to a fair trial) given by the ECJ resembles the Czech Constitutional Court's approach, especially when the issue under regulation refers to the creation or functioning of the Internal Market. Even though the non-compliance of national law with EC law itself does not constitute a reason for derogation, this non-compliance supports other arguments culminating into the unconstitutionality of a norm. The CC analysing art 1 and art 6 of the Directive referred to the interpretation of the ECJ in C-229/00, *Commission v Finland* and C- 424/99, *Commission v Austria* where the ECJ defined the criteria to be fulfilled in the determination of prices (objective and provable criteria, availability of a court remedy, decision in due time).

As it comes to the question whether in the future the CC will consider itself as a court in terms of art 234 EC one might suppose so only in exceptional cases, especially when it comes to obvious violations of EC law (e.g violation of the right to a lawful judge by non-referral by ordinary courts) but one might be sceptical, particularly with regard to norm control.<sup>57</sup>

In Hungary, the accession provisions of the Constitution deliberately avoided taking position on the supremacy question.<sup>58</sup> The Europe clause of art 2 (A) entitles to the transfer of powers to the EU. The CC is competent to review the constitutionality of international treaties (ex ante), of legal norms after promulgation and conflicts between domestic and international treaties. Implementing a Regulation (EC) 735/2004 the Hungarian parliament adopted a law on agricultural surplus stocks in April 2004, which upon request of the President of the

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<sup>57</sup> *Wagnerova* in an interview with the author on September 25<sup>th</sup> 2006.

<sup>58</sup> *Sájó*, Learning Co-operative Constitutionalism the hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy, ZSE 3/2004, 352.

Republic was found unconstitutional on May 25<sup>th</sup> for violation of legal security. The respective Regulation entered into force on May 1<sup>st</sup> and required the new MS to develop and implement relevant measures to be applicable by May 1<sup>st</sup>. The retroactive effect of the Surplus Act was declared unconstitutional. This decision can be questioned for several reasons: first, the Act partly implemented goals which originate from a directly applicable EC-Regulation. The implementation of an EC Regulation contravenes the European Rule of Law, its validity is to be judged in the light of EC law.<sup>59</sup> In parts the Regulation required additional adjustments for its direct application.<sup>60</sup> Nevertheless, it is up to the ECJ only to determine the retroactivity. To the extent the Surplus Act duplicates the Regulation it is to be interpreted by the ECJ.<sup>61</sup> It is not obvious that the duty to have an inventory on the day of the entering into force of the Regulation is retrospective per se. Similarly, it is not unconstitutional to have a property tax applying to assets acquired before the entry into force of the tax law. The ECJ in the past when confronted with similarly structured charges or custom duties did not consider them retrospective.<sup>62</sup> Consequently, the CC should have referred to the ECJ in order to get an interpretation of the regulation. Furthermore it still remains to be seen whether an ex-ante pre-view of a norm (which has not yet been promulgated) amounts to a “decision” which can be referred to the ECJ for a preliminary ruling.

Since the concept on retroactivity as formulated by the ECJ is casuistic a reference by the Hungarian CC had been desirable. As experience in Austria shows the temporary effect of EC law bears a number of facets some of them still awaiting clarification. Thus, the courts of the MS are called upon entering into a co-operative dialogue with the ECJ in order to contribute to a further development of European legal culture. It seems however, that the constitutional jurisdictions in the Czech Republic and Hungary very barely open up to the supranational legal order and get rid of the positivistic burden of the past.

In 1053/E/2005 two UK based companies filed a petition to the CC because the complete ban on internet gambling prevented the foreign operators from enjoying their fundamental

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<sup>59</sup> ECJ C-11/70, ECR 1970, 1125, para 3.

<sup>60</sup> According to art 8 of the Constitution rights and obligations have to be established by statutes. Administrative acts are not allowed.

<sup>61</sup> See ECJ C-179/00, para 31 where the ECJ found that there is no retroactivity regarding surplus stock generating activities that occurred before the entry into force of the regulation in Austria, which, however occurred after the entry into force of the relevant Regulation.

<sup>62</sup> ECJ C-30/00, ECR 2001, I-7511; ECJ C-179/00, ECR 2002, I-510.

freedom of providing their services as interpreted by the ECJ in *Gambelli*<sup>63</sup>. Thus, the Hungarian monopoly violated the free movement of services and the Hungarian legislator by failing to legislate according to European requirements not only violated the communitarian principle of loyalty (art 10 EC) but also created an unconstitutional situation due to the uncertain legal situation contravening the rule of law. The CC held that an unconstitutional failure to legislate only occurs if two conditions are met: (i) there was a legal obligation to legislate; and (ii) the failure to do so created an unconstitutional situation. It stated that the principle of legal certainty requires that the entirety of laws is clear, precise and predictable in its functioning. Conflicting rules do not necessarily constitute an unconstitutionality. Unconstitutionality occurs if the rule is discriminatory or in breach of fundamental rights. Art. 2A and 7 do not contain a concrete legal obligation to legislate and thus, do not constitute a sufficient basis for the petition being successful. Due to the fact that the Act on the Constitutional Court was not amended there is no possibility to declare an act unconstitutional even though it might contravene EC law since the compliance with EC law is not a constitutional obligation<sup>64</sup> and no other substantial provision of the Constitution was violated.

Justice Prof. Kovacs in his concurring opinion stressed on the specific *sui generis* character of EC law and stated that “EC law was closer to domestic law than international law”. Referring to the ECJ’s fundamental rights protection and the jurisprudence of the Conseil Constitutionnel and the German Bundesverfassungsgericht he suggested the Hungarian CC judicial self-restraint and admitted that there would be only limited scope for the CC to exercise its review power over EC law and concluded that the CC might examine the alleged breach of an obligation under EC law by the Hungarian legislature only in the case of a direct threat to constitutional rights. A dissenting opinion by President Justice Bihari advanced a view that the petitioners had no standing at all and that the substance of the case should not have been examined at all since – as he wrongly stated – the EC Treaty is to be understood as an international treaty which can only be examined *ex officio*.

The CC missed another opportunity to clear up the interface between constitutional and communitarian law, showed reluctance *vis-à-vis* structural principles of the EC legal order and did not adhere to the Franco-German type of accepting supremacy.

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<sup>63</sup> ECJ C-243/01, ECR 2003, I-13031.

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In 72/2006 the CC of Hungary had to decide on the constitutionality of the Labour Code, the Law on Public Servants and an Order of the Ministry of Health on the calculation of wages and leisure of physicians and nurses working overtime. One of the petitioners argued that the competence of the CC to rule on the incompatibility is to be based on the Directive 93/104/EC as well as art. 2A<sup>65</sup> and art. 7<sup>66</sup> of the Constitution. The CC confirmed the constitutionality of the Code and the Act since no constitutional provision was brought forward in order to support the challenge. The CC referred to its prior ruling on the sporting bets (1053/E/2005) reconfirming that EC law does not constitute international law and thus, the CC has no competence to review it.<sup>67</sup> However, the Order was annulled since the matter should have been regulated by a statute enacted by the legislator.

The parallel opinion of Justice Prof. Kovacs, which was backed by the judge rapporteur Prof. Kiss underlined the direct effect of the Directive which was declared by the ECJ in the case of *Jäger*.<sup>68</sup> Kovacs also referred to comparable constitutional jurisprudence in France where the Conseil Constitutionnel held that it constitutes an unconstitutionality if directives are not implemented and thus, this leads to a violation of human rights or if obligations under EC law are manifestly violated. He complained about the lacking courage of the Hungarian CC and observed that the lower courts and the Supreme Court follow the principle of supremacy and directly apply the directive. Furthermore, he underlined that the CC could have come to the

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<sup>65</sup> Art. 2A (1) By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as "European Union"); these powers may be exercised independently and by way of the institutions of the European Union. (2) The ratification and promulgation of the treaty referred to in subsection (1) shall be subject to a two-thirds majority vote of the Parliament.

<sup>66</sup> Art. 7 (1) The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law. (2) Legislative procedures shall be regulated by law, for the passage of which a majority of two-thirds of the votes of the Members of Parliament present is required.

<sup>67</sup> According to art. 1 of the Act on the Constitutional Court the competences of the CC include: a) the ex ante examination for unconstitutionality of statutes adopted but not yet promulgated, and of provisions of the rules of procedure of Parliament and of international treaties; b) the ex post examination for unconstitutionality of rules of law, as well as other legal means of state administration;

c) the examination of conflicts between international treaties and rules of law, as well as other legal means of state administration;

d) judgment on constitutional appeals lodged for the violation of rights guaranteed by the Constitution;

e) the elimination of unconstitutionality by omission;

f) the elimination of conflicts of competence between state organs, local governments and other state organs, between local governments;

g) the interpretation of provisions of the Constitution;

h) proceeding in all cases referred by statute to its competence.

<sup>68</sup> ECJ 9.9.2003, C-151/02, *Jäger*, ECR 2003, I-8389.

conclusion that the order of the Ministry can not be relied upon due to the direct applicability of the directive.<sup>69</sup>

#### **4. Final observations**

Supremacy has brought about a dramatic alternation in the constitutional status of domestic judicial authorities, namely the empowerment of all courts to exercise the power of judicial review of national legislative acts, whereas in cases that do not refer to EC law such power is denied to all courts (NL, UK) or reserved to a constitutional court (D, I, E, B, A, CZ, H) or vested in all courts (S, GR). This article elaborated the changes and challenges constitutional courts face in their daily business with EC law. Special attention is given to the protection of fundamental rights as well as norm control procedures.

Constitutional conflicts occurred in the past and focused on the question as to who has the final say and who is the ultimate guarantor of fundamental rights. Since neither the domestic Constitution nor the Treaties nor European case law are providing for undisputed solutions constitutional courts have occasionally ruled on such conflicts.

What can we learn from these conflicts? The Constitutional Courts of Austria, the Czech Republic and Hungary are attributed similar competences. But how will they solve European constitutional conflicts in the future? Empirical data reveal the first problems and show the degree of openness towards the European constitutional order. The three CC under scrutiny draw inspiration from the horizontal and vertical level. Inspiration is gained from constitutional decisions and reference is being made to the jurisprudence of the ECJ. Whereas the Czech CC frequently gathers ideas from Germany, Italy, Austria and occasionally from other MS the CC of Hungary looks mainly to the German BVerfG, the US doctrines and sometimes looks cross the border to Austria. However, the two new MS of the Czech Republic and Hungary are up to now avoid EC law as a reference criterion in constitutional review. Entering into a constitutional dialogue with the ECJ has until today been refused by the CC of the new MS. Yet the Austrian VfGH entered in co-operation procedures with the ECJ and thus proved to be a rare exception among constitutional courts.

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<sup>69</sup> *Kovacs*, Vol (communautaire) au-dessus d' un nid de coucou (ou le calcul de temps de travail des médecins et la jurisprudence de la Cour constitutionnelle de Hongrie), *Revue française de Droit constitutionnel*, 71, 2007, 671.



In order to resolve constitutional conflicts more smoothly in the future the approach of a “Constitutionalism Beyond the State” put forward by *Kumm* may serve as a valuable model of reference. Its’ advantages rely in the fact that it can be applied in all the MS and it is of dynamic character. In lack of adequate doctrines it provides guidelines to the practitioner as to how to handle constitutional conflicts. Apart from that it, indirectly fosters the constitutional development and offers a passable European backdoor from the one-way of ultimate jurisdiction.