22 In Unchartered Waters?

The Place and Position of EU Law and the Charter of Fundamental Rights in the Jurisprudence of the Constitutional Court of Hungary

Márton Sulyok – Lilla Nóra Kiss[*]

Keywords
Constitutional Court of Hungary, Charter of Fundamental Rights, preliminary ruling procedure, constitutional dialogue, CILFIT criteria

Abstract
This paper examines the perception and position of EU law in the jurisprudence of the Constitutional Court of Hungary within the constitutional arrangements brought to life after 2012. In this context, the inquiry addresses the changes regarding the status of EU law in constitutional case-law amounting to what is identified here as the method of 'resourceful engagement'. Under this approach, the paper also examines the extent and frequency of the use of human rights reasoning based on the Charter of Fundamental Rights of the EU in the proceedings of the Constitutional Court (2015-2019), focusing mostly on constitutional complaints procedures. The paper briefly mentions the controversial nature of the 'Implementation Dilemma' regarding the Charter and its application in Member States' constitutional court proceedings. As a corollary, in light of domestic procedures examined in the *Repcevirág Szövetkezet v. Hungary* judgment (April 2019) of the ECtHR, it examines whether the Constitutional Court could eventually start acting as a court of referral under Article 267 TFEU in such proceedings where the protection of fundamental rights under the Charter would require the interpretation of EU law. This would mark a shift from the earlier 'context of non-reference' to an approach of 'resourceful engagement' suggested by this paper.

22.1 Introduction

In many respects and from several aspects of EU law, Hungarian constitutional jurisprudence is to some extent still unchartered territory waiting to be mapped out, many of the

* Márton Sulyok: senior lecturer, University of Szeged; FRA MB. Lilla Nóra Kiss: junior research fellow, University of Miskolc.

competences in this context still raise questions rather than answers. This is true regardless of the significant reforms carried out in parallel with the changes made to constitutional arrangements in 2012.

The new Fundamental Law of Hungary and the new Act on the Constitutional Court (HCCA)[1] entered into force on 1 January 2012. The Fundamental Law, with its own approach regarding the position of EU law in the national legal order based on its Articles E and T (analyzed below) answered some questions regarding the position of EU law in the national legal order, but it also left many issues open.[2] These have been approached by the jurisprudence of the Constitutional Court analyzed below. In another article, we have used the mathematical metaphor of Euclidean distance[3] to describe the attitude of the Constitutional Court towards EU law.

As the title of the book written by Zoltán Szente and Fruzsina Gárdos-Orosz duly recognizes, the 21st century poses many 'New Challenges to Constitutional Adjudication in Europe',[4] especially with regard to *(i)* the migration crisis; *(ii)* the often complicated dynamics of multilevel constitutionalism;[5] *(iii)* European constitutional dialogue[6] regarding, *e.g.* infringement procedures in front of the CJEU; *(iv)* the convergence of European human rights frameworks,[7] in particular in this context; and *(v)* the application of the EU Charter of Fundamental Rights[8] as a frame of reference or as a substantive argument, in Member State Constitutional Court proceedings, such as the case of the Hungarian Constitutional Court.

---

1 Act CLI of 2011 on the Constitutional Court (HCCA), and the Fundamental Law of Hungary.

2 *See e.g.* Nóra Chronowski (ed.), *Szuverenitás és államiság az Európai Unióban*, ELTE Eötvös, Budapest, 2017; Csongor István Nagy (ed.), *The EU Bill of Rights' Diagonal Application in the Member States*, Eleven International Publishing, The Hague, 2018.

3 The so-called 'Euclidean distance' measures the distance (*i.e.* the length of a segment) connecting two points in either the plane or 3-dimensional space. *See* Ondrej Hamulak *et al.*, 'Measuring the 'EUclidean Distance' between EU Law and the Hungarian Constitutional Court – Focusing on the Position of the Charter of Fundamental Rights', *Czech Yearbook of International and European Law*, 2019 (in print).

4 Zoltán Szente & Fruzsina Gárdos-Orosz (eds.), *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective*, Routledge, Abingdon, New York, 2018, 324 p.

5 *See* Chronowski (ed.), 2017.

6 For a more recent overview of dominant theories on constitutional dialogue in Europe *see* Anne Meuwese & Marnix Snel, 'Constitutional Dialogue: An Overview', *Utrecht Law Review*, Vol. 9, Issue 2, 2013, pp. 123-140.

7 As signified with the metaphor of a 'Luxembourg-Strasbourg corridor', *in* Erzsébet Szalayné Sándor, 'Uniós jog Strasbourgban – a koherens alapjogvédelem új rendje Európában', *Magyar-Román Jogtudományi Közlöny* (Kolozsvár), 2011/3-4, p. 97.

8 In this regard, a very concise and informative handbook has been prepared by the Fundamental Rights Agency of the EU (FRA). *See Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level. Guidance*, FRA, 2018, at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf. This handbook, however, might not completely be applicable to Member State Constitutional Courts in all aspects, as will be argued below.

By introducing the 'friendly relationship'[9] between EU law and the Hungarian Constitutional Court, and through enlightening some of 'the twilight zones'[10] in the jurisprudence of the Constitutional Court regarding the Charter and violations of fundamental rights (especially) in complaints proceedings, this paper intends to answer the following questions: *(i)* How can the friendly attitude of the Constitutional Court towards EU law be described as 'resourceful engagement'[11] through samples from its case law (also relevant to the position of the Charter therein), and *(ii)* in this context, could the Hungarian Constitutional Court become a court of referral in preliminary ruling procedures before the CJEU regarding violations of fundamental rights also protected under the Charter?

22.2 The Position of EU Law in the Case-Law of the Hungarian Constitutional Court after 2012

There are all too many less optimistic accounts regarding the 'unleashed potential' of the case-law of the Hungarian Constitutional Court incorporating EU law following Hungary's EU accession.[12] Some scholars characterize the Constitutional Court's jurisprudence as "falling between ideals and reality", scrutinizing its sensitivity to EU law despite its "lack of similar rigor regarding similar constellations".[13] Categorizations of the various EU-law related jurisprudence[14] are set up,[15] leading to the conclusion that a very basic fact lies at

9 Endre Orbán, 'Uniós jog az Alkotmánybíróság gyakorlatában', *Alkotmánybírósági Szemle*, 2018/2, pp. 36-45. Orbán also summarizes relevant academic literature on the subject, but we would like to mention a few key authors on the topic here, *e.g.* Attila Vincze, 'Az Alkotmánybíróság stratégiái az uniós és a belső jog viszonyának kezeléséhez', *in* Balázs Fekete *et al.* (eds.), *A világ mi magunk vagyunk… Liber Amicorum Imre Vörös*, HVG-ORAC, Budapest, 2014, pp. 597-611; Márton Varju & Flóra Fazekas, 'The Reception of European Union Law in Hungary', *Common Market Law Review*, Vol. 48, Issue 6, 2011, pp. 1945-1984; László Trócsányi & Lóránt Csink, 'Alkotmány v. közösségi jog: az Alkotmánybíróság helye az Európai Unióban', *Jogtudományi Közlöny*, 2008/2, pp. 63-69; Nóra Chronowski, 'Az Európai Unió jogának viszonya a magyar joggal', *in* András Jakab *et al.* (eds.), *Internetes Jogtudományi Enciklopédia*, at http://ijoten.hu/szocikk/az-europai-unio-joganak-viszonya-a-magyar-joggal (2019).

10 László Blutman, 'Szürkületi zóna: az Alaptörvény és az uniós jog viszonya', *Közjogi Szemle*, 2017/1, pp. 2-14.

11 *See* Hamulak *et al.* 2019.

12 Building on these and making her own conclusions, *see* Fruzsina Gárdos-Orosz, 'Preliminary Reference and the Hungarian Constitutional Court: A Context of Non-Reference', *German Law Journal*, Vol. 16, Issue 6 (special issue), 2015, pp. 1569-1590.

13 Attila Vincze, 'Odahull az eszme és a valóság közé: az árnyék az szuverenitás-átruházás az Alkotmánybíróság esetjogában', *MTA Law Working Papers*, 2014/23, pp. 1-2.

14 Set out in detail by Orbán 2018, p. 36 (with further references). For details on constitutional review of secondary EU law, *see* Gárdos-Orosz 2015, pp. 1575-1584.

15 *E.g.* Vincze 2014, pp. 4-12. His very illustrative categorization regarding the Hungarian Constitutional Court's dealings with EU law uses succinct metaphors tailored to specific anomalies he identifies in the case law: *(i) "omphaloskepsis or navel-gazing"* (*e.g.* regarding the 2004 referendum of EU accession); *(ii) "life-lie"* (*e.g.* regarding the Hungarian Lisbon-decision [Decision No. 143/2010. (VII. 14.) AB or the Fourth

the heart of the problems. Namely, that the Hungarian Constitutional Court cannot insert EU law into its schematic thinking about its own competences and on the hierarchy of legal norms and this leads to incomprehensible inconsistencies not signaling an outward openness towards EU integration, which would otherwise be mandated under Article E of the Fundamental Law.[16]

These categorizations and approaches inform more recent opinions, which, however, are less inclined to sound alarm bells and feature the Constitutional Court's dominant (and current) approach as 'restraint and seclusion'.[17]

Vincze argued in 2014 that there needs to be a judicial dialogue between national courts and the CJEU, either spontaneously or instrumentalized in the form of preliminary ruling procedures. The Hungarian Constitutional Court, he posited, could contribute to this dialogue creatively, through interpretation by participating in the interactive processes of cooperative constitutionalism and *Verfassungsgerichtsverbund*.[18] We can fully agree with these statements. His corresponding argument, however, was that the Constitutional Court was unwilling to play its part in these processes. We concede that it might have been true at the time, but we are convinced that with the passing of time, his statements need to be revisited and refined – as shown by our findings below.

Recent trends in the Hungarian Constitutional Court's jurisprudence (described later) that might seem as 'delaying or diversion tactics' to the naked eye, upon a closer look turn out to be carefully and resourcefully constructed means of engagement with EU law. Through these, the Hungarian Constitutional Court indeed declares an intention to participate in European constitutional dialogue exactly by suspending some of its proceedings in high-profile cases (*e.g.* '*lex* CEU', civil society organizations) that have parallel counterparts before the CJEU. This way, the input received from the CJEU as a result of relevant EU-level proceedings can be directly channeled into constitutional reasoning, signaling the way forward.

Unfortunately, due to the lack of many high-profile cases (in the proceedings relevant to our inquiry) with an EU law aspect, the Hungarian Constitutional Court faces another issue. An issue that is a (necessary?) boundary of its competence: being bound to the content of the petitions filed with it (otherwise known as the *non ultra petita* rule). Therefore, we shall also look at cases from the aspect of some of the petitions, and at some of the argu-

---

Amendment of the Fundamental Law [Decision No. 12/2013. (V. 24.) AB)]; *(iii) "sabotage"* (*e.g.* regarding the EAW in Decision No. 32/2008. (III. 12.) AB and regarding the 'forced retirement' of judges in Decision No. 33/2012. (VII. 17.) AB], *(iv) "blind man hitting the mark perchance"* (*e.g.* regarding different proceedings involving civil and public servants due to modifications of relevant Hungarian laws [Decision No. 8/2011. (III. 18.) AB and Decision No. 29/2011. (IV. 7.) AB]. *See* Vincze 2014, p. 4.

16 Vincze 2014, p. 13.

17 Orbán 2018, pp. 38-39.

18 *See e.g.* Andreas Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts. Der Europäische Verfassungsgerichtsverbund', *European Constitutional Law Review*, Vol. 6, Issue 2, 2010, pp. 175-198.

ments, petitioners have used regarding EU law and the Charter to shed light on one very important conclusion. References to EU law in the fundamental rights context, and more specifically to the Charter, are superficial at best, which – given the restriction of the Hungarian Constitutional Court's legroom in these cases – does not facilitate the conduct of in-depth analyses of the arising EU-law issues, especially regarding the protection of fundamental rights under the Charter.

Being bound by the content of the petition is also an issue regarding preliminary ruling procedures. If the petition does not contain a request to the Constitutional Court to engage the CJEU in such a proceeding, then it does not have the power to do so under the domestic law specifying its powers. This issue will also be dealt with in detail in the last part of the present paper regarding a very recent case,[19] in which the complaint did contain such a request, with which the Hungarian Constitutional Court refused to comply.

Vincze raises this issue as well, stating that the 'constitutional command' of Article E assures primacy to EU law, obliging the Hungarian Constitutional Court to initiate preliminary ruling procedures in all cases where there is doubt in this respect (*i.e.* regarding the primacy of EU law, which poses – in these cases – a question of constitutional interpretation).

He mentions this specifically in the context of constitutional complaint proceedings serving the protection of fundamental rights, regarding any doubts raised as to the correct interpretation of EU law. He admits, however, that while this interpretation is "obviously very advantageous from the point of view of EU law, it is not completely compatible with the constitution."[20] Below, we shall also address whether the Hungarian Constitutional Court could serve as a court of referral, building on a pre-existing 'context of non-reference', first identified by Fruzsina Gárdos-Orosz in 2015.[21]

Based on recent domestic and international developments in this domain, we shall verify whether the statements of the past will become the truths of the future, or whether the present situation changes the course of the constitutional assessment on this issue.

Let us start our inquiry with one statement of the past then, taken from the Hungarian Lisbon-decision, since it was the Lisbon Treaty that afforded legally binding force to the Charter of Fundamental Rights relevant to our paper. Decision No. 143/2010. (VII. 14.) AB,[22] declared that the Lisbon Treaty (attributing a legal value to the Charter equivalent

19 Decision No. 3165/2014. (V. 23.) AB.

20 *See* Vincze 2014, p. 14. (for 'constitutional command'), and p. 15. (regarding compatibility with the constitution).

21 *See* Gárdos-Orosz 2015.

22 What can be characterized as the *second Lisbon decision* is the one that is mostly dubbed 'Identity decision' [Decision No. 22/2016. (XII. 5.) AB] in academic literature, detailing the relationship of EU law and Hungarian constitutional law from the points of view of 'sovereignty control' and 'identity control' also applied by the German Constitutional Court in its 2010 Lisbon judgment. Damien Chalmers, 'A Few Thoughts on

to that of the Treaties) was formally approved by an Act of Parliament[23] and is thus "a norm that has a meritorious content within the national legal system".[24]

The increasing number of references to the Charter as a whole, or to specific provisions thereof over time in the petitions filed to the Hungarian Constitutional Court is possibly due to the above statement (as will be analyzed below in the context of what makes a constitutional complaint petition 'admissible' also in terms of Charter-references).

From the case-law after 2010, but before the entry into force of the Fundamental Law, Decision No. 29/2011. (IV. 7.) AB should also be mentioned briefly. In this respect, Vincze referred to the Hungarian Constitutional Court as a "blind man hitting the mark perchance". The basic statement of the case was that under the effective legal framework at the time, the Constitutional Court did not have legal grounds (competence) to examine whether Hungarian laws violated EU law, therefore, it refused to carry out the review also based on the Charter.[25]

Following the 2011 'constitutional turn', it was the new Article E (probably referring to the first letter of Europe) of the Fundamental Law that determined the formal position of EU law, building significantly on the previous Article 2/A with some key additions.[26] Most importantly for us, Article E(3) sets forth that EU law may lay down generally binding rules of conduct. Article T in turn specifies that "[g]enerally binding rules of conduct may be laid down in the Fundamental Law or laws", and defines laws as Acts of Parliament, Government and ministerial decrees (including the Prime Minister's decree), decrees of the Governor of the National Bank, decrees of the heads of autonomous regulatory bodies, and local (government) decrees. *Prima facie*, EU law is not considered as 'law' within the meaning of Article T, albeit it may take the form of a generally binding rule of conduct in light of Article E. Article T specifies that laws must be adopted by a body having legislative competence and specified in the Fundamental Law, promulgated in the official gazette. In addition, Article 24(2) of the Fundamental Law sets forth that the Constitutional Court:

"

---

the Lisbon Judgment', *in* Andreas Fischer Lescano *et al.* (eds.), *The German Constitutional Court's Lisbon Ruling: Legal and Political Science Perspectives*, ZERP Diskussionspapier, 1/2010, pp. 5-11.

23 Act CLXVIII of 2007 on the promulgation of the Lisbon Treaty.

24 *See* Decision No. 143/2010. (VII. 14.) AB, Reasoning III. 2.

25 Decision No. 29/2011. (IV. 7.) AB, Reasoning, III.5.

26 For a concise comparison of the two 'Europe clauses' and their development, *see* Nóra Balogh-Békési, 'Szuverenitásféltés és alkotmány', *MTA Law Working Papers*, 2014/57, pp. 7-13, and Nóra Balogh-Békesi, *Az Európai Unióban való tagságunk alkotmányossági összefüggései az esetjog tükrében*, Pázmány Press, Budapest, 2015, Chapters 5 and 6; or Allan F. Tatham, *Central European Constitutional Courts in the Face of EU Membership*, Martinus Nijhoff, 2013, pp. 156-159.

b shall, at the initiative of a judge, review the conformity with the Fundamental Law of any law applicable in a particular case as a priority but within no more than ninety days;
c shall, on the basis of a constitutional complaint, review the conformity with the Fundamental Law of any law applied in a particular case;
d shall, on the basis of a constitutional complaint, review the conformity with the Fundamental Law of any judicial decision;
e shall, at the initiative of the Government, one quarter 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 law;
f shall examine any law for conflict with any international treaties."

It is possible, that these provisions read together led the Constitutional Court in the past to declare an absence of competence to nullify generally binding rules of conduct taken in the form of EU law under Article E. The Constitutional Court's competence to conduct the control of conformity of laws (*i.e.* generally binding rules of conduct) with the Fundamental Law (under Article 24) only extends to laws adopted in accordance with Article T.[27]

In its more recent case-law, the Hungarian Constitutional Court echoed its earlier conclusions made in 2011, referenced above under Decision No. 29/2001. (VII. 7.) AB. This was reiterated and clarified in respect of its own competences under the new 2012 HCCA in Decision No. 3143/2015. (VII. 24.) AB. The Constitutional Court rejected the constitutional complaint of the petitioner financial institution challenging select provisions of a law (Act of Parliament)[28] for reasons of unconstitutionality. In this decision rendered on the merits of the case, the petitioner argued that the contested law, as well as its provisions, are

> "contrary to the respective provisions of the Charter of Fundamental Rights of the European Union – *ergo* the law of the European Union. The Constitutional Court hereby […] repeatedly points out that based on provisions of the

27 This issue of EU law was brought under a new light in the so-called EPC (European Patent Court) decision of the Hungarian Constitutional Court [Decision No. 9/2018. (VII. 9.) AB]. This 'new light' being that the issue of 'enforced cooperation' is the intended framework in which the EPC shall exist, which is – by definition – not a "generally binding rule of conduct" under Article E of the Fundamental Law, as it only "generally binds" the parties who submit to such 'enforced cooperation'. The decision is also interesting and novel in its approach as it examines the issue of the EPC from the aspects of both Article E and of Article Q defining the relationship of domestic and international law.

28 Act XXXVIII of 2014 on settling certain questions regarding the decision for the uniformity of law handed down by the Curia in the matter of consumer loan contracts by financial institutions.

> Fundamental Law and the Act on the Constitutional Court, the Constitutional Court does not have the competence to examine the collision of any laws with the law of the European Union, therefore, the relevant elements in the petition are refused under Section 64, point *a)* of the Act on the Constitutional Court."[29]

22.3 The Position of the Charter in the Hungarian Constitutional Court's Jurisprudence – Un-Chartered Territory?

In describing what the above factors entail for the Constitutional Court's jurisprudence and proceedings, on which the Charter may have a bearing, it is first important to highlight some very important issues. In constitutional complaint proceedings, the fundamental rights contained in the Charter cannot be directly referenced by private parties and economic operators as a legal basis. To be more specific, they could, but standing on their own, they will not lead to any conclusive result. The HCCA clearly sets forth that petitioners (persons or organizations) should allege and prove either that *(i)* "their rights enshrined in the Fundamental Law were violated" [Sections 26(1)a) and 27a) of the HCCA]; *(ii)* "due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision". [Section 26(2)a) of the HCCA]. The nature of the action or omission complained against is tied – on the level of the HCCA – to the Fundamental Law. Therefore, when the Constitutional Court decides on the admissibility of the complaints under the current legal framework, it will take into account the constitutionally relevant violations, not the connections of the violations to rights otherwise included in the Charter.

In this regard, it is important to mention that the Charter primarily concerns EU institutions and Member States when they implement EU law (Article 51).[30] Here, another issue arises: namely, whether the Hungarian Constitutional Court is a Member State institution that implements EU law. We have discussed what we there called the 'imple-

29 Decision No. 3145/2015. (VII. 24.) AB, Reasoning [56].

30 From the CJEU case-law *see* Judgment of 26 February 2013, *Case C-617/10, Aklagaren v. Hans Akerberg-Fransson*, ECLI:EU:C:2013:105, later first confirmed by the judgment of 26 September 2013, *Case C-418/11, Texdata Software GmbH*, ECLI:EU:C:2013:588. On the scope of the Charter, *see* from a vast body of literature, *e.g.* Petra Jeney, 'The Scope of the EU Charter and its Application by the Hungarian Courts', *Hungarian Journal of Legal Studies*, Vol. 57, Issue 1, 2016, pp. 59-75; Lukasz Bojarski *et al., The Charter of Fundamental Rights as a Living Instrument*, Rome-Warsaw-Vienna, 2014, pp. 77-93; Xavier Groussot *et al.*, 'The Scope of Application of Fundamental Rights on Member States Action: In Search of Certainty in EU Adjudication', *Eric Stein Working Paper*, No. 1/2011. More recently a creative interpretation regarding the application of the Charter was given by Jakab, *see* András Jakab, 'Application of the EU Charter in National Courts in Purely Domestic Cases', *in* András Jakab & Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values*, Oxford University Press, 2017, pp. 252 and 255-257.

mentation dilemma' at length in another recent paper,[31] but a short summary of our main findings on the issue is in order here, as discussed below.

While the argument that the Charter "applies to the Member States only when they act as the EU's agents (*i.e.* when they implement EU law)"[32] is correct; two contradicting aspects therein are hard to reconcile in the context of the proceedings of the Constitutional Court: *(i)* the Member States act as the EU's agents; and *(ii)* they (only) act as agents when they implement EU law.

Member States normally do not act as agents of the EU when they create constitutional avenues for the protection of fundamental rights or for constitutional review based on the national constitution.

Therefore, one would be remiss to jump to the conclusion that constitutional courts can easily, and in every case, be considered 'agents of the EU'. The reason for this is that *by* their nature they do not 'implement EU law'. Member State constitutional courts can only exercise those competences, engage those procedures, and implement those protections that have been afforded to them in the national constitution and national constitutional procedural law. We have demonstrated this with a brief presentation of the relevant restrictions of the Hungarian Constitutional Court.

In the context of fundamental rights, consequently, any protections afforded to fundamental (human) rights by the Charter may inform this decision-making of the Constitutional Court, through influencing interpretation or argumentation rooted in the national constitution. Yet it normally goes no further – as will be seen in some of the cases presented below. Regardless of the reception of our interpretation of the 'implementation dilemma', there are many references to the Charter in numerous proceedings of the Constitutional Court (judicial initiatives, review and complaint petitions). If we ventured to apply different categories to these 'chartered' references, the following categories could be created:

i. *References* by the Hungarian Constitutional Court to the Charter regarding the merits of the case [in decisions (mainly through concurring or dissenting opinions) or orders]. In short, based on our desk research focusing on the past 5 years (2015-2019),[33] the Constitutional Court has so far included Charter-specific remarks in over two dozen cases,[34] most recently in March 2019[35] in a case regarding collective expulsion and the interpretation of Article E regarding the transfer of competences to the EU.[36]

---

31 Hamulak *et al.* 2019.

32 Csongor István Nagy, 'The EU Bill of Rights Diagonal Application to Member States 2018', *in* Nagy (ed.) 2018, p. 8.

33 For more details, *see* Hamulak *et al.* 2019.

34 The most famous among these being Decision No. 22/2016. (XII. 5.) AB – for a detailed analysis of the relevant aspects of the case *see* Hamulak *et al.* 2019.

35 Decision No. 2/2019. (III. 5.) AB.

36 In the majority argumentation – under para. [49] of the decision –, a reference to "interpretation in light of the Charter" comes up one time regarding an EU directive, specified in the context of constitutional

ii. *Suspension* of proceedings (through orders, with regard to any on-going proceedings before of the CJEU, in the spirit of constitutional dialogue and 'resourceful engagement' with EU law).[37]
iii. *References* to the Charter, included in the petitions[38] (or their summaries) that are part of any eventual decision or order on the matter at hand. (The most common outcome in these cases being refusal due to failure to meet admissibility criteria set up by the HCCA and the relevant jurisprudence of the Hungarian Constitutional Court.) The problem with these petitions has been described above in the context of the Constitutional Court's competences regarding the content of the petitions.

The main conclusions that can be drawn from the sample cases are the following. *(i)* It is not only the responsibility of the Constitutional Court to resourcefully engage with EU law, but *(ii)* such engagement also presupposes 'well-rounded' petitions in terms of EU law, specifically with regard to the protection of fundamental rights. In other words, petitioners and their legal representatives are also responsible for finding points of connection with the EU, resourcefully engaging with protections afforded thereby. *(iii)* Charter-based reasoning (extending far beyond mere references to the Charter as a whole or to certain provisions on the level of what they state) should be embedded in the relevant constitutional reasoning. This is especially true in constitutional complaints where 'victim status', *i.e.* being personally affected by the violation or a causal link between the violation and the act or omission complained of should be substantiated as admissibility criteria.

However, even if the level of constitutionally anchored Charter-relevant argumentation were to improve, the lack of competence to review the compatibility of Hungarian law with EU law under current constitutional and statutory arrangements is the main obstacle before the Charter gaining more solid ground. Another reason for the slow penetration

---

interpretation. This aside, references to the principle of constitutional dialogue inside the EU and to *Europafreundlichkeit* (namely the constitutional commitment of Hungary to contribute to European unity under Article E are also made. Two dissenting opinions (Czine and Juhász, under paras. [91]-[92] and [109] respectively) also reference the Charter.

37 Order No. 3220/2018. (VII. 2.) AB (regarding the VAT Act – reason for suspension: preliminary ruling procedure in progress), Order No. 3199/2018. (VI. 21.) AB and Order No. 3200/2018. (VI. 21.) AB (the so-called '*lex* CEU' case), Order No. 3198/2018. (VI. 21.) AB (regarding the Act on civil society and non-profit organizations) – in the three cases the reason for suspension has been the relevant infringement proceedings in progress in front of the CJEU. For a detailed description of these arguments *see* Hamulak *et al.* 2019.

38 Please note that at the time of writing this paper there are no official statistics available due to the absence of filtering tools enabling the court to assess all incoming petitions for a measure of Charter-references. Thus, we have compiled a sample of 10 cases from the period specified as the window of our desk research. All cases in this selection resulted in refusal orders due to the reasons described above. The cases in the sample are: Order No. 3179/2017. (VII. 14.) AB, Order No. 3090/2017. (IV. 28.) AB, Order No. 3272/2016. (XII. 20.) AB, Order No. 3143/2016. (VI. 29.) AB, Order No. 3164/2015. (VII. 24.) AB, Order No. 3019/2015. (I. 27.) AB, Order No. 3020/2015. (I. 27.) AB, Order No. 3141/2015. (VII. 9.) AB, Order No. 3082/2015. (V. 8.) AB, as well as the most recent case – Order No. 3034/2019. (II. 12.) AB.

of the Charter into the jurisprudence of the Constitutional Court is that the Court is tied to the content of the petitions, which are – as presented above and elsewhere[39] – normally 'deficient' in making the Charter legally relevant for constitutional reasoning.

However, we can always refer to the guiding hand of other constitutional jurisdictions for comparison, which – owing to differences in the legal framework or in the legal system itself – can and do use the Charter as a decisive argument in major constitutional issues.

In Austria, in a 2014 same-sex marriage case (*cf.* B 166/2013), the Constitutional Court of Austria (ACC) took a look at the Charter (Article 21 – non-discrimination) and

> "recalled that, in the scope of application of the Charter […], the rights guaranteed by the Charter may be invoked as constitutionally guaranteed rights, provided that the guarantee enshrined in the Charter is similar in its wording and purpose to rights that are guaranteed by the Austrian Federal Constitution, as is the case with Article 21 […]. However, the [ACC] found that the national provisions relevant to the case did not implement EU law within the meaning of Article 51.1 […], as interpreted by the Court of Justice of the European Union in its settled case-law; consequently, Article 21 […] proved to be inapplicable in the present case. The Constitutional Court added that, even if the Charter were applicable, the provisions at issue […] would not violate Article 21 […], owing to the wide margin of appreciation granted to the Contracting States […]."[40]

Interestingly, a few years later in 2017, the Constitutional Court of Austria overturned this decision, with no reference and regard to the Charter, establishing the right for same-sex couples to marry in Austria.[41]

Romania could be mentioned as another example, where the *Curtea Constituțională* (RCC) went further and initiated a preliminary ruling procedure before of the CJEU regarding same-sex relationships. It suspended its proceedings in which the preliminary ruling procedure arose, awaiting feedback from Luxembourg on the interpretation of the notion of spouse under EU law with regard to free movement (*cf.* constitutional dialogue). Once the CJEU handed down its judgment in the *Coman* case in June 2018,[42] the RCC

39 Hamulak *et al.* 2019.

40 *Cf.* Website of the Constitutional Court of Austria, at www.vfgh.gv.at/medien/_Wiederholung__der_in_den_Niederlanden_geschlossenen.en.html.

41 *See* Decision G 258/2017 by the ACC. On the analysis of the case *see* Árpád Lapu, 'Házasság mindenkinek – az osztrák Alkotmánybíróság decemberi döntése', *Fontes Juris*, 2018/1, pp. 67-72.

42 Judgment of 5 June 2018, *Case C-673/16, Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrari and Ministerul Afacerilor Interne (Coman)*, ECLI:EU:C:2018:385. For a detailed description of the issues of the case *see* Márton Sulyok, 'Une photo de famille. Pillanatkép a családi élet és a házastársfogalom Európai Unió Bírósága általi elemzéséről', *Európai Tükör*, 2018/3, pp. 117-131.

resumed its proceedings one month later and incorporated the findings of the CJEU in its decision. The RCC's decision is unique – from the point of view of constitutional law – for the following reasons.

i. The RCC declared[43] that Romania violates the positive obligations doctrine[44] flowing from Articles 7 and 8 of the Charter when avoiding any form of legal and formal recognition of same-sex relationships, joining states such as Bulgaria, Latvia, Lithuania, Poland or Slovakia.[45]

ii. The RCC also reiterated its doctrine of "cumulative [dual] conditionality" referring to its well-established case law, as follows:

> "applying a provision of the EU law in a constitutional review, as a provision interposed between the EU law and the basic one, pursuant to Article 148 (2) and (4) of the Constitution of Romania,[46] implies a cumulative conditionality: on the one hand, this provision has to be sufficiently clear, precise and unambiguous by itself or its meaning had been clearly defined by the Court of Justice of the European Union and, on the other hand, the provision has to be circumscribed to a certain level of constitutional relevance, for its normative content to support the alleged violation by the national law of the Constitution – the sole direct provision of reference within a constitutional review. From such a hypothetical perspective, the reference of the Constitutional Court […] is different from a mere application and interpretation of the law, a competence conferred upon courts of law and administrative authorities, it also being different from possible issues relating to the legislative policy advanced by the Parliament or by the Government, as the case may be."[47]

(iii) As a result of the preliminary ruling procedure, the RCC found that the above conditions meet Article 21(1) TFEU and Article 7(2) of the Directive 2004/38/EC (subject to the *Coman* case) and determined that same-sex relationships fall into the category of private and family life under the Charter (Articles 7 and 8).[48]

---

43 Decision No. 534 of 18 July 2018, on the unconstitutionality of the provisions of Sections 277.2 and 277.4 of the Civil Code (*Coman* decision). Published in the Official Gazette of Romania No 842 of 03.10.2018. For an introduction of the constitutional argumentation of the case *see* Sulyok 2018, pp. 126-129.

44 The doctrine originates from the jurisprudence of the ECtHR, meaning that States have positive obligations to create meaningful legal rules to effectively protect the enjoyment of the rights protected by the ECHR. For a detailed overview on how this doctrine applies also to issues of private and family life *see* Jean-François Akandji-Kombe, *Positive Obligations Under the European Convention on Human Rights*, Human rights Handbooks No. 7, 2007, DG Human Rights, Council of Europe, especially pp. 36-48.

45 *Coman* decision, para. 29.

46 The Romanian 'integration clause'.

47 *Coman* decision, para. 38.

48 Id. paras. 39-40.

These examples lead us to the next section of our paper: mapping the possibilities of the Hungarian Constitutional Court for becoming a court of referral.

22.4 The Status of the Hungarian Constitutional Court as a Court of Referral – Extracting the Rules of Engagement with EU Law from a 'Context of Non-Reference'

As presented in the introduction, Fruzsina Gárdos-Orosz has first identified what she called a "context of non-reference" regarding the Hungarian Constitutional Court's stance on matters of EU law in 2015. She described this context as a missed opportunity in defining its "proper role in achieving the constitutional aim of contribution to the European rule of law integration."[49] She then goes on to argue that

> "the institution of the preliminary reference may be of help for the Constitutional Court in finding a cooperative solution that is acceptable both for observing the Hungarian constitutional identity and promoting common constitutional goals as the Member States of the Union."[50]

Gárdos-Orosz was also right in arguing that with the new rules of the HCCA the Constitutional Court "has definitely diminished the chance of avoiding situations where considering a referral is unavoidable".[51] The different legal, political and constitutional debates of the recent past on the European and international level are sufficient evidence that the Hungarian Constitutional Court, just as any other constitutional court, can no longer seek comfort in seclusion.[52] On the contrary: if an issue triggers a response, it shall start engaging with EU law with increasing frequency and significance.[53] One possible path to choose in this effort is to start acting as a court of referral in the sense embodied in Article 267 TFEU and the relevant CJEU jurisprudence. This issue may be obvious to some, but the question is not whether the Constitutional Court can be considered a court of referral

49 Gárdos-Orosz 2015, p. 1571.

50 Id. p. 1572.

51 Id. p. 1575.

52 As an example for such debates in the context of examining the role of the Hungarian Constitutional Court, we can mention the infringements procedures currently on-going against Hungary as well as the so-called 'Article 7' proceedings regarding a 'systemic breach' of the rule of law based on the Treaties. The context of current European debates, however, is much vaster, and this paper is not about these, thus they shall not be mentioned in the following. The role of national (constitutional) identity and the role of the state are central to these debates as is the role of national constitutional courts in engaging with the CJEU. This was one of the main motivators behind writing the present paper as well.

53 On the complicated relationship of the Hungarian Constitutional Court and EU law, *see* Orbán 2018.

under relevant EU rules. This is, indeed, obvious. The question is much rather whether the Constitutional Court should start acting as a court of referral in light of its recent position and status in its cases related to EU law, especially when it comes to the protection of fundamental rights.[54]

Since the CJEU's 1997 decision in *Dorsch*,[55] we know that

> "in order to determine whether the body making a reference is a 'court or tribunal' […], which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent."

In the more recent 2008 landmark *Cartesio*[56] case referred by a Hungarian court, the CJEU extended this definition by recognizing the court responsible for maintaining the commercial register as a

> "court or tribunal which is entitled to make a reference for a preliminary ruling […], regardless of the fact that neither the decision of the lower court nor the consideration of the appeal by the referring court takes place in the context of inter partes proceedings."[57]

Initiating preliminary ruling procedures is the obligation of national courts aimed at ensuring the uniform interpretation of EU law. Therefore, the national court or tribunal before which a dispute is brought takes the sole (discretionary) responsibility for determining both the need for a request for a preliminary ruling and the relevance of the questions it submits to the CJEU. Sole discretion is of key importance in this regard. Subject to certain criteria determined in the jurisprudence of CJEU,[58] national judges have a *de facto* margin

54 An interesting account is given by Dimitry Kochenov and Matthijs van Wolferen on the relationship of the CJEU and Member States' top courts, including constitutional courts as well, regarding the role of the preliminary ruling procedure in building what the authors call 'dialogical rule of law'. *See* Dimitry Kochenov & Matthijs van Wolferen, 'Dialogical Rule of Law and the Breakdown of Dialogue in the EU', *EUI Law Working Papers*, 2018/1, pp. 11-15.

55 Judgment of 17 September 1997, *Case C-54/96, Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, ECLI:EU:C:1997:413.

56 Judgment of 16 December 2008, *Case C-210/06, CARTESIO Oktató és Szolgáltató bt*, ECLI:EU:C:2008:723, paras. 55-56.

57 Id. para. 125.

58 *See e.g.* Judgment of 8 September 2015, *Case C-105/14, Criminal proceedings against Ivo Taricco and Others (Taricco)*, ECLI:EU:C:2015:555; Judgment of 11 March 1980, *Case C-104/79, Pasquale Foglia v. Mariella Novello (Foglia v. Novello)*, ECLI:EU:C:1980:73.

of discretion in deciding whether the interpretation of EU law is necessary to decide the case before them.

Applying these factors to the Hungarian Constitutional Court, if the issue (petition) at hand can be decided in light of the national constitution and national law – without the interpretation of EU law, then discretion may point into the direction of no reference. Also, whether the exercise of discretion will lead to a preliminary ruling procedure, depends on relevant petitions to that effect and on the limitations set by national constitutional law.

In the *CILFIT* case,[59] the CJEU had ruled that

> "it follows from the relationship between the second and third paragraphs of Article 234 [previously Art. 117] that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the [CJEU] a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case."[60]

Thus, national court judge(s) shall decide whether the interpretation of EU law is necessary for them to render a judgment, and it is necessary when it is relevant and is amenable to affect the outcome of the case. While this may be considered a kind of 'interpretation of EU law', the line is extremely narrow.

In *CILFIT*, the CJEU provided a framework for the level of discretion of national courts by enabling them to interpret EU law regarding its relevance and impact on the case before them. On the issue whether an effect on the outcome of the case is tangible, different approaches may be found. *Melica* confirms the CJEU's wording in *CILFIT* in that 'not necessary' means that there is no way EU law could affect the outcome of the case.[61]

In the *Foglia v. Novello* case, the CJEU expressed that it accepts only 'genuine disputes', therefore an 'artificial expedient of arrangements' does not fall within the jurisdiction of the Court. Deciding whether the relationship of the case with EU law is genuine may be hard to decide in light of the margin of discretion of the national court on the one hand and the interpretation of EU law on the other.

---

59 Judgment of 6 October 1982, *Case C-283/81, Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health (CILFIT)*, ECLI:EU:C:1982:335.

60 Id. para. 10.

61 *See* Luigi Melica, 'The Unconstitutional Development of the European Legal Framework', *Diritto Pubblico Comparato et Europeo*, 2018/3, pp. 581-630.

In the *Taricco* case, the relationship of EU law and the case before the Italian court seemed to be in a great Euclidean distance from each other, therefore some[62] argued that the questions referred by the national court were indeed inadmissible. The relationship of the case with EU law was not clear and not close. The Italian law in question gave rise to a situation that affected the financial interests of the EU. The interdependence between the case law and the preliminary ruling procedure is, clearly, not based on a supposed conflict between norms, but on a conflict between two different general interests related to two different political choices.

Despite this, the CJEU found that it was sufficient that a national court assumed that national provisions did not meet those requirements of EU law which foresaw that measures to counter VAT evasion must be effective and dissuasive. And since national courts

> "have to ensure that EU law is given full effect, if need be by disapplying those provisions […] without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure",

the Italian Court's reference was declared admissible.[63] It is not obvious in every case whether the outcome is affected by the interpretation of EU law or not, and consequently, whether there is an obligation to refer or not.

Traditionally, constitutional courts (due to their competences as outlined above based on the Hungarian example) do not instinctively refer cases to the CJEU given the usual (constitutional) nature of cases they encounter and given the fact that their primary point of reference is the national constitution.[64] This situation is, of course, subject to change in the EU, especially when we talk about the context of protecting fundamental rights, with protections guaranteed both in the national constitution and the EU Charter of Fundamental Rights. As we have shown above, there are many approaches to choose from also at the disposal of the Hungarian Constitutional Court when (re)defining its relationship to EU law and the fundamental rights it protects.

According to the CJEU's own statistics,[65] the number of preliminary procedures referred by constitutional courts is (relatively) low: 5 requests from the *Verfassungsgerichtshof* (Austria); 1 request from the *Conseil constitutionnel* (France); 2 requests from the *Bun-*

62 *Case C-105/14, Taricco*, para. 28.

63 *See* Melica 2018, p. 589.

64 For a discussion of the role of constitutional courts in a preliminary ruling procedure, with special focus on the German Federal Constitutional Court, *see* Monica Claes, 'The Validity and Primacy of EU Law and the 'Cooperative Relationship' between National Constitutional Courts and the Court of Justice of the European Union', *Maastricht Journal of European and Comparative Law*, Vol. 23, Issue 1, 2016, pp. 151-170.

65 *Annual Report of the CJEU (2018)* at https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/_ra_2018_en.pdf, p. 146.

desverfassungsgericht (Germany); 3 requests from the *Corte Costituzionale* (Italy); 2 requests from the *Konstitucinis Teismas* (Lithuania); 1 request from the *Cour constitutionnelle* (Luxembourg); 1 request from the *Trybunał Konstytucyjny* (Poland);[66] 1 request from the *Ustavno sodišče* (Slovenia); 1 request from the *Tribunal Constitucional* (Spain); and finally 38 requests from the *Cour constitutionnelle* (Belgium).

Please note that the latter, relatively large number in the Belgian case is probably due to the transformation of the *Cour d'Arbitrage* into the Constitutional Court, a process finalized in 2007. Two additions need to be made to this list compiled by the CJEU: *(i)* The RCC's reference in the *Coman* case mentioned above, and *(ii)* the most recent filing from the Slovakian Constitutional Court in C-378/19 (*Prezident Slovenskej republiky*) on 14 May 2019.[67]

As we have argued above, it is obvious that the Hungarian Constitutional Court *(i)* is established by law, *(ii)* functions permanently, *(iii)* has a jurisdiction that is compulsory *erga omnes, (iv)* applies the rules of law, and *(v)* is independent.

The question before us now is merely, whether the Constitutional Court could be classified as a court of the last instance,[68] in proceedings that see it having to decide petitions that require the interpretation of the Charter or similar EU legal acts regarding protections for fundamental rights. According to some commentators,

> "[a] national court of the last instance within the meaning of Article 267(3) TFEU does not have a duty to refer a question on the interpretation of EU law to the Court of Justice in the ruling of the Court would have no bearing on the final decision."[69]

66 Judgment of 7 March 2017, *Case C-390/15, Rzecznik Praw Obywatelskich (RPO)*, ECLI:EU:C:2017:174, by which the Polish Constitutional Court (PCC) is kind of a pioneer among V4 countries in 'resourceful engagement' with EU law. The PCC questioned the validity of the reduced rate of VAT for books and other publications, as provided for under EU law, regarding which the CJEU ruled that the examination of the questions referred has disclosed no factor of such a kind as to affect the validity of point 6 of Annex III to Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT. This issue, however, was never intended to be the subject of this paper.

67 The only publicly available data so far amounts to the subject matter, which is defined in four areas: freedom of establishment, freedom to provide services, approximation of laws and energy. *See Case C-378/19, Request for a preliminary ruling from the Ústavny súd Slovenskej republiky (Slovakia) lodged on 14 May 2019.*

68 *See* Flóra Fazekas Flóra, *A magyar Alkotmánybíróság viszonya a közösségi jog elsőbbségéhez egyes tagállami alkotmánybírósági felfogások tükrében*, PhD dissertation, Debrecen, 2009, pp. 175-181. However, things have changed due to the Fundamental Law that provided new competences for the Hungarian Constitutional Court. By those, the Constitutional Court qualifies as a court of referral under Article 267 TFEU according to Gárdos-Orosz 2015, p. 1574.

69 Jan Gregor *et al.*, 'Reference for a Preliminary Ruling Procedure as An (In)Effective Tool of Judicial Harmonisation of European Union Law', *THEMIS 2018*, Thessaloniki, pp. 9-10.

Based on this logic, is it plausible that a judgment of the CJEU clarifying the application of the provisions of the Charter would have a bearing on the final decision of the Hungarian Constitutional Court?[70]

An important decision also involving the dismissal of two requests for a preliminary ruling on the above grounds (referring the issue of obligation to refer and to deny such requests) has been recently brought before the ECtHR in a Hungarian case, *Repcevirág Szövetkezet v. Hungary,* on 30 April 2019.[71]

We have not included the underlying Hungarian Constitutional Court's case initially into our sample period of the previous five years (2015-2019, starting from the 'context of non-reference'), as it was decided in early 2014. However, in the recent ECtHR judgment confirming the Hungarian point of view, the Court also reflects on the Constitutional Court's decision to refuse a constitutional complaint requesting that the Constitutional Court turn to the CJEU with a preliminary reference. This makes the case relevant to this last part of our inquiry.

In refusal Order No. 3165/2014. (V. 23.) AB, the Constitutional Court refused to admit a constitutional complaint against a decision of the Curia, and therefore precluded turning to the CJEU in a preliminary ruling procedure. The order was based on the following:[72]

In the case underlying the complaint, the Tax Authority determined a large amount of unpaid tax owed by the petitioner and imposed a tax fine and interest for late payment. This decision came as a result of a tax deduction applied by the petitioner after the purchase of agricultural machinery of significant value, which he later gave to certain companies to operate, free of charge. Under the current regulation, the petitioner believed to have legal cause to apply the VAT-deduction and consequently paid less taxes. This was found unlawful by the Tax Authority; which decision was also confirmed by the then Supreme Court of Hungary (now Curia of Hungary).

As a result, the petitioner filed a lawsuit against the Supreme Court for damage caused in a judicial capacity, arguing that the Supreme Court did not take into consideration effective domestic and EU rules (*i.e.* Directive 77/738/EEC), which led to the damages incurred. He also requested that the trial court, in this case, turn to the CJEU for a preliminary ruling. The court denied both petitions, and on appeal, the trial court's decisions were approved on both accounts.

The petitioner then filed a constitutional complaint alleging the violation of Article XXVIII of the Fundamental Law on the right to a fair trial and argued that the Curia failed to comply with its obligation to initiate a preliminary ruling procedure by arbitrarily

70 Given the title of our paper and the extensive literature regarding the status of EU law in general in the jurisprudence of the Hungarian Constitutional Court, we will only focus on the issue of preliminary ruling procedure in the fundamental rights context through a very recent 2019 case study.

71 *Repcevirág Szövetkezet v. Hungary*, No. 70750/14, 20 April 2019.

72 Decision No. 3165/2014. (V. 23.) AB, Reasoning [3]-[6].

declining the request to that effect, without professional, objective and sufficiently detailed justification. In this aspect, the petitioner also referenced the *CILFIT* and *Köbler* cases of the CJEU and the criteria defined therein[73] and added 13 references to the Charter. The petitioner argued,

> "in reference to Article 47 of the Charter that the Curia, by unlawfully discarding the reference for a preliminary ruling procedure, violated the right to a fair trial. Based on Article 51 of the Charter, the Charter was unquestionably applicable in the proceedings, because [*sic!*] the Curia (should have) applied Article 267 TFEU."[74]

The petitioner also made a secondary claim in his complaint, requesting that the Hungarian Constitutional Court turn to the CJEU in a preliminary ruling procedure. In the grounds put forward for substantiating the refusal,[75] the Hungarian Constitutional Court argued that the petitioner founded the alleged violation of the right to a fair trial on the supposition that the trial court in the case regarding damage caused by judicial action refused to turn to the CJEU. The Constitutional Court first recalled that in terms of its well-established case law regarding the criteria for admissibility, certain factors need to be considered in the instant case. First of all, the complaint serves as a means of 'constitutional appeal'[76] regarding any unconstitutionality that may influence the judgment of the court on the merits or alleging that there is a fundamental question of constitutional significance arising in the case, and that therefore, the Constitutional Court may not serve as a forum to re-adjudicate the issue de novo, or to re-examine the general direction of the judicial decision or reassess the evidence.[77]

Besides the above general points, the refusal of the preliminary ruling procedure initiative was based on a multi-tiered reasoning.

i. The Constitutional Court agreed with the Curia's argument regarding the fact that questions posed by the petitioner in the case do not relate to the interpretation of the Treaties or a decision on the validity of the legislative acts of EU institutions [in a broad sense], but concern the re-examination of a judgment by a Member State court, which is consequently outside the purview of the CJEU. (For a decision by the CJEU would have had no bearing on the decision.)

---

73 Judgment of 30 September 2003, *Case C-224/01, Gerhard Köbler v. Republik Österreich*, ECLI:EU:C:2003:513, para. 59.

74 *See* p. 8 of Petition No. IV/507/2014 as part of Order No. 3165/2014. (V. 23.) AB.

75 Order No. 3165/2014. (V. 23.) AB, Reasoning [13]-[20].

76 Márta Dezső *et al., Constitutional Law in Hungary*, Kluwer Law International, 2010, pp. 197-198.

77 In detail, *see* Order No. 3003/2012. (VI. 21.) AB, Order No. 3028/2014. (II. 17.) AB, Order No. 3110/2014. (IV. 17.) AB and Order No. 3231/2012. (IX. 28.) AB.

ii. The Hungarian Constitutional Court stated that in examining the conformity of judicial decisions with the constitution, it refrains from making any determinations regarding special branches of law and relevant issues of legal interpretation.
iii. The Constitutional Court argued that it sees the essential content of the right to a fair trial in the enforcement of procedural rules that have constitutional significance, and any elements of judicial proceedings beyond that – such as a discretionary decision by the Curia to refuse a request for a preliminary ruling procedure – are not regarded as questions that have a constitutional bearing. In this case, the Hungarian Constitutional Court held that it has no jurisdiction to decide *in lieu* of trial courts whether they have an obligation to initiate a preliminary ruling procedure. (Whether the decision of the CJEU would have a bearing on the case in front of trial courts, is an issue within the proceeding court's sole discretion.)
iv. The Constitutional Court emphasized, upon reflection on the petitioner's claim to the Hungarian Constitutional Court *to* initiate a preliminary ruling procedure, that the petitioner can only request the court to nullify the court judgment complained of in proceedings under Section 27 HCCA, but this in no way extends to requesting a referral instead.

Against this domestic procedural background, the ECtHR decided the case arriving at the following conclusions[78] through an analysis reflecting on Article 6 ECHR:

(i) The applicant alleged a violation of his right to access to the CJEU through the Curia's refusal to request a preliminary ruling procedure, in which regard the ECtHR argued that:

> "The Court reiterates that it is not competent to assess the merits of the interpretative stance [of the Curia] in the light of European Union law in the first set of proceedings, in particular, whether or not it was in line with the CJEU's case-law […]. The Court's competence is confined to assessing whether or not these reasons are arbitrary or manifestly unreasonable."[79]

(ii) Against this background, the ECtHR came to the reassuring conclusion that the Curia

> "could have explained more explicitly why it refused to make a preliminary reference. However, implicit reasoning can be considered sufficient […] The Court, therefore, does not consider arbitrary or manifestly unreasonable the reasons given […] for not making a reference to the CJEU."[80]

78 *Repcevirág Szövetkezet v. Hungary*, No. 70750/14, 20 April 2019, paras. 54-62.
79 Id. para. 56.
80 Id. paras. 58 and 60.

(iii) as far as the Hungarian Constitutional Court's refusal of the complaint for lack of jurisdiction is concerned, the ECtHR also made an important point finding no violation of Article 6 ECHR:

> "61. In so far as the Constitutional Court's reasoning is concerned, this court provided reasoning in reply to the request of the applicant company which complained [of the Curia's] refusal to approach the CJEU, consisting in holding that it lacked jurisdiction in this respect. Such a position cannot be considered arbitrary or manifestly unreasonable either. It is not for the Court to challenge the Constitutional Court's finding that requests for a preliminary reference to the CJEU should be made before the ordinary courts and that it lacked jurisdiction to review such decisions. The Court would stress in this context that Article 6 § 1 does not require a supreme court to give more detailed reasoning when it simply applies a specific legal provision to dismiss an appeal on points of law as having no prospects of success, without further explanation […]."

This Strasbourg judgment brings to light the fact that the role and position of the Constitutional Court in the Hungarian justice system sparks intensive debates in Hungary triggering a response from international judicial fora as well.

Regarding the role of the Constitutional Court in protecting fundamental rights through complaints procedures, we should mention that the ECtHR has very recently declared in *Szalontay v. Hungary*[81] that the constitutional complaint proceedings now qualify as a necessary and effective remedy[82] in terms of the admissibility test of individual ECtHR applications. This only reinforces our arguments about the role of the Hungarian Constitutional Court in protecting fundamental rights.

In this context, there might come a time when the relevant use of Charter-arguments in the proceedings of the Constitutional Court will lead to similarly important results, but until then, the only way to see what lies ahead of us is to map out what we consider to be the cornerstones of the Hungarian Constitutional Court's 'resourceful engagement' with fundamental rights under EU law.

---

81 *Szalontay v. Hungary (dec.)*, No. 71327/13, 4 April 2019.

82 Under para 39. of the decision, the ECtHR has concluded that in the case at hand "either a constitutional complaint under section 26(1) coupled with a complaint under section 27 against the impugned legislation […] or a constitutional complaint solely under section 27 against the judgments given in allegedly unfair proceedings, were accessible remedies offering reasonable prospects of success." Declaring that the applicant has failed to exhaust the domestic remedies at his disposal indicates necessity and the reference to the reasonable prospects of success is an inference to effectiveness.

22.5 Conclusions on a Roadmap towards a 'Resourceful Engagement' with EU Law and the Charter

Above, we examined the strengths and weaknesses of the jurisprudence of the Hungarian Constitutional Court in light of EU law and the Charter, and we have presented some foreign examples as well for comparison. Below, we should address some of the opportunities and challenges on the road ahead.

As the ECtHR's most recent decision in *Repcevirág* demonstrated, the refusal of a request for preliminary ruling by the Hungarian Constitutional Court already passed the tests of the Strasbourg system of human rights protection against arbitrariness, but this case only shows that the issue of the Hungarian Constitutional Court serving as a court of referral is expected to garner yet more attention.

Another very recent development of EU law possibly influencing Member States' constitutional courts' 'resourceful engagement' with EU law may also be mentioned from among the case-law of the CJEU, with implications regarding the Charter.

In *C-235/17, Commission v. Hungary*, infringement proceedings were initiated concerning alleged violations of the right to property through national legislation. National provisions extinguished without compensation the rights of usufruct over agricultural and forestry land. In its judgment, finding Hungary in non-compliance with its obligations under EU law, the CJEU held that the compatibility of the contested provisions with EU law

> "must be examined [in light of] the exceptions thus provided for by the Treaty and the Court's case-law, on the one hand, and of the fundamental rights guaranteed by the Charter, on the other hand (*see*, to that effect, judgment of 21 December 2016, AGET Iraklis, C-201/15, EU:C:2016:972, paragraphs 65, 102 and 103)."[83]

With above, the CJEU basically stated that when a Member State intends to justify the limitation of a fundamental right, the compatibility of the provision in question with EU law shall *(i)* not only be compared to the exceptions provided for under the Treaties but *(ii)* also be in relation to the rights protected by the Charter.

Such rules bring protections afforded to fundamental rights on the EU level to a full circle, seemingly limiting the legroom of constitutional courts in figuring out ways to avoid engaging with the Charter. We have seen above that some countries (Austria, Romania) already have landmark cases with Charter-implications in their jurisprudence, but for any

83 Judgment of 21 May 2019, *Case C-235/17, Commission v. Hungary*, ECLI:EU:C:2019:432, para. 66.

constitutional court to become a court of referral it is not only the provisions of Article 267 TFEU that are quintessential, but the different perceptions and structures of preliminary reference in the different legal systems. Preliminary references normally stay within the system of 'ordinary courts' as issues of interpreting EU law normally arise in the context of first- or second instance proceedings. If in these cases requests are accepted and filed with the CJEU, then by the time the case reaches the Hungarian Constitutional Court through 'constitutional appeal' (*i.e.* a constitutional complaint), the issues relevant to the interpretation of EU law will have already been clarified.

It is firstly up to the petitioners to shed light on such fundamental-rights-related issues in their cases that would prompt or at least challenge the Hungarian Constitutional Court to conduct an actual in-depth analysis of Charter-relevant human rights arguments. In these cases, then, the Hungarian Constitutional Court may easily find itself in a position where it will be required to 'resourcefully engage' with EU law. Individual action in protecting individual fundamental rights could thus induce an adequate response. This path, so far, has been less beaten, and navigating is difficult on a terrain made up of real issues of *ratione materiae* competence and sovereignty, as well as complicated perceptions of EU law emerging at every turn, making headway slow. However, at least, progress is tangible.