24 Constitutional Identity as Interpreted by the Council of Europe and the European Union

Conflict of Laws – Conflict of Courts?

András Zs. Varga[*]

One of the recent challenges faced by the legislation and jurisprudence of the different European organizations – namely the European Union and of the Council of Europe – are the burgeoning conflicts between international-supranational institutions and their Member States. The issue of who shall render the final decision in constitutional conflicts, particularly when it comes to conflicts based on or related to human rights or the rule of law is inevitable. The question is the following: what can a sovereign state or its Supreme/Constitutional Court do if it finds that a judgement of an international court (the Court of Justice of the European Union – hereinafter: CJEU – or the European Court of Human Rights – hereinafter: ECtHR) is contrary to the national constitution? Such conflicts are also emerging between the CJEU (refusal to adhere to the European Convention of Human Rights in Opinion 2/2013[1]) and the ECtHR (the Bosphorus presumption – liability of member states for breach of human rights irrespective of their other international obligations – sustained in *Avotiņš v. Latvia*[2]). The answer to this question must take into account the fundamental principle according to which the rule of law and primacy of international law requires that judgements of international courts be observed and enforced. At the same time, in case there is no instrument to correct flawed international judgments, if there is no counterbalance to the unlimited power of international courts that expropriate legislation, if constitutional courts are mere servants of international courts, then arbitrariness will abound.

* Professor of public law, Pázmány Péter Catholic University Faculty of Law and Political Sciences; Judge, Hungarian Constitutional Court; varga.zs.andras@jak.ppke.hu.

1 Opinion 2/13 of the Court (Full Court) 18 December 2014.

2 Case: *Avotins v. Latvia*, Appl. No. 17502/07, see *Stian Øby Johansen*: EU law and the ECHR: the Bosphorus presumption is still alive and kicking – the case of *Avotiņš v. Latvia*, http://eulawanalysis.blogspot.hu/2016/05/eu-law-and-echr-bosphorus-presumption.html.

24.1 Constitutional Identity in the Reading of the Council of Europe

When Mr Clayton, the UK member of the Venice Commission suggested at the end of the 101th Plenary Session in December 2014 to give more attention to the "alienation of some member states from the European Court of Human Rights" and Prof. Jan Erik Helgesen, the member for Norway announced the Oslo seminar (to be organised in 2016 or 2017) on this issue and proposed that international conferences be organised on the matter for encouraging dialogue between the ECtHR and national courts, notably constitutional and supreme courts,[3] many members were persuaded by the relevance of the problem. If we take a look at the most recent contradictions between the judgments of the ECtHR and national courts, we have to say that the question regarding the final say in constitutional conflicts, particularly conflicts based on or related to human rights is of vital importance.

As a first example for the possible answers to our question, let us first consider the amendments of December 2015 to the Federal Constitutional Law No. 1-FKZ of 21 July 1994 on the Constitutional Court of the Russian Federation. In July 2015 the Constitutional Court of the Russian Federation ruled "that the Russian Constitution had priority, with the consequence that a decision from the ECtHR that contradicted the Russian Constitution could not be executed in Russia".[4] The amendments to the law underlined the principle of the primacy of the constitution, and entitled the Constitutional Court to declare decisions of international courts to be unenforceable. The Venice Commission examined the Russian response and concluded that a state "cannot invoke the provisions of its internal law as a justification for its failure to perform a treaty, including the European Convention on Human Rights. The execution of international obligations stemming from a treaty in force for a certain State is incumbent upon the State as a whole, i.e. all State bodies, including the Constitutional Court."[5] Yet in spite of the crudeness of the Russian answer and the foreseeability of the of the Venice Commission's retort, the question remains to be answered.

When a constitutional court finds that a judgement of an international court is contrary to the constitution, finding a solution should start from the primary exigency that the decision itself must be enforced, since the state is bound by international law (e. g. the Treaty on European Union – hereinafter: TEU – or ECHR). But this primary answer does not assist furthering the general acceptance of, or overcoming the reluctance toward the international decision: harmonisation of national jurisprudence with the standpoint of the international court. The question is delicate since the final nature and enforceability of the international judgement does not imply that it is also appropriate and applicable over a longer period of time. Consequently, we cannot be satisfied by simply saying that

3 CDL-PL-PV(2014)004-bil, p. 13.
4 CDL-AD(2016)005, para. 14.
5 CDL-AD(2016)005, para. 97.

the scepticism of different states and courts is nothing more than a nationalistic view that should be rejected. Anti-European sentiment in certain states may be reason for concern but it has some considerable foundations.

A first, obvious but not trivial argument is that such a conflict can arise not only between an international and a domestic court but may also be perceived between international courts. The example is, of course, Opinion 2/13 of the CJEU regarding the accession of the European Union to the European Convention on Human Rights. The CJEU found that the agreement presented by the European Commission on the conditions of accession was incompatible with the TEU. The main reasoning of the opinion was that "jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU".[6] Of course, the EU is still awaiting accession to the ECHR while member states have already joined. Nevertheless, the arguments presented by the CJEU is the same as the arguments raised by the different member states. One of the reactions of the ECtHR was made public on the 23rd of May, 2016 in the Case *Avotins v. Latvia*[7] in which the Court sustained the so called Bosphorus presumption:[8] member states of the Council of Europe – hereinafter: CoE – are liable under the ECHR even when fulfilling other international obligations.

Another argument would be the broader interpretation of human rights. All signatory states of the CoE undertook to abide by the final judgment of the ECtHR in any case to which they are parties. Formally, this obligation cannot lose its effect with the passing of time. There is no doubt that all member states observed this obligation not only in relation to the particular cases, but they adjusted their legislation and government practice to the judgments of the ECtHR. At the same time, the legal background did not remain unchanged. Both binding and soft law (recommendations or even the opinions of the Venice Commission) were conquering new fields of law or provided broader interpretations. These changes infiltrated the jurisdiction of the ECtHR, thus member states had to face growing number of obligations that were unforeseen before. To give a few examples from my country: the law establishing a monopoly for the trade in tobacco[9] was found to be in violation of Article 1 of Protocol No. 1 of the ECHR, the different levels of cooperation between different religious groupings and the State in social affairs[10] was found to be in violation of Article 11 of the ECHR.

The following argument stems from the tensions between the lack of political reasons (social reality) and legal obligations. Although Article 1 of the Statute of the CoE mentions

6 Opinion 2/13 of the Court (Full Court) on 18 December 2014, para. 256.
7 See fn 2.
8 See: Fisnic Korenica: *The EU Accession to the ECHR.* Springer, 2015, pp. 358-362.
9 Case *Vékony v. Hungary*, Appl. No. 65681/13.
10 Case of *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, Appl. No. 70945/11 and others.

a set of values and goals considered to be common for the founding member states and those adhering later, the shape of the CoE became dominated by legal aspects. In the case of the ECtHR this is natural: the ECHR is legally binding. But it cannot be left out of consideration that the Convention is "lean" in comparison with the constitutions of the member states or even compared to the Universal Declaration of Human Rights (just one example: the Convention does not mention the dignity of human beings nor any non-individual – collective – rights). Yet at the same time, social reality is permanently changing making it necessary to give new answers to old questions. Not only legal but also political answers must be given which may lead to tensions. One example can be the law on measures for combatting terrorism[11] declared to be in violation of Article 8 of the ECHR. In this case, applicants were considered to be persons potentially subjected to unjustified and disproportionately intrusive measures. Thus, no real abuse but already its mere possibility was declared contrary to the ECHR, giving the ECtHR a role similar to that of the constitutional courts: it carried out an abstract control of legal acts. The situation and need for new rules after a terrorist attack against Paris or Brussels highlights the inconsistency of the judgment with social and legal reality.

Another argument could be based on the fading difference between binding and soft law. The role of the Venice Commission could be the perfect example. The Venice Commission never misses a chance to stress that its opinions are non-binding, signatory states are free to accept or to reject them. This approach does not fit perfectly with reality. In general, an opinion left out of consideration does not go unnoticed and triggers different responses (monitoring, launching of different proceedings, our follow-up mechanism). For member states that are also members of the EU the situation is even more serious. The last paragraph of item 4 of the *Communication from the Commission to the European Parliament and the Council* COM (2014) 158 on *A new EU Framework to strengthen the Rule of Law* states[12] that "The Commission will, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission, and will coordinate its analysis with them in all cases where the matter is also under their consideration and analysis." Actions based on the Framework may lead to legal proceedings before the CJEU or political proceedings within the European Parliament. Hence – especially if a CJEU action is launched – the soft law opinion of the Venice Commission may be "upgraded" to possess binding force. This is another phenomenon which may trouble the member states. Poland – as the first member state – faces the consequences of the new Framework.[13]

11 Case of *Szabó and Vissy v. Hungary*, Appl. No. 37138/14.

12 See: Láncos Petra Lea, 'A Bizottság közleménye a jogállamiság erősítésének új, uniós keretéről', in: *PLWP* 2014/5. http://d18wh0wf8v71m4.cloudfront.net/docs/wp/2014/2014-05.Lancos.pdf.

13 See: Commission Opinion on the Rule of Law in Poland and the Rule of Law Framework: Questions & Answers. http://europa.eu/rapid/press-release_MEMO-16-2017_en.htm, its preliminaries will be presented in Chapter II.

A not merely symbolic argument would be the consistent difference in text between "old" and "new" democracies. The practical situation does not need any explanation, while its appropriateness does. In the first years of the activity of the Venice Commission this difference had solid foundations. As time passes, this argument is losing substance. Firstly, an ontological argument may be raised: what is the starting point of this comparison – the fall of the Roman Empire? Westphalia? The Glorious Revolution? The French Revolution? 1848? 1920? The end of the Second World War? The foundation of the CoE? The farther our starting point, the less member states qualify as "old" democracies. Secondly, a mathematical argument should be considered: the ratio of the age difference between "old" and "new" democracies is decreasing year by year. Thirdly, this difference may be disobliging to peoples of the different "new" democracies (by way of example: Poland was the country attacked by Nazis what caused the second World War, but this country together with Czechoslovakia did not choose their authoritarian communist regime, they were left in the hand of Stalin by "old" democracies. However, these two countries could serve as example for any democracy: Poland as the first "new" democracy which performed transition in a truly democratic and peaceful way, the people of Czechoslovakia managed the "divorce" resulting in the Czech Republic and Slovak Republic a manner that may stand as an example to the whole world).

The last point goes to the heart of the reluctance of the ECtHR to accept arguments based on constitutional identity. Certain – and by no means irrelevant – groups of people feel that the ECtHR and generally the rule of law serves only "others", while general values are gradually forgotten. Just to name some examples regarding Hungary: *Korbely v. Hungary*, Appl. No. 9174/02 (volley in 1956) or *Vajnai v. Hungary*, Appl. No. 33629/06 (prohibition of public display of communist symbols, e.g. the red star). This argument leads to one of the most troubling phenomena, marked by the term "sovereigntists": expropriation of values such as the rule of law or human rights by different political movements. When the rule of law or human rights are instrumentalized and used as weapons in political debates, these values are transformed from common ideals to sectarian idols. Thus "Strasbourg" or "Brussels" or "Luxembourg" may become a blasphemy for other political movements. It is no coincidence that in the last years the UK expressed doubts regarding the judgements of the ECtHR in the same or even cruder tone than the Russian Federation, even threatening to leave the ECHR. I think the UK should be considered an old democracy with a certain constitutional identity.[14] It demands attention when such an old democracy feels its identity endangered by the ECtHR.

14 www.telegraph.co.uk/news/uknews/law-and-order/11911057/David-Cameron-I-will-ignore-Europes-top-court-on-prisoner-voting.html, www.mirror.co.uk/news/uk-news/david-cameron-considers-exit-european-5816205.

The conclusion cannot be avoided: the rule of law and the primacy of international law requires that judgements of international courts be observed and enforced. But if there is no instrument to correct misguided judgments, if there is no counterbalance to the unlimited power of international courts that expropriate legislation, if constitutional courts are mere servants of international courts, we face arbitrariness. In this case, the old and common European ideal of the rule of law becomes a tyrannous idol. This implies a new order: the euro-absolutism. This new order may be coined "Juristocracy" as Prof. Béla Pokol proposes.[15] Do we think that constitutional courts will silently commit to this fearful process? Do we think that the principle of democracy will become an empty reference?

24.2 A Case Study: Poland the Venice Commission and the European Commission

One example for possible constitutional conflicts is the national and international debate regarding the Constitutional Tribunal of Poland.[16]

The Act on the Constitutional Tribunal was amended (of 25 June 2015, entered into force on 30 August 2015) allowing the Sejm (Parliament of Poland) to elect the successors of all the outgoing judges of the Constitutional Tribunal – hereinafter: CT – (whose mandate ended in 2015). Before the general elections, during its last session, the Sejm elected 5 judges to replace three judges whose mandate was terminated in November and two judges leaving the Tribunal in December. The five judges couldn't enter the Court, therefore the President of Poland did not accept their oath required under the Constitution.

In November, the newly elected Sejm amended the Act yet again. One of the new rules fixed the beginning of the term of office of the judges, the starting date of the mandate was linked to taking the oath. Also in November, the Sejm decided that the October election of the five judges was invalid. In December, the Sejm elected five new judges, and the President of Poland accepted their oath.

Also in December, the Constitutional Tribunal decided that election of the judges in October was constitutional, consequently, the President of Poland was obliged to accept their oath, while the election of two judges – replacing the judges whose mandate had only expired in December – was unconstitutional. The President of the Constitutional Tribunal let the two judges elected in December enter the bench of the Tribunal, but refused this for the three other judges. Therefore, the Sejm decided in late December to amend the Act yet again, prescribing that thirteen of the fifteen judges must be present for a full bench – the full bench of the Tribunal was therefore unable to sit and hear cases.

15 See: Béla Pokol, 'The Juristocratic Form of Government and its Structural Issues', *PLWP* No. 2016/9. http://d18wh0wf8v71m4.cloudfront.net/docs/wp/2016/2016-09_Pokol.pdf.

16 Opinion CDL-AD(2016)001 of the Venice Commission, paras. 13, 14, 18, 20, 24, 25, 26, 30, 32, 43.

In March 2016 the full bench – with 12 judges – declared the amendments of December to be unconstitutional, but the Government refused to publish the decision in the official journal referring to the fact that the bench that had taken the decision had been incomplete.

The Venice Commission examined the case upon the request of the Polish Ministry of Foreign Affairs,[17] and during its 106th plenary session in March 2016 adopted opinion CDL-AD(2016)001. The Opinion concluded – among other observations – that "[i]n a State based on the rule of law, any such solution must be based on the obligation to respect and fully implement the judgments of the Constitutional Tribunal." The Commission therefore called upon authorities of Poland to "fully respect and implement the judgments of the Tribunal." The Commission observed that three judges are missing from the Court, while there are "two sets of three judges each, the so-called "October judges" elected by the 7th Sejm and the "December judges", elected by the 8th Sejm", and "(t)he acceptance of the oath by the President is certainly important – also as a visible sign of loyalty to the Constitution – but it has a primarily ceremonial function". The Commission did not accept the argument of the Polish Government, that under the constitutional customs the role of the Polish President may be decisive, hence the argument was based on a single event (in 1997) when the President of Poland was asked to refose the oath of elected judges.[18]

Although the considerations put forward are in line with the general approach of the Venice Commission, there are some arguments which may raise doubts in regard of constitutional grounds and expedience of the Opinion.[19]

First of all, the situation in Poland was also analysed by the European Commission. The dialogue launched under the Rule of Law Framework is the premiere of this instrument created in 2014.[20] The last item of part 4.2 of the Communication on the Framework states that

> The Commission will, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission, and will coordinate its analysis with them in all cases where the matter is also under their consideration and analysis.

As a last stage of the process, if the European Commission considers that there is no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set, the Commission will assess the possibility of activating one of the mechanisms set out in Article 7 TEU, which does not exclude a possible action before the Court of Justice of the European Union. Consequently, the opinion of the Venice Commission is

17 Idem, para. 1.
18 Idem, paras. 107, 108, 110, 112, 136.
19 These doubts were expressed in the dissenting opinion of the author.
20 COM(2014)158 final/2.

more than a non-binding (soft law) instrument rendered by one of the most important advisory bodies of the Council of Europe. Applied by the European Commission observations made in our opinion may lead to certain political and/or legal measures, which giving indirectly binding effect to the opinion.

The position of the Opinion that the present situation of the Constitutional Tribunal of Poland cannot be solved by terminating the term of office of all judges (as was suggested by some officials[21]) can be supported. It would be a much too simple solution to put all judges in an unacceptably detrimental situation regardless of their date of appointment and the violations of other state authorities. But a simplistic evaluation of the role of the 7th and 8th Sejm in causing the situation cannot be accepted either. It was the action of the 7th Sejm aimed at ensuring the appointment of its preferred judges that the 8th Sejm reacted to in order to balance out the appointments. To consider both action and reaction unconstitutional without any difference (Paras. 124-125) is unjustified.

The Opinion examines the role of the President of Poland, who had not accepted the oath of the "October judges", while accepting the oath of the "December judges". Three of the "December judges" have not performed judicial duties due to the decision of the President of the Tribunal in accordance with decision K 34/15 (of 17 November 2015) that held that the election of the three "October judges" had been valid and the President of Poland had been under the obligation to accept their oath. Based on these facts, the Opinion underlines that the proper functioning of the rule of law requires that decisions of a constitutional court be respected by other political organs and urges the Polish authorities to be guided by the principle of loyal co-operation. In its conclusion, the Opinion reiterates that decisions of the Constitutional tribunal are to be respected and fully implemented. This statement and conclusion is very one-sided and not well-founded. The role of the President of Poland and the acceptance of an oath cannot be simply brushed off. According to Section 1. of Article 21 of the Constitutional Tribunal Act of Poland of 25 June 2015 "A person elected to assume the office of a judge of the Tribunal shall take the following oath in the presence of the President of the Republic of Poland…" and Section 2 of the same Article determines the consequence of a refusal to take the oath: it "shall be tantamount to resignation from the office of a judge of the Tribunal." It should be clear that the oath is not a mere administrative accessory for a judge, on the contrary, it is a constitutive part – a condition for the validity – of the process of appointment. Thus, the role of the President is not an empty ceremonial rite, the President is much rather vested with a decisive power that is performed jointly with the *Sejm*. Accepting or refusing the oath is an act with legal effect. This role of the President is part of the system of checks and balances which cannot be left out of consideration when loyal cooperation is analysed.

21 Opinion CDL-AD(2016)001 of the Venice Commission, para. 125.

The Opinion does not pay enough attention to the independence of individual judges, which is an indispensable component of the principle of rule of law.[22] The Opinion remarks simply that for the three vacant positions there are two sets of three judges each, the so called "October judges" and "December judges". The situation is more complex. Independence protects a judge who is validly appointed. This is normally beyond dispute, but in the present case, it is pivotal. There is an important difference between the "October" and "December judges". The process of appointment of the "December judges" is complete, while the appointment of the "October judges" was interrupted, it is incomplete, a decisive act, the oath before the President, is missing. As the oath is a condition of validity, the two sets of judges are not similar, judges belonging to one set or to the other cannot be considered in the same way. When compared, law gives greater protection to the validly appointed "December judges" than the other group. Thus, the analogy of *Marbury v. Madison*[23] has an inverse consequence as opposed to what was expressed in the Opinion: it was not the President of Poland (a decisive element in the process of appointment) who has paralysed the Constitutional Tribunal when performing his right to accept or not to accept the oath, but it was the President of the Tribunal who prevented the validly appointed "December judges" from taking up office. It would have rather been worth examining the confusing role of the President of the Tribunal as it seems his acts are beyond the competences attributed in a democracy to such a position (i.e. hindering judges in exercising their duty).

This circumstance cannot be left out of consideration. If the Venice Commission does not protect validly appointed judges against those whose appointment process was not completed or if the Commission accepts the two groups to be equal, the rule of law is severely weakened. In particular because the election of the "October judges" took place in a way contrary to the rule of law, impairing the independence of the judges, as a legal amendment – with no justification – terminated the term of office of the lawfully elected judges. One component of the principle of rule of law was, is and should be observed always and in any legal system, and serves as a *conditio sine qua non* of the rule of law. This *conditio sine qua non* of rule of law is the independence of judges. No change of the economic, social, political or security environment permits a violation of this principle. No purpose, neither transparency nor efficiency is sufficient grounds for weakening this independence. *Without the independence of judges, the rule of law does not exist*.

As a final remark, attention should be drawn to the fact that law itself, consequently the rule of law as such is not a perfect arithmetical system. There could be – moreover: there are – specific components of the different legal cultures which cannot be rejected only because these are not customary in other legal systems (recently these are often referred as elements of the national *constitutional identity*). Accepting this approach, the rejection

22 CDL-AD(2011)003rev, para. 55.

23 Mentioned in footnote 8 to para. 43 and expressed in footnote 25 to para. 101.

of the constitutional custom referred to by the Polish Government appears to be overly rigid and categorical.

The Opinion of the Venice Commission was accepted by the European Commission, and the proceedings under the Framework were based on this Opinion.[24] Thus, the proceedings of the Council of Europe (its advisory body, the Venice Commission) as an international organisation and of the European Union (its executive body, the European Commission) as a supranational structure, are interlinked. Consequently, the impact of the powers of the EU on sovereignty should be examined. The present article shall seek to do so, even if confined to the case of Hungary. The reasons for this limitation are the decisive difference between the constitutions of the Member States and the different jurisdictions of their Supreme/Constitutional Courts.

24.3 Constitutional Identity and the European Union: Final Conferral of Sovereignty or Limited Transfer of Powers?

According to its most simple definition, sovereignty is power actually and in principle exclusively exercised within a territory and over a certain people (i.e. supreme power), which is acknowledged by others exercising power in a similar position. The external aspect of sovereignty is constituted by independence, autonomy and the competence for making decisions without any external control, while its internal aspect is constituted by the entity having the supreme power and the rules created by this entity. Resulting from the foregoing are the so-called sovereignty-based (internal) sovereign rights, the right to command and the obligation for subjection (obedience). The forms of exercise of sovereignty are, as it is well-known, legislation, exercise of executive powers and jurisdiction.[25] If national sovereignty is deemed as a necessary element of constitutionality, which it definitely is, then the nation framing a constitution is the bearer of sovereignty. Therefore, we cannot speak of statehood without a people/nation[26] in terms of content, and without a constitution in terms of public law (in a formal sense).

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24 See fn 12.

25 Dezső, Márta, 'A szuverenitás', in: Kujorelli, István (ed.): *Alkotmánytan I.* Osiris, Budapest, 2002, pp. 121-122 and 136-138. Hercegh, Géza (ed.): *Nemzetközi jog.* Alkotmánytan I. Osiris, Budapest, 1989, pp. 38-40. Gombár, Csaba, 'Mire ölünkbe hullott, anakronisztikussá lett. Magyarország szuverenitásáról and Nagy, Boldizsár: Az abszolútum vágyáról és a törékeny szuverenitásról', in: Gombár, Csaba – Hankiss, Elemér – Lengyel, László – Várnai, Györgyi (ed.): *A szuverenitás káprázata.* Korridor Politikai Kutatások Központja, Budapest, 1996, pp. 13-45, 7-8 and 227-233. Vild, Éva, 'A Szentszék és a magyar állam viszonyáról', in: IURA, 13. évfolyam, 2007. 1. szám. pp. (158-175) 158.

26 For the sake of simplicity we use these two concepts as synonyms, bearing in mind that they are not identical. L. Zlinszky, János, *Az Alkotmány értéktartalma és a mai politika.* Szent István Társulat, Budapest, 2005. Kenneth Janda – Jeffrey M. Berry – Jerry Goldman: *Az amerikai demokrácia*. Budapest, Osiris, 1996.

24.3.1 Sovereignty – the European Union – Hungary

The European Union is not a state. It does not have its own nation[27] framing a constitution, a constitution, therefore it does not have an own (original) sovereignty. It exists by the will of its members – the sovereign Member States –, which have conferred only certain itemized competences deriving from their sovereignty, and not their sovereignty itself.[28] Article 1 of the Treaty on European Union explains this issue clearly and unequivocally ("By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common.") as does Article E of the Fundamental Law of Hungary ("(2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union"). Competences not conferred upon the Union in the Treaties remain with the Member States, the Union shall respect their national identities and their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security (Art. 4 of TEU). As regards competences, as it follows from the principle of conferral, the principles of subsidiarity and proportionality prevail, and no measures of the Union shall exceed the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein – neither in content nor in form. This is provided by Subsection (4) of Article E of the Fundamental Law of Hungary, according to which for the authorisation to recognise the binding force of an international treaty on the conferring of competences, the votes of two-thirds of the Members of the National Assembly shall be required.

The Union is, therefore, not a sovereign entity,[29] sovereignty was retained by the Member States, yet on the other hand, due to the conferral of competences, the sovereign rights originating from sovereignty – notably: legislation – are divided among the Member

27 Petra Lea Láncos, 'The perspective of EU constitualization', www.eu-consent.net/library/deliverables/D15b_Team4.pdf.

28 Szabó, Marcel – Láncos, Petra Lea – Gyeney, Laura: *Az Európai Unió jogi fundamentumai*. Budapest, Szent István Társulat, 2014, pp. 45, 61, 77. Kecskés, László: *EU-jog és jogharmonizáció*. Budapest, hvgorac, 2011, pp. 289, 291, 619, 629-631 and Láncos Petra Lea: Szuverenitás és szupremácia – a tagállami integrációs klauzulákban tükrözött szuverenitáskoncepciók és alkotmányjogi jelentőségük. In: PLWP 2011/17, http://d18wh0wf8v71m4.cloudfront.net/docs/wp/2012/2011-17.pdf.

29 Note that the attempt at establishing a constitution, which was vetoed by the French and Dutch referendum (Treaty establishing a Constitution for Europe, published in the Official Journal of the European Union, C 310 1, Luxembourg, Office for Official Publications of the European Communities) would not have changed this situation either, for its Art. I-1. would have required the conferral of competences and not the sovereignty of the Member States. In spite of this, the Member States retained their sovereignty. See: Kaarlo Tuori, *European Constitutionalism*. Cambridge University Press, 2015, 345.

States and the Union.[30] Article 16 of TEU vests legislative functions in the Council, while Subsection (3) of Article E of the Fundamental Law recognises these as general mandatory rules of conduct (in addition to the Fundamental Law of Hungary and Hungarian legal regulations). Despite the fact that sovereignty had been retained by Hungary as a Member State, in the actual exercise of sovereignty, Hungary is bound, on the one hand, by the international treaty establishing the Union, and on the other hand – in terms of the conferred competences and to the extent necessary for their implementation – the legal acts created by the institutions of the EU.

24.3.2 The Limitations in Principle of Delegated Competences and Their Exercise

In case of a conflict between EU law and the law of a Member State, the supremacy of EU law is a binding principle for all Member States – and thus also for Hungary. This means that EU law is superior in the hierarchy of sources of law to the internal (domestic) legal order, so in case of a conflict of law EU law shall prevail. This is stated regarding its own legal order by the European Union (more precisely: the Court of Justice of the European Union declared this in the *Van Gend en Loos* case[31]). However, the actual situation is even more complex.

Firstly, a part of the secondary sources of law – namely directives – expressly require domestic legislation. In this case, the adopted domestic law gains its validity from two other sources of law: on one hand, from the superior domestic law (the Fundamental Law of Hungary), and on the other hand, from the specific directive of the European Union. Therefore, in such cases the two legal orders are interconnected. Secondly, the touchstone of the full autonomy of the two legal orders is the Fundamental Law, situated at the top of the internal legal hierarchy. But is the legal order of the European Union superior to the Fundamental Law? Many think, on the basis of the *Van Gend en Loos* case, that the answer is a simple 'yes'. But, if the case was so, the Fundamental Law would lose its characteristic of being a positive constitutional law, and we could no longer talk about the sovereignty of Member States. The question can be precisely answered – with a 'no' – on the basis of Article E of the Fundamental Law of Hungary. Based on this provision, the Fundamental Law of Hungary (just as earlier the Constitution) elevated the legal order of the European Union "above itself" in relation to some of its provisions, but the same cannot be said about the Fundamental Law of Hungary as a whole. There has to be a constitutional min-

30 Touri, ibid., 347.

31 Kende, Tamás – Szűcs, Tamás (szerk.), *Európai közjog és politika*. Budapest, Osiris, 2002, p. 559.

imum that shall be superior to the legal order of the European Union as long as Hungary possesses sovereignty as a Member State.[32]

In essence, the Fundamental Law of Hungary reflects the theory of the "integration-resistant constitutional core" elaborated under German law. Nonetheless, the bounds of the supremacy of Union law *vis-á-vis* the domestic law are not clear. From the perspective of sovereignty and the procedural resolution of the conflict of laws only the possible directions for a solution have crystallized. The most important are: the possible decisions of the Constitutional Court in case of a conflict of laws between domestic and EU law, advisory opinions, annulment, call for a harmonisation of laws, the establishment of legislative omission, the adjudication of a constitutional complaint,[33] and the correlations between supremacy and sovereignty, the supremacy of sovereignty and self-identity,[34] the compromise solutions based on the sovereignty of the individual states and attempts to find a new concept of sovereignty.[35] Ultimately, this question depends on the actual and legal identity of the European Union (integration/confederation/federation) and its developments.[36]

The occurring debatable situations can be categorized into three domains pursuant to the TEU and the provisions of the Treaty on the Functioning of the European Union (hereinafter referred to as: TFEU). The first category includes the exclusive competences conferred upon the Union (Art. 3 TFEU), according to which only the Union has exclusive competence to draft and adopt binding legal acts, while the Member States have competence only as far as they are authorized by the Union (mainly in the form of directives), or if the aim of these legal acts is the implementation of legal acts adopted by the Union (Subsection (1) of Article 2 TFEU).[37] In this category, the Member States' scope of action is highly limited until the TEU and TFEU are in effect, in case of a legal dispute, the supremacy of EU law and the decision rendered by the CJEU is, in essence, indisputable. The second category comprises the shared competences (Art. 4 TFEU). As far as these competences are concerned both the Union and the Member States may create and adopt binding legal

32 András Jakab doubts that this approach would be enforceable. See: Jakab, András, *A magyar jogrendszer szerkezete*. Budapest-Pécs, Dialóg-Campus, 2007, pp. 111-112. and 184-188. Furthermore, the concept of the untouchable "core" is disputed by: Vörös, Imre, *Csoportkép Laokónnal. A magyar jog és az alkotmánybíráskodás vívódása az európai joggal*. HVGORAC, Budapest, 2012, pp. 106-109. See also: Blutman, László – Chronowski, Nóra, 'Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában (I.)', *Európai Jog*, 2007. 2. (3-16.), p. 10.

33 See: Chronowski, Nóra, *"Integrálódó" alkotmányjog*. Budapest-Pécs, Dialóg-Campus, 2005. 265. Blutman – Chronowski ibid., pp. 10-14.

34 Blutman – Chronowski ibid., pp. 3-4, 10 and 12. Trócsányi, László: *Az alkotmányozás dilemmái. Alkotmányos identitás és európai integráció.* Budapest, HVGORAC, 2014.

35 L. Jakab, András, 'A szuverenitás fogalmához kapcsolódó kompromisszumos stratégiák, különös tekintettel az európai integrációra', *Európai Jog*, 2006/2., pp. 3-14.

36 L. Szuper, József, 'Föderalizmus-dilemmák az európai alkotmányozásokban', *Európai Jog*, 2006/6, pp. 9-17.

37 Szabó – Láncos – Gyeney, *Az Európai Unió…* ibid., pp. 78.

acts, however, the Member States may exercise this competence only to the extent that the Union has not exercised or has disclaimed its right of exercising its competence (Subsection (2) of Article 2 TFEU).[38] This category is supplemented by competences that are retained by the Member States, nevertheless, regarding which the Union is entitled to take measures which support, coordinate or supplement the competences of the Member States (Subsections (4)-(6) of Article 2 and Article 6 TFEU), and in respect of which the TFEU applies further detailed rules. In case of the latter competences even a Member State may dispute according to its own legislation (that is before its own Constitutional Court) the compliance of the supporting, coordinating or supplementary measures of the Union with its own legal acts, as the competence relevant to these is retained by the Member State.

And finally, there is a third category as well, namely the competences that are not vested in the Union in any way. Due to the formulations of the TEU and TFEU which allow for a flexible interpretation, this category is actually very limited, for most of the competences of the Member States constitute a part of at least the conferred competences or the competences implemented through supportive, harmonizing or supplementary measures. Probably the best example for this flexible formulation is the shared competence for the area of freedom, security and justice (Paragraph (j) of Subsection (2) of Article 4 of TFEU). The scope of competence, which is seemingly of a theoretical nature, is specified by detailed policies, such as the issues regulated in Articles 67-89 of TFEU: the absence of internal border controls for persons, asylum and immigration, external border controls, prevention of racism and xenophobia, the coordination among police and judicial authorities and other competent authorities, cooperation in penal and civil law, and access to justice.[39] In fact, the competence of the EU covers many areas that are integral to the essence of classical sovereignty.

However, in light of the foregoing – for as long as sovereignty is possessed by a Member State, and the Union exists by the will of the Member States – the competence of the Member States relevant to this subject matter cannot be fully deprived of their substance. The scope of action of the Member States is also guaranteed by the circumstance that formally the Member States did not waive the primacy of their own legal order in favour of the Union, this is an essential difference between the TEU-TFEU and the failed Agreement on the Constitution containing a legal waiver formula.[40] Thus, the primacy of EU law continues to be based on the decision of the CJEU, which – in case of a legal dispute – can attempt to enforce it, but the Member States may put up serious resistance.

38 Szabó – Láncos – Gyeney, *Az Európai Unió*… ibid., pp. 78-79.

39 Szabó, Marcel – Láncos, Petra Lea – Gyeney Lauram, *Uniós szakpolitikák*. Budapest, Szent István Társulat, 2014, pp. 176-220.

40 Szabó – Láncos – Gyeney, *Az Európai Unió*… ibid., p. 95.

When defining the retained competences it may be assumed that the Member States did not confer their constitutional identity to the Union.[41] Notwithstanding a solemn-looking formula that still conferred the control over their constitutional order and its elements to the institutions of the Union was adopted in Article 2 of TEU, in case of a legal dispute, this identity can be argued.[42]

It must be noted that the CJEU refrains from acknowledging even the smallest scope of action for the Member States, which, for Hungary, is sufficiently illustrated by the judgment in the *Jóri* case.[43] According to the facts of the case detailed in the judgement, András Jóri was appointed as commissioner for data protection for a term of six years on 29 September 2008 by the National Assembly of Hungary pursuant to Act LXIII of 1992 on the Protection of Personal Data and on the Publication of Data of Public Interest. Based on Article 16 of the Transitional Provisions of the Fundamental Law his mandate was terminated on 31 December 2011. His functions were taken over by the Hungarian National Authority for Data Protection and Freedom of Information. The European Commission – with the support of the European Data Protection Supervisor – launched an action for failure to fulfil an obligation against Hungary. In the procedure Hungary presented the following argument in its defence:

> Hungary states, first of all, that the decision to replace the Commissioner with a body which operates as an authority and, accordingly, to terminate the mandate of the Commissioner was adopted by the constitutional authority, and that the new legislation relating to the Authority is based on the Fundamental Law.

By contrast, the CJEU held that as the Commissioner had been elected based on the 1992 act on data protection, therefore, the termination of the Commissioner's mandate should also have been based on the 1992 act, consequently Hungary violated Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[44] With this, not only did the CJEU state that EU law is superior to the constitution of a Member State (which undoubtedly is the case in respect of conferred competences), but questioned the constitutional quality of the Fundamental Law of Hungary. The judgment can only be interpreted as one that suggests that the Fundamental Law as a new constitution should have been in conformity with Act LXIII of 1992 on data protection,

41 Trócsányi ibid.

42 Láncos Petra Lea: Az Európai Unió értékeinek kikényszerítése és az értékek meghatározhatóságának problémája. http://media-tudomany.hu/laparchivum.php?ref=39.

43 Judgment of the Court (Grand Chamber) 8 April 2014 (…) in Case C-288/12.

44 Judgment of the Court (Grand Chamber) 8 April 2014 (…) in Case C-288/12, sections 40, 57, 59, 61-62.

and the constituent power should have aligned itself to the legislative power. Nobody has ever authorised the CJEU to question the constitutional quality of a source of law (even if it occurred by simple disregard), it nevertheless decided to do so.

24.3.3 The Latitude of Member State Constitutional Courts

Despite the activity of the CJEU, which defends and expands EU law, it cannot be stated that Member States and constitutional courts that intended to defend their own constitution should surrender in every case. Naturally, the jurisdiction of constitutional courts depends on the debated competence; the possibility for intervention by constitutional courts is inversely proportional to the intensity of the transfer. Constitutional courts' jurisdiction determined by the present legislation can be summarized in a simplified manner as follows.

A constitutional revision by Member States of legal acts included in exclusive competences is essentially impossible, it may only take place to review the formal adequacy of an implementing legal act delegated to the Member State. The constitutional court of the Member State enforces EU law also in this case (which means that it cannot dispute the essence of the competence conferred under an international treaty). The starting point is largely similar to this when it comes to shared competences, although it should be noted that the detailed rules of the TFEU still provide ample opportunity for substantial interaction by the Member States in the process of legislation or interpretation of the law. As far as the shared competence related to the area of freedom, security and justice is concerned (an example already referred to) we find multiple important detailed rules. Pursuant to Subsection (1) of Section 67 of TFEU fundamental rights, the different legal orders and legal traditions (that is to say the constitutional identities of the Member States) are respected in the course of the exercise of shared competences within the area. Based on Article 72, shared competences (that is their detailed rules) are not relevant for the exercise of Member States' competences in connection with maintaining public order and safeguarding national security. Article 73 leaves the competence relevant to the coordination of public administration on the level of the Member States with the Member States. As regards the competence shared between Member States in the ambit of immigration policy, Article 79 expressly stipulates that it shall be open to Member States to determine the number of third-country nationals seeking job opportunities as employees or independent entrepreneurs they admit to their territories.[45]

Obviously, the Member States' largest margin for adopting legislative acts (the adoption of laws in the first place) and the interpretation of law (eventually by the constitutional courts) is available in the case of retained powers. The issues covered here are those that constitute an indisputable part of the constitutional identity of the Member States. Any

45 Szabó – Láncos – Gyeney: Uniós szakpolitikák… ibid., pp. 177, 191, 214.

issue which is a *sine qua non* condition of statehood and – if we take into consideration the source of statehood – of national self-identity shall be deemed to form part of this. Without the need for exclusivity, such elements are the self-definition of the state and of the nation, the historical, national and legal traditions, and the fundamental constitutional values, especially those which do not fall under common values pursuant to Article 2 TEU. Naturally, these cannot be interpreted in complete isolation from the legal foundations of the EU; however, their interpretation certainly cannot be transferred to the CJEU. To provide a domestic example: based on the interpretation of the Fundamental Law of Hungary, in particular of Article E thereof, in case where there is a dispute regarding the above, the decision shall be made by the Hungarian National Assembly (as a constituent and legislative power) or the Constitutional Court (as the institution authorized to deliver *erga omnes* interpretations of the Fundamental Law of Hungary).

It is worth collecting the most important arguments for maintaining the opportunity for interpretation by Member States as presented by constitutional courts. The Constitutional Court of the Czech Republic found through conceptualizing sovereignty as a totality of powers – and not as the absolute criterion of a state – that due to the rule of subsidiarity the EU did not become a federal state, because it "does not dispose of a power to establish powers".[46] In other words, it means that in principle, the EU may only expand its existing competences, and it is not authorized to establish new competences for itself, this is reserved for the totality of its Member States. According to the standpoint of the German Constitutional Court, the Member States remain sovereign states even following the Treaty of Lisbon, democratic legitimacy is possessed by the Member States, and based on this legitimacy they may transfer competences to the Union.

> The European unity based on the *contractual union of sovereign states* cannot be realized without the *required* margin for the political shaping of economic, cultural and social living conditions (…). It applies furthermore to those political decisions which are particularly related to cultural, historical and linguistic aspects.[47]

Based on this, the German Constitutional Court – in a sense surpassing the well-known Solange I and Solange II decisions – upholds the right for revising the efficient operation of subsidiarity, that is, the revision of EU-decisions in defence of the Basic Law of Germany and its constitutional identity.[48]

46 Vörös ibid., p. 32, e.g.: ÚS, 19/08., Pl. ÚS. 29/09.
47 Vörös ibid., p. 35.
48 Vörös ibid., p. 35, 2 BVR 1010/08, BverfGE 123.

The Constitutional Court of Hungary has not rendered a decision such as the latter one; however, it declared that in terms of the competence of the Constitutional Court, the legal acts of the Union are not considered to be international treaties – not even the primary sources of law embodied within treaties. It was therefore possible to hold a referendum on the Treaty of Accession.[49] Sooner or later the formulation of a clear standpoint cannot be avoided. This is indicated by the growing interest of Member States in issues of constitutional identity,[50] which is exacerbated by the principle of preemption limiting the exercise of Member State sovereignty, and the Union's practices based on the same.[51]

24.3.4 Arguments Available for the Hungarian Constitutional Court

In the event that a conflict presents itself between Hungarian constitutional identity and the supremacy of EU law – and it certainly will –, the above described facts may serve as the starting point for the Constitutional Court. First, we need to point out from the outset that *Hungary has only transferred the right to exercise some of its competences derived from its sovereignty to the EU, and not its sovereignty as such.* As a result, in case of a legal dispute the authority to interpret EU law belongs to the CJEU, nevertheless, making a decision about the question whether the exercise of one competence in a specific situation – in particular the expansion of the competence – would mean the preemption of sovereignty, belongs under the jurisdiction of the Constitutional Court. In order to protect the constitutional identity, the Constitutional Court has to proceed from the *presumption of the maintenance of sovereignty*. In a methodological sense this means that in the event of doubt if there are certain arguments that support the retention of the exercise of a certain competence within the sovereignty of the Member State, it shall be presumed that this competence was not transferred to the Union – even if there are arguments that support transfer as well.[52] The applicability of this presumption clearly depends on the rules of the TEU-TFEU on competences: the probability is low in the case of exclusive competences, higher in the case of shared competences and very high in the case of retained competences.

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49 Vörös ibid., pp. 22-26, Decision 58/2004 (XII. 14.) of the Constitutional Court of Hungary, Decision 1053/E/2005 of the Constitutional Court of Hungary, Decision 72/2006 (XII. 15.) of the Constitutional Court of Hungary.

50 Tuori ibid., pp. 338, 351. In the latter section Tuori implies that the constitutional courts of the Member States will be involved in a dispute not only with the CJEU, but with the European Court of Human Rights (ECtHR) as well.

51 Tuori ibid., pp. 343, 353.

52 This argument means the application of the doctrine of *probabilism*, – a medieval concept, which encompasses the presumption in favour of liberty – to the relationship between Hungary and the European Union. L. James M. Joyce, 'A Nonpragmatic Vindication of Probabilism', Chicago Journals, www.jstor.org/stable/188574 (downloaded on 18 March 2012), A. Fleming, Julia, *Defending Probabilism*, Washington, Georgetown University Press, 2006.

Another argument for the application of the presumption of retention in a specific case presents itself if there is reasonable ground to assume that at the time of the transfer of a competence the Member State was not able to consider an important, but at the time unknown circumstance. In such a case the Constitutional Court must expressly presume that we did not transfer the competence (parallel to the presumption, this is backed by the principle of *clausula rebus sic stantibus*). This argument may lead to the conclusion that the National Assembly shall adopt a two-thirds majority decision by applying Subsection (4) of Article E of the Fundamental Law of Hungary on whether it deems a specific competence as one that is subject to the TEU-TFEU. Considering, however, that it was a referendum that decided on the Accession Treaty, in case of doubt, the option for a repeated referendum – as a constitutional requirement – relating to the foundations of sovereignty shall not be excluded.

Regarding the question whether we can talk about a fundamental question of sovereignty that requires a referendum (on the integration-resistant core of the constitution) the general considerations shall be observed. It is very useful to take into consideration the arguments of the German Constitutional Court presented above: the question would affect the foundations of sovereignty (constitutional identity) if political a decision needs to be made that is strongly related to cultural, historical and linguistic aspects. This needs to be pronounced in the first place by the National Assembly and ultimately by the Constitutional Court.

The presumption of retained sovereignty can also be applied in the case of shared, and even in the case of exclusive competences if the institutions of the EU are clearly and evidently unable to exercise them. An extreme case of this is when there are well-founded arguments that the EU will put itself into a state of violation of law, but the consequences of such infringement shall be borne by the Member State. In such a case, the Member State has a legitimate self-defence position: no infringement on the part of the EU may result in an irreparable consequence for a Member State. If this threat can be clearly established, then the Member State may (or, as the case may be, must) take back the exercise of the transferred competence until the state of infringement by omission ceases to exist.

A further argument in favour for the freedom of action based on the presumption of retained sovereignty is a situation where fundamental rights are violated or seriously endangered. In such cases the above referenced arguments presented by the German Constitutional Court in the Solange decisions[53] can be applied. It may be a particularly strong argument that the EU is currently in the state of continuous infringement.

According to Subsection (2) of Article 6 TEU, "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such

53 Blutman, László, *Az Európai Unió joga a gyakorlatban*, Budapest, HVGORAC, 2010, pp. 97, 295-297, 341, 422, 477. Várnay, Ernő – Papp, Mónika: *Az Európai Unió joga*. Budapest, KJK-Kerszöv, 2002, 238. Kecskés ibid., p. 615.

accession shall not affect the Union's competences as defined in the Treaties." The TEU is clear on this point: the Union "shall accede". As the modal verb "shall" denotes the binding nature of the event discussed, it obviously prescribes mandatory accession. Still, the Commission has sought the opinion of the CJEU on the draft version of the Accession Treaty that the Commission prepared. By contrast, Opinion[54] 2/13 of the Court of Justice of the European Union (Full Court) issued on 18 December 2014 took the view that the EU is a new kind of legal order that is supreme to the legal orders of the Member States; it protects the fundamental rights recognised by the Charter, and this protection (the content-based interpretation of rights) shall remain within the autonomy of EU law; the European Court of Human Rights (ECtHR) could undermine the autonomy of EU law, and therefore the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms does not comply with Article 6(2) TEU.[55] This is nothing more than an action by which the CJEU overrode a binding rule of the TEU, namely an international treaty adopted and ratified by all Member States.[56] The very same Treaty it was intended to protect. The CJEU thus defied the unequivocal provision of the TEU, and – since the Court is not accountable – there are no legal remedies against its decision. This arbitrary decision is especially surprising in the light of the assumption that the CJEU – in the name of the value of the rule of law – will not accept similar defiance against the ECtHR.

However, this provides an argument for the constitutional courts of the Member States, including the Hungarian constitutional court, for the establishment of its own competence. Since the EU has not subjected itself to the jurisdiction of the ECtHR despite the requirement set forth under the TEU, while the Member States have, the legal protection for Member States is stronger. Since applying to the ECtHR is a personal right, Member State cannot waive their competence; consequently, it is not only their right, but also their obligation to resist the institutional infringements of the EU in cases involving fundamental rights.

In conclusion, we find quite a few arguments that, on the one hand, provide an opportunity for the Constitutional Court of Hungary for restoring the harmony between EU law and the Fundamental Law of Hungary, while on the other hand, permit the Hungarian Constitutional Court consider an issue at dispute to be one that is included in the scope of retained competences originating from Hungarian sovereignty, or even – tem-

54 Avis 2/13 – Avis au titre de l'article 218, paragraphe 11, TFUE.

55 Avis 2/13 – Avis au titre de l'article 218, paragraphe 11, TFUE, paras. 158, 166, 168, 170, 172, 194.

56 L. Orbán, Balázs, 'Európai bírói fórumok küzdelme a háttérben', napigazdasag.hu, 9 January 2015, www.napigazdasag.hu/cikk/32780/ (as of 14 March 2015) and Michèle Finck, 'The Court of Justice of the European Union Strikes Down EU Accession to the European Convention on Human Rights: What Does the Decision Mean?', *I-CONnect*, 28 December, 2014, www.iconnectblog.com/2014/12/the-court-of-justice-of-the-european-union-strikes-down-eu-accession-to-the-european-convention-on-human-rights-what-does-the-decision-mean/ (as of 14 March 2015).

porarily, as long as the Union's infringement by omission persists – as regained. Finally, based on the above we may conclude that in certain situations – on the basis of a decision of the Constitutional Court – the National Assembly or even the ultimate source of power, the people may decide on the exercise of a given competence.