



3rd Congress of the World Conference on Constitutional Justice
'Constitutional Justice and Social Integration'
28 September – 1 October 2014
Seoul, Republic of Korea

Questionnaire

Reply by the Constitutional Court of Hungary

B. Social integration

As concerns the specific sub-topics for the 3rd Congress, please reply to the following questions in a succinct manner, in any of the languages of the conference – but if possible with a translation into English.

1. Challenges of social integration in a globalised world

1.1. What challenges has your Court encountered in the past, for example in the field of asylum law, taxation law or social security law?

During the transition from socialism to a market-oriented economy, in the course of reforming the social security system and trying to prevent the threat of a national bankruptcy, Hungary has faced several challenges on the field of social security and taxation law. The most important questions that affected social integration were turned into legal problems and found their way to the Constitutional Court. (Asylum law has not played significant role in the jurisprudence of the Hungarian Constitutional Court.)

Series of decisions¹ were made in 1995, when the Government introduced an austerity package (named after the then-minister of finance Mr. Lajos Bokros) claiming that it was inevitable due to an “economic emergency situation”. The Court insisted here that no exceptional historical situation (except those foreseen in the Constitution) might justify the lifting of constitutional guarantees.

As regards taxation, the Constitutional Court has rather restrained itself from the annulment of Acts of Parliament imposing tax. This approach has nevertheless changed in 2006, when for the first time the Constitutional Court declared an Act² unconstitutional on the basis of the Constitution's provision on sharing public burdens³. Three months later another Act that

¹ See in particular 43/1995. (VI. 30.) AB decision; furthermore 42/1995 to 45/1993 decisions in the CODICES database <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

² Act on the Tax on Petty Cash; see 61/2006. (XI. 15.) AB decision.

³ This was the first decision that declared an Act unconstitutional on the basis of Article 70/I of the Constitution (“All natural persons, legal persons and unincorporated organisations have the obligation to contribute to public revenues on the basis of their income and wealth.”), declaring that “the legislation may only use the legal institution of taxation for purposes in line with the constitutional objective defined in Article 70/I of the Constitution, and any taxation securing as a ‘quasi sanction’ the enforcement through economic means of a statutory restriction of administrative nature, serving a different legislative purpose, is considered to violate Article 70/I of the Constitution, and as such it is unconstitutional.”

introduced the so-called “expected corporate tax” was annulled⁴. In 2008 the Constitutional Court has turned down the Act on Luxury Tax⁵.

This line of jurisprudence ended in 2010, following the Court’s decision on the unconstitutionality of a retroactive 98 per cent tax⁶, the newly elected government quickly restricted the competence of the Constitutional Court to review certain fiscal matters, so now the Hungarian Constitutional Court does not examine the constitutionality of financial, budgetary and tax laws - as long as the state debt exceeds half of gross domestic product (GDP)⁷.

The limitations of the Hungarian Constitutional Court’s powers have been a subject of strong criticism: “Although it is undoubtedly the constitution-making power’s competence to amend the competences of the Constitutional Court, their curtailing is hardly in line with rule of law. It is definitely not acceptable if an entire sector (finances and taxation) is exempted from the requirement of compliance with the constitution.”⁸

1.2. How were issues of social integration or conflict transformed into legal issues?

Decision 43/1995⁹ determined for subsequent cases the methods for judging the constitutionality of cutting off social benefits: it focused on the protection of acquired rights, reliance interest, and legal certainty. The court was very keen to keep itself in line with other European constitutional courts even when acting from different constitutional positions regarding social rights. In these cases, the Court, which had no power to grant an injunction, often helped itself by abolishing the provisions on the coming into force of the given laws and postponing the investigation into the merits.¹⁰

In one of the milestone decisions¹¹ concerning social security, the Constitutional Court established as a general constitutional requirement that the right to social security entails the obligation of the State to secure a minimum livelihood through all of the welfare benefits necessary for the realisation of the right to human dignity.

1.3. Is there a trend towards an increase in cases on legal issues relating to social integration? If so, what were the dominant questions before your Court in the past and what are they at present?

Except taxation and other financial regulations (see Point 1.1.), mostly all questions remained on the agenda of the Constitutional Court throughout the last twenty years; as

⁴ 8/2007. (II. 28.) AB decision

⁵ 155/2008. (XII. 17.) AB decision

⁶ 184/2010. (X. 28.) AB decision; <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

⁷ Article 37 (4) of the Fundamental Law:

“As long as the state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its powers set out in Article 24(2)b) to e), review the Acts on the central budget, the implementation of the central budget, central taxes, duties and contributions, customs duties and the central conditions for local taxes for conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul these Acts only for the violation of these rights. The Constitutional Court shall have the unrestricted right to annul also Acts having the above subject matters, if the procedural requirements laid down in the Fundamental Law for the making and promulgation of those Acts have not been met.”

⁸ Opinion of the President of the Constitutional Court, see Péter Paczolay: International Conference on Jurisdiction of the Constitutional Court “Limits and Possibilities of Expansion”, 26 September 2013, Riga

⁹ 43/1995. (VI. 30.) AB decision; <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

¹⁰ László Sólyom, Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court, University of Michigan Press, 2000, 322.

¹¹ 32/1998. (VI. 25.) AB decision

typical examples the “permanent” pension reform¹² and the complex problem of homelessness¹³ can be mentioned.

Please give two or three typical examples (please refer to the précis in the CODICES database, when you have already contributed these cases. Otherwise, please consider sending précis / summaries to be included in the CODICES database.)

2. International standards for social integration

2.1. What are the international influences on the Constitution regarding issues of social integration/social issues?

Several civil liberties are formulated similarly (sometimes there is even a verbatim identity) in the European Convention on Human Rights and in the former Constitution, but also in the new Fundamental Law (entered into force on 1 January 2012). In the Fundamental Law, one can recognise textual importation from the European Charter of Fundamental Rights, too. For example several requirements regulated in the Charter under the title of “Solidarity” are included in the Fundamental Law (such as the right to collective bargaining and the right to healthy and secure work conditions).

2.2. Does your Court apply specific provisions on social integration that have an international source or background?

Since Article Q para. 3 of the Fundamental Law stipulates that “Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in legal regulations.”, international law is integrated into the Hungarian legal system and may affect the Constitutional Court’s interpretation in certain cases.

2.3. Does your Court directly apply international instruments in the field of social integration?

The Constitutional Court shall examine any legal regulation for conflict with any international treaties¹⁴.

¹² András Simonovich: The Mandatory Private Pension Pillar in Hungary, available online at: econ.core.hu/file/download/mtdp/MTDP1112.pdf

In the communist era, Hungary had built up a relatively generous first pillar system, which was universal and was combined with a similarly public health care system. During the transformation of the economy, the employment rate dropped drastically (from 76 per cent in 1989 to 58 per cent in 1995) and has barely increased since. The unemployed and those working in the hidden economy chose early retirement, causing a significant increase in the number of pensioners, while simultaneously reducing the number of potential active contributors. The transition from socialism to capitalism was accompanied by a significant temporary drop in real earnings, too. In 1998, Hungary, a pioneer among the ex-communist countries in this regard, partially privatized its first pillar system. Rather than adding a new pillar on top of the existing “first pillar” system, the government “carved out” a mandatory private pillar from the old system.

¹³ 38/2012. (XI. 14.) AB decision <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

In its decision [176/2011. (XII. 29.) AB decision] the Constitutional Court underlined the fact that dustbin scavenging is an activity that does not violate the rights of others, nor can it be established that it is dangerous for society. In addition, the decision emphasised that by making dustbin scavenging a regulatory offence, the local government stigmatised homeless and other marginalised people, which was against the prohibition of discrimination. Following this decision, a legislative package was adopted by Parliament and legislative provisions rendered permanent living in the public space a regulatory offence. The Commissioner of Fundamental Rights requested the Constitutional Court to review these legislative amendments, and the Constitutional Court annulled them claiming that they accorded unduly wide legislative powers to local governments to define punishable anti-social behaviour and to impose fines or even detention on homeless persons, and the challenged provisions violates the rights and human dignity of the affected persons, as well as the prohibition of discrimination and the principle of legal certainty.

¹⁴ Article 24 para. 2 point f) of the Fundamental Law

However, the Treaties of the European Union and their amendments are not considered sources of international law from the point of view of the Constitutional Court's competences; these treaties and their amendments are primary sources of law following Hungary's accession to the EU in 1 May, 2004, and they are integrated into the domestic legal system.¹⁵ Therefore the Hungarian Constitutional Court has not applied the EU Charter of Fundamental Rights, and the petitions requesting the direct application of it were rejected without examining the petition on the merits.¹⁶

2.4. Does your Court implicitly take account of international instruments or expressly refer to them in the application of constitutional law?

There are examples for both types of references in the case-law of the Hungarian Constitutional Court. The trend, however, shows that the express references are less, especially in comparison with the cases decided in the first few years of the Court's existence.

2.5. Has your Court ever encountered conflicts between the standards applicable on the national and on the international level? If so, how were these conflicts solved?

As an example for such conflicts may serve the use of totalitarian symbols. The Hungarian Penal Code's disposition¹⁷ was examined in 2000 by the Constitutional Court which found it compatible with the Constitution. The European Court of Human Rights came, however, to the conclusion first in *Vajnai v. Hungary*¹⁸ and then in *Fratanolo v. Hungary*¹⁹ cases that the given disposition of the Hungarian Penal Code violates Article 10 of the ECHR.

Mr. Vajnai submitted a constitutional complaint in 2013; the Constitutional Court declared its opinion on the issue as follows:

"The content of the rights secured in the European Convention of Human Rights is embodied in judgments delivered in individual cases, thus promoting the common perception of the interpretation of human rights. The observance of the Convention and the practice of the ECHR cannot lead to the limitation of the protection of fundamental rights secured by the Fundamental Law and to the definition of a lower level of protection. The practice of Strasbourg and the Convention define the minimum level of the protection of fundamental rights that all contracting parties have to assure but the national law may establish a different and namely a higher order of requirements in order to promote human rights."²⁰

¹⁵ See 72/2006 (XII.15.) AB decision, full text available in English at http://www.mkab.hu/letoltesek/en_0072_2006.pdf

¹⁶ See 29/2011. (IV. 7.) AB decision concerning the dismissal of civil servants, [http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2011-1-002?fn=document-frameset.htm\\$f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2011-1-002?fn=document-frameset.htm$f=templates$3.0)

¹⁷ Article 269/B of the Penal Code: The use of totalitarian symbols

"(1) A person who (a) disseminates, (b) uses in public or (c) exhibits a swastika, an SS-badge, an arrowcross, a symbol of the sickle and hammer or a red star, or a symbol depicting any of them, commits a misdemeanour – unless a more serious crime is committed – and shall be sentenced to a criminal fine. (2) The conduct proscribed under paragraph (1) is not punishable, if it is done for the purposes of education, science, art or in order to provide information about history or contemporary events. (3) Paragraphs 1 and 2 do not apply to the insignia of States which are in force."

¹⁸ Application no. 33629/06, judgement of 8 July, 2008

¹⁹ Application no. 29459/10, judgement of 3 November, 2011

²⁰ 4/2013. (II. 21.) AB decision on the use of symbols of totalitarian regimes, §19.

Please indicate a few typical examples (If possible by reference to cases in the CODICES database).

3. Constitutional instruments enhancing/dealing with/for social integration

3.1. What kind of constitutional law does your Court apply in cases of social integration – e.g. fundamental rights, principles of the Constitution (“social state”), “objective law”, Staatszielbestimmungen, ...?

The former Constitution (in force until 2012) used the word ‘right’ in connection with social security²¹, whilst the new Fundamental Law refers to it only as state objective²². Nevertheless, the jurisdiction of the Constitutional Court already before 2012 made it clear²³ that social security cannot be considered as a fundamental right but it is a right that lays an obligation on the State to provide social allowances.

Furthermore, the new Fundamental Law added “decent housing conditions” to the list of state objectives,²⁴ a provision that has not existed in the former Constitution, nor was it derived by Constitutional Court²⁵.

3.2. In cases where there is access of individuals to the Constitutional Court: to what extent can the various types of constitutional law provisions be invoked by individuals?

Following a constitutional reform in the year 2011, a procedure was introduced for challenging before the Constitutional Court individual acts of public authority, including judicial decisions that are contrary to the Fundamental Law (‘full constitutional complaint’) with the requirement for demonstrating that one’s basic rights and liberties have been directly violated, and available for individuals only after the exhaustion of other legal remedies.

²¹ Article 70/E. § (1) *Citizens of the Republic of Hungary shall have the right to social security; in the case of oldness, sickness, disability, being widowed or orphaned and in the case of unemployment through no fault of their own, they shall be entitled to the assistance necessary for their subsistence.*

(2) *The Republic of Hungary shall implement the right to social support through the social insurance system and the system of social institutions.*

²² Article XIX

(1) *Hungary shall strive to provide social security to all of its citizens. Every Hungarian citizen shall be entitled to assistance in the case of maternity, illness, disability, handicap, widowhood, orphanage and unemployment for reasons outside of his or her control, as provided for by an Act.*

(2) *Hungary shall implement social security for the persons referred to in Paragraph (1) and for other persons in need through a system of social institutions and measures.*

(3) *The nature and extent of social measures may be determined in an Act in accordance with the usefulness to the community of the beneficiary’s activity.*

(4) *Hungary shall contribute to ensuring the livelihood for the elderly by maintaining a general state pension system based on social solidarity and by allowing for the operation of voluntarily established social institutions. The conditions of entitlement to state pension may be laid down in an Act with regard to the requirement for stronger protection for women.*

²³ 32/1998. (VI. 25.) AB Decision

²⁴ Article XXII.

(1) *Hungary shall strive to ensure decent housing conditions and access to public services for everyone.*

(2) *The State and local governments shall also contribute to creating decent housing conditions by striving to ensure accommodation for all persons without a dwelling.*

(3) *In order to protect public order, public security, public health and cultural values, an Act or a local government decree may, with respect to a specific part of public space, provide that staying in public space as a habitual dwelling shall be illegal.*

²⁵ 42/2000. (XI. 8.) AB Decision [ABH 2000, 334-335]

3.3. Does your Court have direct competence to deal with social groups in conflict (possibly mediated by individuals as claimants/applicants)?

The Constitutional Court has no such direct competence.

3.4. How does your Court settle social conflicts, when such cases are brought before it (e.g. by annulling legal provisions or by not applying them when they contradict the principle of equality and non-discrimination)?

It is the duty set forth by the Fundamental Law for the Constitutional Court to annul any legal regulation or any provision of a legal regulation which conflicts with the Fundamental Law.

3.5. Can your Court act preventively to avoid social conflict, e.g. by providing a specific interpretation, which has to be applied by all state bodies?

The Constitutional Court may uphold the validity of the legal regulation that was challenged before it and at the same time define constitutional requirements for the compulsory interpretation of the given legal regulation.²⁶

3.6. Has your Court ever encountered difficulties in applying these tools?

No particular difficulties.

3.7. Are there limitations in the access to your Court (for example only by State powers), which prevent it from settling social conflicts?

From 1 January 2012 abstract posterior constitutional review can be initiated by

- 1) the Government,
- 2) one-fourth of the Members of Parliament,
- 3) the Commissioner for Fundamental Rights,²⁷
- 4) the Head of the Highest Judicial Authority [Kúria], and
- 5) the Prosecutor General.

Before that date the Hungarian Constitutional Court was accessible to literally everybody ('actio popularis'), without the requirement to show any legal interest in challenging any legal regulation in the Hungarian legal system.

(As regards the limitations for reviewing Acts on the central budget, the implementation of the central budget, central taxes, duties and contributions, customs duties and the central conditions for local taxes for conformity with the Fundamental Law see Answer 1.1.)

Please provide a few typical examples (if possible also by reference to cases in the CODICES database).

²⁶ First in 38/1993. (VI. 11.) AB decision, [http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1993-2-011?fn=document-frameset.htm\\$f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1993-2-011?fn=document-frameset.htm$f=templates$3.0), later in 28/2005. () AB decision concerning changes in the social welfare system [http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2005-2-003?fn=document-frameset.htm\\$f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2005-2-003?fn=document-frameset.htm$f=templates$3.0)

²⁷ Upon the recommendation of the Venice Commission that urged to keep an indirect access mechanism through which individual questions can reach the Constitutional Court (through the Ombudsman or other relevant bodies).

4. The role of constitutional justice in social integration

4.1. Does your Constitution enable your Court to act effectively in settling or avoiding social conflict?

Presently there are six competences in the Fundamental Law²⁸ devoted to the Constitutional Court, and the drafters of the new constitution left open the possibility to establish further competences also in cardinal laws²⁹.

On the other hand, as mentioned earlier in Answer 1.1., the Constitutional Court cannot control anymore the Acts on the State Budget and its implementation, the central tax type, duties, pension and healthcare contributions, customs and the central conditions for local taxes to the extent that would affect the main budgetary total expenditures.

The Fundamental Law extended the restriction of the Constitutional Court's competence further, Article 37 (par. 5) provides that in the case of statutory provisions which entered into force during the period when the state debt exceeded half of the GDP, the restriction shall also apply if the state debt no longer exceeds half of the GDP, even if only in respect of this period.

4.2. Does your Court de fact act as 'social mediator', or/and has such a role been attributed to it?

There are some who see the Constitutional Court as a "Second Chamber" besides the unicameral Parliament as regards the weight of decisions and the role in shaping politics, however this view is not prevalent.

4.3. Have there been cases, when social actors, political parties could not find any agreement, they would 'send' the issue to your Court which had to find a 'legal' solution, which normally should have been found in the political arena?

It is typical in the functioning of the Constitutional Court

²⁸ Article 24 (2): the Constitutional Court shall

a) examine adopted Acts not yet promulgated for conformity with the Fundamental Law;

b) at the initiative of a judge, review the conformity with the Fundamental Law of any legal regulation applicable in a particular case;

c) on the basis of a constitutional complaint, review the conformity with the Fundamental Law of any legal regulation applied in a particular case;

d) on the basis of a constitutional complaint, review the conformity with the Fundamental Law of any judicial decision;

e) at the initiative of the Government, one-fourth of the Members of the National Assembly, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights, review the conformity with the Fundamental Law of any legal regulation;

f) examine any legal regulation for conflict with any international treaties.

²⁹ Article 24 (2) g) exercise further functions and powers laid down in the Fundamental Law or in a cardinal Act.