András Jakab:* Constitutional Reasoning in the Hungarian Constitutional Court

Megjegyzés [sz1]: On the margin you find remarks which are meant to help the authors of the other country reports, but which will not be included in the final version of this paper.

The present study aims to discover the features of judicial reasoning in the Hungarian Constitutional Court (HCC).[1] The nature of the HCC changed very recently (over several steps, beginning November 2010). The changes included the introduction of a German style constitutional complaint instead of the *actio popularis*, the curtailing of the competences of the HCC concerning tax and financial statutes, as well as changes to the political culture surrounding the HCC.[2] Since the changes have taken place, there have not been enough judgments brought by the HCC to be able to find out how far (and whether) the reasoning of the Court has changed. No judgments delivered after 2010 are included in our 40 judgments sample of the most important judgments or 'leading cases' of the HCC (see below). The present paper is

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[1] The present study is part of the CONREASON (Comparative Constitutional Reasoning Project) http://www.mpil.de/red/schumpeter. I am most grateful to Orsolya Salát for her help in analysing the 40 most important judgments (or 'leading cases') and for many useful suggestions and remarks; to Botond Bitskey for statistics about the case law of the HCC; further to Armin von Bogdandy, Balázs D Tóth, Johanna Fröhlich, Rainer Grote, Gábor Halmai, Giulio Itzcovich, Béla Pokol, Pál Sonnevend, Esther Vogel and the participants of the 8 August 2012 workshop at the Max Planck Institute for Comparative Public Law and International Law (Heidelberg) for their critical remarks and useful references.

[2] For more details see András Jakab – Pál Sonnevend, Kontinuität mit Mängeln: Das neue ungarische Grundgesetz, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2012/1. 79-102; Herbert Küpper, *Ungarns Verfassung vom 25. April 2011. Einführung – Übersetzung – Materialien*, Peter Lang, Frankfurt aM 2012.

therefore to a certain extent legal history (hence the past tense of this paper), and whether it can be used as a piece in contemporary comparative law is still to be seen in the years to come.

Megjegyzés [sz2]: For the time when we publish the country reports, I probably have to rewrite this report and the possible effects of institutional changes (if any) on the style of constitutional reasoning will become visible. But in the meantime it can still be used as a sample country report.

A. Legal, Political, Institutional and Academic Context

Two General Approaches to Constitutional Reasoning

The Constitution was practically rewritten in 1989-90, but some parts and provisions continued to be the legacy of socialism. The first HCC (led by László Sólyom, 1990-1998, during socialism a professor of private law) had to use this basis to build up the conceptual system (and case-law) of modern Hungarian constitutionalism (called the "invisible constitution", e.g. in Dec. 23/1990 (X.31) AB). It successfully managed to do so, but in the literature it was often accused of "activism" (meaning making arbitrary decisions which could not be anticipated from the text). The HCC was itself divided over its role and the methods of constitutional interpretation (text-positivist vs. activist: these designations existed only in the scholarly literature,[3] in the judgments they were never mentioned). The two approaches could not be characterised by any group identity or political affiliation, the difference was only methodological. They should also not be understood as strict schools, because sometimes elements from the two differing approaches were used by the same judge or author. The characteristics should thus be understood as family resemblances in the sense of Wittgenstein.[4] The elements of these two approaches turned up in judgments, in scholarly and in the political discourse as well, thus it seemed best to place their analysis before all other enquiries on the legal, political, institutional and academic context.

Text-positivism

As a preliminary remark, text-positivism should not be confused with legal positivism (Kelsen or Hart): text-positivism was not a school of legal theory, it was just an approach to interpretation with some implied (but often unreflected) theoretical presuppositions, also in some of the sample judgments. This style of reasoning had three elements: (I) methods of interpretation, esp. (a) the rejection of objective teleological arguments, (b) the preference for subjective teleological arguments, (c) the rejection of harmonising arguments referring to international law, (II) the preferred rank list of substantive arguments, and (III) a general approach towards doctrinal-conceptual sophistication.

Ad (I). (a)-(b) The most important feature of this approach was the strong reliance on the text (this explains the designation text-positivism) and the explicit rejection of the objective teleological method. To put it bluntly: "if it is not written explicitly, then it is not law". Consequently, if the text of the Constitution did not explicitly say anything (or if it says contradictory things) about a question, then it cannot be decided.

This method of interpretation was a legacy of socialism. Now if we want to know why socialist legal scholars disfavoured the (objective) teleological interpretation,[5] the leading legal scholar of Hungarian socialism, Imre Szabó, has an answer for us.[6] He identifies the true essence and the fatal flaw of the (objective) teleological approach: it detaches a law from the will of the legislator and elevates a purpose which was not determined by the legislator but simply assumed or derived, to a principle of interpretation. However, the sole purpose of legal interpretation, according to Szabó, is to ascertain, as far as possible, the original actual will of the legislator. Thus according to this approach, teleological interpretation should *only* take place within the parameters of historical interpretation (i.e., only the subjective teleological interpretation is acceptable)[7] and therefore cannot be counted as an independent method of interpretation.

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[3] In Western languages see e.g. Kim Lane Scheppele, The New Hungarian Constitutional Court. After Solyom, retreat into formalism?, *East European Constitutional Review* 1999, 81–87; András Jakab, Wissenschaft und Lehre des Verfassungsrechts in Ungarn, in: Armin von Bogdandy – Pedro Cruz Villalón – Peter M. Huber (eds.), *Ius Publicum Europaeum*, Heidelberg, CF Müller 2007, vol. II. 773-801.

[4] Ludwig Wittgenstein, *Philosophische Untersuchungen*, 3rd ed. 1982, I. § 66-67.

[5] Before the Second World War, recognition of the objective teleological method was characteristic, if not exclusive. See Imre Szabó, *A jogszabályok értelmezése* [The Interpretation Of Legal Rules], Budapest, KJK 1960, 103-09 (listing further references). But practically every author recognised it under some designation or another (for example, the "particular, logical method").

[6] Szabó (n. 5) 97-109, esp. 104-09.

[7] Szabó (n. 5) 105. His point of view corresponded fully with the opinion of the Soviet literature at the time. See *ibid.* 106 n.10 (citing further references).

Seventeen years later, Szabó wrote the following: "interpretation is always only declarative," and "one may not interpret anything into the text of the statute that is not already there."[8] A few pages further, he evaluated the objective teleological method: "the method—which later became completely dissociated from the historical method and, along with the purposivist interpretation, introduced a sort of legal opportunism, that is, it gave a law a purpose that corresponded to the nature of a given case—this method reduced the law to a mere means to reach any arbitrarily desired end. This [...] methodological element, the so-called teleological interpretation, must be rejected.…."[9]

We see, then, that the strongest objection to the objective teleological method was its departure from the original will of the legislator and its tendency to allow too great a discretionary scope in interpreting the law. Setting aside the ideological component, one could consider this an argument stating that the objective teleological method leads to legal uncertainty. Under the circumstances of the period, however, this point of view seems rather to have been an expression of the antipathy of both socialism and any "usual" dictatorship for unchecked creativity. Socialism wanted to turn the application of law into a predictable machine for the processing of statutes.[10] Imre Szabó contributed to this phenomenon—probably more consciously than unconsciously.[11] On the other hand, adherence to the actual text was the strongest protection against party-political influence during socialism, thus it also gained a certain moral-professional standing.

Following the collapse of socialism, the concept of teleological interpretation began to regain (lost) ground in the legal literature, and as we are going to see from the numbers also in the interpretive practice of the HCC. But some of the quoted arguments (also from judgments of the sample) showed signs of the previous approach.[12] Especially symptomatic were the deferential arguments which stated that they could not solve the case because 'it is not in the text'. Arguments relying on the subjective purpose were also characteristic, and the fact that in the second half of the period the number of such references increased supports the commonly held believe that changes in the personnel of the HCC resulted in a return to this old methodology.[13]

(c) Another feature of this traditional approach was its state-centred nature. Sovereignty was perceived as international independence which also applied against international human rights treaties (a necessary doctrine in every dictatorship, also in Eastern European countries during socialism). When the activist era ended at the HCC in 1998 (change of personnel), the references to international law dropped significantly (until that point, the majority of the sample judgments contained such references, after the change only 25%).

Ad (II). Amongst the substantive arguments, democracy was the strongest, and separation of powers and protection of fundamental rights were the weakest.[14] This is a legacy of Marxist-Leninist constitutional doctrine too, in

[8] Imre Szabó, *Jogelmélet* [Legal Theory], Budapest, KJK 1977, 259 (author's translation).
[9] Szabó (n. 8) 261 (author's translation).
[10] Cf. Imre Szabó, *A jogelmélet alapjai* [Fundamentals of Legal Theory], Budapest, Akadémiai, 1971, 184. The elimination of creativity was largely successful because the Hungarian judiciary avoided (and still avoids) speculative conceptual derivations. For Hungarian judges, the law is only what is "written in the text" (textualism). See Béla Pokol, *A jog elmélete* [Theory of Law], 2001, 284 (discussing Hungarian courts' staunch loyalty to text).
[11] Like consolidating dictatorships in general, socialism also had certain characteristics which resembled the rule of law (or similar principles) to some degree. See Roger Scruton, Totalitarianism and the Rule of Law, in: Ellen Frankel Paul (ed), *Totalitarianism at the Crossroads*, New Brunswick, N.J., Transaction, 1990, 171-213 (analysing the phenomenon thoroughly). A good example of the phenomenon is "socialist legality," meaning roughly "legal certainty within the framework of a socialist dictatorship" (with emphasis on dictatorship). The term is fundamentally hypocritical, since its function is to legitimate lawlessness, if and when it is in the interest of the dictatorship of the proletariat. See Friedrich-Christian Schroeder, Wandlungen und Konstanten der "sozialistischen Gesetzlichkeit", *Recht in Ost und West* 1989, 358-62.
[12] In ordinary courts it is considerably stronger. On the textualist interpretation as a legacy of socialism in the whole of Eastern Europe see Zdeněk Kühn, Formalism and Anti-Formalism in Judicial Reasoning, in: Bjarne Melkevik (ed), *Standing Tall*, Budapest 2012, 226-227 with further references.
[13] Scheppele (n. 3).
[14] See e.g. the concurring opinion by Judge László Kiss in Dec. 4/1999 (III.31) AB stating that "the function and the competences of the Parliament *cannot be limited* because of the requirement […] of democratic functioning" [Italics mine]. For a detailed critique of this statement see András Jakab – Miklós Hollán, Socialism's Legacy in Contemporary Law and Legal Scholarship: The Case of Hungary, *Journal of East European Law (Columbia University)* 2004/2-3. 95-122, esp. 104-108. József Petrétei, *Alkotmányjog* (Constitutional Law), vol. I., 2001, 83-94 analyses the basic principles of Hungarian constitutional law. These are: sovereignty, democracy, the rule of law and market economy. They partly overlap, but the protection of fundamental rights is not included in any of them.

which democracy had a much higher value than the protection of fundamental rights and which explicitly rejected the idea of separation of powers (principles of 'unity of powers' and 'democratic centralism').[15]

Ad (III). Activists also claimed that text-positivists were not particularly creative and did not see doctrinal-conceptual issues. Constitutional issues were conceptualised as procedural problems, the substantive problems often remained in the background.[16] This also seems to be a socialist legacy. During socialism, *Verfassungsdogmatik* was unnecessary, as (political) conflicts were never decided on the basis of the Constitution, but through the decisions of the socialist party. There was no constitutional court which could have applied it, and ordinary courts perceived the Constitution as only a political declaration (and it was only a political declaration).[17] To build up a systematic and sophisticated *Verfassungsdogmatik* under these circumstances would have been a futile exercise. Constitutional lawyers instead spent their time on comparative law or history of law (or on writing propaganda-like analyses of the Constitution, but with more ideological elements than conceptual sophistication). If a word in the Constitution was unclear, then statutes (!) were used to define it: the Constitution was thus not perceived as a limit of, but as a recommendation to the legislature.

In the first decade, text-positivism was the usual approach in Hungarian legal scholarship (at the HCC it was only a minority opinion though), and criticised the HCC (esp. its first president, László Sólyom, 1990-1998) for deciding according to an activist approach. In the second decade of the period, both at the HCC and in the literature, a balance of the two approaches could be seen, but the actual theses of the first decade survived even after their representatives left, because these were already engraved in precedents and text-positivists also considered HCC precedents as binding later interpretations.

Activism

Activism is not (or originally was not) a self-designation, but rather an accusation by text-positivists.[18] Although later it was also accepted by activist authors themselves.[19] This approach can be characterised by (I) preferred methods of interpretation, (II) favourite substantive arguments, (III) the attempt to build a sophisticated *Verfassungsdogmatik*.

Ad (I) and (II). The most preferred methods were the objective teleological and the harmonising methods, but also the non-legal argumentation method was accepted in this approach. The Constitution was perceived as a comprehensive and coherent document which provided an answer to every possible question (even if the answers were sometimes just implied ones, if you were creative enough then you could find them). General principles of constitutional law were especially used for building harmonising arguments, but referring to a 'value system' behind the Constitution,[20] also non-legal arguments. The favourite substantive arguments were the rule of law, democracy and human dignity.

The disappearance of non-legal arguments and the clear drop in the number of references to international law in the second half of the analysed period shows that changes in the personnel of the HCC did have some effect on the style of reasoning, even though many of the other elements (both structural and substantive, except 'human dignity' which clearly became less frequent) seemed to have survived the first generation activist judges and are still pervasive today (often in the form of precedents quoted by the new judges but containing the old arguments).

Ad (III). The main task of constitutional scholarship and one of the tasks of the HCC was seen by the activists to be the building of a sophisticated *Verfassungsdogmatik.* A detailed conceptual system (which goes beyond the actual text of the Constitution) was seen as necessary in order to be able to solve cases and to do it in a flexible but predictable

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[15] See Georg Brunner, Das Staatsrecht der Deutschen Demokratischen Republik, in: Josef Isensee / Paul Kirchhof (ed), *Handbuch des Staatsrechts*, Heidelberg, CF Müller, 3rd ed. 2003, vol. 1 para 25-27 for a discussion of these principles concerning East Germany.

[16] For a criticism of this proceduralism see Scheppele (n. 3) with further references.

[17] It was not by chance that since the 1950s no (book-format, article-by-article) commentary of the Constitution had been published. The only function of the short commentaries in the 50s was to legitimatise the regime and not to help to decide political conflicts. But for legitimating you do not need a commentary. A commentary is needed only where conflicts are decided on the basis of law.

[18] Very rarely, also used as a self-designation, see Interview with László Sólyom, *East European Constitutional Review*, 1997, 72.

[19] Gábor Halmai, The Hungarian Approach to Constitutional Review: The End of Activism?, in: Wojciech Sadurski (ed.), *Constitutional Justice, East and West*, 2002, 189-212.

[20] See e.g. Gábor Attila Tóth, *Túl a szövegen. Értekezés a magyar alkotmányról* (Beyond the Text. A Study on the Hungarian Constitution), Budapest, Osiris, 2009, 186-207.

manner. This resulted in long (doctrinal) *obiter dicta* of the judgments which were probably often meant to teach both outsiders and the staff of the HCC.

Legal and Political Culture as the Context for Constitutional Reasoning

Most of the lawyers who are currently working were educated during socialism, and accordingly, the theses of text-positivists were the commonplaces they believed in. Many judges seriously thought that they were just the "mouthpiece of the legislator" (they even proudly quoted Montesquieu in order to show Western education). Many of them also cynically added that they could not do justice but just apply the law (in a textualist manner). They did not pay much attention to the HCC, as they considered it an issue for the legislator to deal with HCC judgments (this perception fitted well to the lack of constitutional complaint against judgments of ordinary courts).

Politicians kept changing their positions according to their political situations. In opposition, they were always huge supporters of the HCC, encouraging it to make creative and activist decisions (and the HCC usually chose to decide all hot issues, sometimes against all the political elite and even against public opinion), whereas on government they referred to it as anti-democratic. But in general, politicians were rather anti-HCC, on the one hand because politicians everywhere in the world tend to dislike limits on their power, and on the other hand because they were also educated during socialism and were indoctrinated with an anti-HCC standing. Hungarian politicians saw democracy as hierarchically superior to fundamental rights and also saw law as an instrument of social engineering in the hands of politicians (as it was seen during socialism), and not as a means of promoting justice. The HCC itself was seen as instrumental for them, and not as a value in itself.

The 1949/89 Constitution itself had little respect as such (even though the basic values of constitutionalism became a standard part of political discourse), partly because of its dubious origins: It had the dark year of 1949 in its title, and its main parts were adopted by an illegitimate body (the last communist parliament in 1989). No government rebelled actively against any judgment of the HCC, after some mourning about the anti-democratic activism of the HCC the bitter pills were swallowed (i.e. they accepted that an important statute was annulled),[21] but the implementation of some of its judgments establishing an unconstitutional omission were ignored (i.e. no new statute was adopted).

Political parties did not really have any coherent political philosophies (or if they did, then they handled these in a very opportunistic way, keeping silent about them in certain situations, most likely just using them as rhetorical elements without actually internalising the content). Consequently, we could not establish any specific approach in the public discourse as to the nature of law and as to the nature of the political community. The social problems were pressing, but again, no social collapse or alike threatened, thus the HCC generally did not consider it its task to deal with these issues. Corruption (esp. party financing) was also a major issue, but the HCC did not (care to or dare to) stretch its competences to deal with it.

The Court and Its Judges

According to the Constitution (Act XX of 1949 as revised and restated by Act XXXI of 1989) and to Act XXXII of 1989 on the Constitutional Court (ACC),[22] the HCC had the following competences:[23]

a) the ex ante examination for unconstitutionality of statutes adopted but not yet promulgated, and of provisions of the rules of procedure of Parliament and of international treaties;
b) the ex post examination for unconstitutionality of laws, as well as normative decisions and normative orders;
c) the examination of conflicts between international treaties and laws, as well as normative decisions and normative orders;

[21] This changed in 2010, see above fn. 1, but none of the sample judgments fell into the period after 2010, therefore we did not have to consider this change at this point.

[22] During the first twenty years of the existence of the HCC (1990-2010), only a few changes have been made to the constitutional and ACC rules on the HCC. If no other reference has been made, then the legal situation is the one directly preceding the curtailment of the competences of the HCC in November 2010. For more details see Kriszta Kovács – Gábor Attila Tóth, Hungary's Constitutional Transformation, *European Constitutional Law Review* 2011, 183-203. For more details on the HCC and for a translation of some of the important judgments of the first decade see László Sólyom – Georg Brunner (eds), *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court,* Univ. Michigan Press, Ann Arbor 2000; Gábor Spuller, *Das Verfassungsgericht der Republik Ungarn,* Peter Lang, Frankfurt aM 1998.

[23] Some other statutes conferred further competences on the HCC in the area of referenda and university autonomy.

d) judgment on constitutional complaints lodged for the violation of rights guaranteed by the Constitution;
e) the elimination of unconstitutionality by omission;
f) the elimination of conflicts of competence between state organs, local governments and other state organs, or between local governments;
g) the interpretation of provisions of the Constitution.

As a main rule, the abstract ex post review of laws based on *actio popularis* (i.e. a type of procedure in which anybody can challenge any statute by claiming that it is unconstitutional without having to show any direct personal interest and without having to have a concrete case either) dominated the work of the HCC (9.000 out of 15.000 cases).[24] Thus in the majority of the procedures, anybody (even foreigners) could launch a procedure without showing any personal interest: a short letter stating the unconstitutionality (also naming the exact provision of the Constitution and the exact provisions of the law wished to be annulled). Ordinary courts also had standing to file a case upon noting the unconstitutionality of a law or any statutory instrument applicable in the judgment of a case while suspending that case (only the HCC could annul laws). The HCC did not have the power to annul judicial decisions, only the law upon which they (the judicial decisions) were based (and following such an annulment, the ordinary courts themselves had to redo their procedures according to their rules of procedure, but the HCC could not order this). In theory, individual complaint existed as a competence, but it practically died out as it did not provide any advantage over the abstract *actio popularis* review and was actually more difficult to file (i.e. deadline, legitimate interest had to be shown).[25] The HCC did not have any discretion to pick from the complaints and had to respond to all of them (obviously unfounded complaints could be *a limine* rejected without reaching the judges, but even they had to be answered). The combination of *actio popularis* on the one hand, and the lack of discretionary power on the other hand, led to the HCC being seriously overloaded. This resulted in delays of several years (there was no deadline in any of the procedures of the HCC).

As a politically very important, but rather rare competence, the HCC could also realise the *ex ante* (or preventive) examination of statutes adopted but not yet promulgated for unconstitutionality, and of provisions of the rules of procedure of Parliament and of international treaties. This procedure was initiated by the President of the Republic.

International treaties as such could not be reviewed, but the internal legal acts implementing them (Hungary was a dualist country) could (Dec. 4/1997 (I.22) AB). If the implementing act was higher or the same in ranking as the conflicting other norm, then the other norm had to be annulled. If the implementing norm was lower in rank (typically: conflict between the Const. and an international treaty implemented in a statute), then normally the HCC gave the affected law-maker some time to rewrite one of the norms. If this did not happen, then the implementing norm (but not the international treaty itself) was quashed.

As already mentioned, there was no review of decisions of ordinary courts on their constitutionality. The HCC tried, however, to acquire the power to review the decisions of ordinary courts through three methods. One of them was the so called "living law" doctrine (Dec. 57/1991 (XI.8) AB). According to this doctrine, which was borrowed from the Italian doctrine (*diritto vivente*), statutes have the meanings that courts attribute to them.[26] Therefore if unconstitutional case-law existed on the basis of a statute, then the statute was unconstitutional and had to be quashed. There was also a more statute-friendly method for ensuring constitutionality of judicial case-law: the HCC sometimes defined the constitutional interpretation of a statute, i.e. chose from different possible interpretations the one which was constitutional (Dec. 38/1993 (VI.11) AB). If the courts did not follow this decision, there was still the power to quash the statute itself. And finally, the Supreme Court had the power to issue "decisions for the unity of jurisprudence" (*jogegységi határozat*), i.e. abstract norms about the interpretation of statutes to be used by lower courts. The HCC claimed to have the power to quash these decisions, and in fact it did so (the first time in Dec. 42/2005 (XI.14) AB).

Another interesting power that the Hungarian CC possessed was the ability to declare that a state organ had made an "unconstitutional omission", which meant that it had failed to make a necessary law or statutory instrument; resulting

[24] I am grateful to the Secretariat of the HCC for the (unpublished) data of the HCC (on file with the author). Only cases which were not *a limine* rejected were counted.
[25] From 1999 onwards, there was a possibility of redoing the whole ordinary court procedure, if the original judgment had been based on a law or statutory instrument which was later annulled by the HCC. But this was always a separate procedure which had to be launched by the parties (incl. the Prosecution Service), and the HCC itself could not annul any individual judicial decision.
[26] For more information on this doctrine see Antonio Ruggeri – Antonino Spadaro, *Lineamenti di giustizia costituzionale*, Giapichelli, Torino, 2004, 134.

in an unconstitutional situation (this procedure could also be launched *ex officio*). And finally, the competence to "interpret the provisions of the Constitution" has to be mentioned: If there was a concrete constitutional conflict (without such concrete question, the decision would result in an academic monograph), then the HCC could provide an official interpretation of the relevant provision of the Const. to be used in the conflict.

In addition, some other, but less important competences were regulated by Act XXXII of 1989 on the Constitutional Court and by other statutes (esp. the constitutionality of referendum questions). The registration and dissolution of parties and the election cases were dealt with by the ordinary courts and not by the HCC.

There were no oral arguments at the HCC and decisions had to be made on the basis of written submissions. Formally, there were no opposing parties, only the initiator of the procedure and the law. It was usual practice, however, to ask for the opinion of the government (more precisely: of the ministry of justice). Rarely, written expert opinions were also asked for (either on questions of law or on questions of fact). There were no specific (constitutional/statutory) rules about the admissibility of proof/argument in the court.

The HCC published all cases *which reached a judge*. Those which were *a limine* rejected (by the secretariat of the HCC) for being 'obviously unfounded' were not published. The number of cases concluded each year ranged from 934 (2003) to 2178 (1991), the average being around 1300 cases. Approximately half of them were decided (*a limine* rejected) by the secretariat of the HCC. A quarter of the cases (around 350 cases per year) were actually decided either by the President of HCC (if the petitioner persistently repeated or upheld his/her petition despite the secretariat's rejection, then the President of the HCC rejected it) or by a panel of judges (panels of three judges or the full chamber of 11 judges). Only these (thus a quarter) of the decided cases reached a judge, and were consequently published. The general rule for publication was to publish the judgments in the official journal of the HCC *(Alkotmánybírósági Közlöny)* and then the yearbook of the HCC *(Az Alkotmánybíróság Határozatai)*, but the most important judgments were *also* published in the Official Gazette *(Magyar Közlöny)*. The remaining cases were concluded only in an administrative sense, because they were merged with other cases.[27]

The number of judgments peaked in 1991 (probably to be explained by the novelty of the institution which everybody wanted to try in the frame of the *actio popularis*) and also at the end of the examined period (probably best explained by the general economic and political crisis, in which it seemed to be a last hope). The internal proportions also changed: the percentage of cases which were reaching judges grew, whereas the number of rejections by the secretariat decreased. The reason for this was twofold: on the one hand, the public probably learned how to use the institution and the average quality of the petitions rose; on the other hand, (unfortunate) procedural rules made it necessary for the judges to deal with certain cases even if these were obviously unfounded (esp. referendum cases).

The 11 members of the HCC were elected by a two thirds majority of the Parliament for 9 years (re-electable once). According to the majority opinion of Hungarian scholars and judges, the HCC was not part of the judicature and also not simply a "negative law-maker", but rather a separate and independent branch of power. It also had a separate chapter in the Constitution, and the text mentioned "members" of the HCC (for the sake of simplicity, I will use the term "judge" though), and not judges (signalling that it was not a court in the traditional sense). The election of the members was highly politicised, but for procedural reasons a consensus between opposition and government was necessary. The necessary consensus meant that those constitutional law professors who could be categorised as belonging clearly to one political side or another could not be elected, or two of them had to be elected at the same time. Throughout this period, most of the HCC judges were university professors, the preconditions for election specifically mentioned the scholarly route as one of the alternative options.[28]

Legal Scholarship and Constitutional Reasoning

[27] The data stems from the website of the HCC: http://mkab.hu/letoltesek/statisztika_ossz.pdf.

[28] Art. 5 ACC (1) Hungarian citizens with a law degree who have reached the age of 45 years and who have no criminal record may be elected as Members of the Constitutional Court. (2) The Parliament elects the Members of the Constitutional Court among learned theoretical jurists (university professors of law or 'Doctors of State and Juridical Sciences' [of the Hungarian Academy of Sciences, i.e. a title corresponding to the German *Habilitation*]) and lawyers with at least twenty years of professional experience. Such professional experience must be acquired in a position demanding a degree in 'state and juridical sciences'. (3) Members of the Government or employees of political parties, as well as high ranking officials of state administration who served in such capacity during the four years before the election may not become Members of the Constitutional Court.

Hungarian legal scholarship was never deferential at all towards the HCC. As a matter of fact, amongst evaluating articles, the majority were always rather critical. Law professors (if both alive and Hungarian) did not receive any references in the sample, but the HCC was most likely aware of the vast majority of criticism, so it might have influenced the HCC in a hidden manner. The majority of judges have always been law professors (who continued teaching during their mandate), and this is very likely to have contributed to such influences. As a means of more direct influence, some law professors used the possibility of *actio popularis* and submitted petitions to the HCC.

In general, being a judge at the HCC had a higher prestige than being a law professor (the salary was almost three times higher). Most law professors considered it to be the highest job they could ever reach. But there were also a (very) few (to the author of the present lines: two) known instances where an offer to become a HCC judge was rejected by an established law professor.

B. Arguments in Constitutional Reasoning

The distribution of the 40 most important judgments showed that during the twenty years, after a short learning period in the first two years, the peak of the most important judgments arose for the next three years, which then sank constantly (with minor waves, but with an obvious tendency). The reason for this was probably that the older the judgment, the bigger the probability there was that it could gain quotes in the literature.[29] In the beginning phase there were more unresolved questions, thus the decisions were more likely to be surprising, i.e. their information value for the subsequent discourse was higher.

The Structure of Constitutional Arguments

In the overwhelming majority of the judgments (31 out of 40), we only found chain-structure arguments (one conclusive argument or a chain of arguments following from one another).

In only a few (8 out of 40) judgments we found the "legs of a chair" structure (cumulative-parallel arguments, i.e. the arguments support a certain legal interpretation independently; every argument would suffice on its own, but there are more of them; the reasoning thus resembles the legs of a chair). This type of argument was used, however, for only the main question of the cases, explaining why a law was unconstitutional, e.g. in 35/1994 (VI.24) AB: "[the statute] contravenes not only Art. 70A, but also Art 9(1) of the Constitution". Thus several equal reasons were listed and any of them would have been enough to annul the statute, but the HCC 'overkilled' it (probably in order to emphasise rhetorically the main point for those who might doubt it)[30] by listing more than one reason. For intermediary steps in the reasoning it was used even less frequently.

We only found one example for the dialogic reasoning, when the opinion presents a range of relevant considerations, none of which is really conclusive, yet taken together they indicate a certain solution. In 36/2000 (X.27) AB, the existence of a general right to personal freedom was justified by referring to many different (explicit) fundamental rights of the Constitution.

Types of Arguments in Constitutional Reasoning

Petitions were summarised at the beginning of the judgments of the HCC (whether the summaries were correct, is difficult to determine, as petitions of private persons were not public, unless the petitioner himself/herself published it). We did not analyse these parts, as these did not represent the reasoning of the HCC, but rather the reasoning of the petitioners. Those arguments which were used to interpret statutes or statutory instruments (i.e. infra-constitutional

[29] One possible explanation could also be that the HCC itself was more likely to quote its older judgments in order to show that it was coherent and not arbitrary. This explanation is, however, ruled out, as the self-quotes and the reputation in the literature differed so much, as the search by Opten showed.

[30] There was a significant correlation (0.393) between a non-chain structure of argument and the presence of dissenting or concurring opinions. It means that if there were separate opinions, then it was more likely to differ from the traditional chain-style structure.

Megjegyzés [sz3]: One of the tasks of this project is to test whether the abstract methodological categories apply in real life to the judgments.

Megjegyzés [sz4]: For details on the selection of the 40 most influential judgments see the project description. The issue will also be discussed in our first workshop.

Megjegyzés [sz5]: It would of course be interesting to see whether the distribution is similar in other countries or not.

Megjegyzés [sz6]: Remark about the footnote: You do not have to the mathematical counting of the correlations, we will do it for you. If you have difficulties coming to terms with this statistical concept, we are happy to help you. Very briefly: correlation is a number between -1 and +1. The correlation is +1 in the case of a perfect positive (increasing) linear relationship, -1 in the case of a perfect decreasing (negative) linear relationship.

Megjegyzés [sz7]: You do not have to list all the arguments that you found. Only those which seemed interesting examples to you, or those where you had doubt how qualify it. The latter is important, because such doubtful cases should be qualified the same way throughout the research, in order to allow comparability.

If it is possible, try to make groups within the types of arguments, try to explain in which situation they were used. Feel free to make any other comments which might be relevant for other participants of the research or for our readers.

norms) were not considered either, as the focus of the research was *constitutional* reasoning at the HCC. We included in the analysis, however, the concurring and dissenting opinions, as they did form part of the reasoning culture of the HCC.

In the *Table*, we only considered whether a type of argument came up in the reasoning ('yes' marked with '✓', or 'no' marked with '-'), but not how many times it did. Because of repetitions and half-repetitions it would have been difficult and very time-consuming to quantify the frequency within the judgments.

If we considered an argument as borderline between two types of arguments, then we made a mark for both categories. And a last general methodological remark before the actual analysis: if a judgment quoted an argument from another judgment, then the quoted argument also qualified on its own (and not just as a "precedent-argument").

Megjegyzés [sz8]: See in a separate file.

Analogies

We only found one case of analogy. In Dec. 4/1993 (II.12) AB the HCC argued that "The Constitution [...] guarantees free communication, and freedom of expression does not depend on its content. This also applies to the freedom of religion." Even on this occasion, the analogy was rather just hinted at or implied, and not explicit. We can say that analogy in the sense that it was used in this research (i.e. applying a norm to a situation which actually does not fall under its scope, but for reasons of similarity of situations and for reasons of lack of precise detailed rules we still apply the norm) was basically non-existent in Hungarian constitutional reasoning.

Establishing/Debating the text of the Constitution

We did not find any argument which dealt with doubts about how to establish the text of the Constitution. There seemed to be no problem establishing which norms were of constitutional rank and which were not.

Applicability of the Constitution

The question about the applicability of the Constitution only came up in a dissenting opinion in Dec. 4/1997 (I.22) AB, in which it was stated that the constitutional provision on constitutional review (Art. 32/A) could not be applied directly, but that its normative content was defined by other laws. The argument is weak (it basically questions constitutional review itself), and it did not appear again in our sample. Questions of primacy of EU law against the Constitution did not come up (even though the HCC could have discussed it in Dec. 30/1998 (VI.25) AB), state-centred arguments in a state of emergency are also unknown in Hungary,[31] and there has never been any explicit political question doctrine (even if objective teleological interpretation of constitutional competence provisions can play a similar function).

A special type of this applicability argument was when the court (or the dissenter) refused to use any method or argument, and stated that the Constitution did not say anything about the issue or that it was contradictory (Dec. 23/1990 (X.31) AB) and consequently no decision could be taken. Examples of the former are Dec. 47/2007 (VII.3) AB which stated that "all efforts to establish exactly and exhaustively those reasons which the President of the Republic could use to justify to award an honour to a certain person, are not interpretations of the Constitution, but they are law-making, and consequently, outside the competence of the Constitutional Court"; or Dec. 64/1991 (XII.17) AB which contained that "the question whether the foetus is a legal subject cannot be decided through interpretation of the Constitution". Similar arguments were found in Dec. 38/1993 (VI.11) AB and in Dec. 8/1992 (I.30) AB.

Ordinary meaning of the words of the Constitution or references to the 'wording of the Constitution' in general

This argument was found in 9 out of the 40 judgments, making it a usual, rather than a dominant argument There were three situations in which it was used: (1) when trying to find out the meaning of an individual word in the Constitution, (2) when trying to argue for a certain interpretation due to the phrasing of a sentence, (3) when trying to explain why the HCC could not do something (because it is just not in the text of the Constitution).

[31] András Jakab, German Constitutional Law and Doctrine on State of Emergency – Paradigms and Dilemmas of a Traditional (Continental) Discourse, *German Law Journal* 2006/5. 453-477, esp. 475-476.

Ad 1. The meaning of an individual word can either be the everyday meaning or the technical-legal meaning. As a matter of fact, we mainly found examples for the latter one, e.g. in Dec. 23/1990 (X.31) AB when interpreting the word "arbitrary" from Art. 54(1) Constitution: "A punishment can qualify as arbitrary if it leaves too much discretion to the subjective decision of the judge." There was a similar situation and a similar style of reasoning in Dec. 4/1999 (III.31) AB when the word "decision" was interpreted from Art. 24(3) Constitution: "the 'opinion' or 'proposal' of a committee is obviously not a decision". A monolingual dictionary was even used once to determine the meaning of a legal term (*Magyar Értelmező Kéziszótár* in Dec. 4/1999 (III.31) AB)), but normally the judges preferred to use their own intuition as to the ordinary meaning of words. A grammatical type of argument was used in Dec. 49/2001 (XI.22) AB, in which the HCC argued that the expression "high courts" *(ítélőtáblák)* implied several courts because of the grammatical plural.

Ad 2. The general phrasing of a sentence can also give clues about its meaning. This was used by the HCC in Dec. 46/1994 (X.21) AB when stating that "both fundamental rights provisions [...] allow for limitations by statute" or in Dec. 34/1994 (VI.24) AB when inferring from the fact that "this right is phrased [in the Constitution] as subjective right". Here, you do not use a word singled out, but rather the word in its textual context.

Ad 3. And finally, in some cases the text of the Constitution was referred to as a limitation of the competences of the HCC: Something lacked in the text, something did *not* follow from the text. Examples are Dec. 48/1991 (IX.26) AB when stating that "an interpretation which does not follow directly from the text, which is thus an extensive interpretation, would actually mean a modification of the Constitution, which is, however, the competence of the Parliament"; Dec. 62/2003 (XII.15) AB when stating that "an opposing interpretation would mean the extension of the text of the Constitution" or Dec. 27/1998 (VI.16) AB when stating that "it does not follow from the use of words in the Constitution that..." This type of argument was basically a very simple deferential argument which also implied the rejection of the use of any other types of arguments and thus cuts short the discussion of the issue.

Harmonising arguments

In the Table we divided harmonising arguments into (1) domestic harmonising arguments (marked with 'H') and (2) international harmonising arguments (marked with 'H(int)'). In this way, we also have information about how open a constitutional system was towards international law.

Ad 1. Domestic harmonising arguments can have the form of interpreting one constitutional provision in light of another, interpreting constitutional provisions in light of each other or using two constitutional provisions together to establish the constitutional standard. We found harmonising arguments in 32 out of the 40 judgments, thus making it one of the three (quantitatively) most dominant arguments (besides precedents and objective teleological arguments). The method was explicitly mentioned in Dec. 23/1990 (X.31) AB when stating that "the whole of the Constitution is the basis [of the interpretation]", in Dec. 48/1991 (IX.26) AB when stating that "we depart from the presupposition that the Constitution, like law in general, is a unified and coherent system" (formulated in a very similar way in Dec. 62/2003 (XII.15) AB).[32]

Ad 2. International harmonising arguments use international law in order to interpret the Constitution. The method was explicitly mentioned in Dec. 30/1998 (VI.25) AB (explicitly about *favor conventionis*). We found such arguments in 17 out of the 40 judgments. The overwhelming majority of these arguments referred to international human rights treaties (and their case law), esp. to the ECHR and ICCPR, with a slight dominance of the ECHR.[33] Consequently, this type of argument was typically found in fundamental rights cases. Sometimes we only found vague references to "international treaties" without any concrete details in the reasoning, like in Dec. 38/1993 (VI.11) AB and Dec. 64/1991 (XII.17) AB. It is surprising that international law was also referred to in some cases in which it was obvious that Hungary was not bound by it, for example, the ECHR before it was ratified by Hungary, even though the judgments did not mention its lack of binding force in Dec. 23/1990 (X.31) AB. In Dec. 36/2000 (X.27) AB, however, it was explicitly mentioned that Hungary was not bound by an international instrument, but that it was still used as an aid of

[32] On one occasion we found a methodologically obviously flawed argument, when the HCC interpreted the Constitution in light of the then valid statutes (60/1994 (XII.24) AB), but we still marked it in the Table, as it was definitely a harmonising argument, and in this paper our purpose was not to critique the reasoning.

[33] An exception is the UN Convention on the Rights of the Child which is used as an aid for interpreting the Constitution in Dec. 21/1996 (V.17) AB.

interpretation. In yet another case (Dec. 20/2005 (V.26) AB), however, the HCC analysed in a very detailed manner how (and from when exactly) a Third Pillar EU instrument bound Hungary and, consequently, how it had to be used as an aid to interpret to Constitution. The use of H(int) arguments became rarer in the second half of the period (whereas before 1998 more than half of the judgments contained such arguments, after that only 25% of judgments did so). The reason might have been twofold: (1) On the one hand, this might have been caused by the change in the personnel of the HCC (see later activism vs. text-positivism). (2) On the other hand, frequent references to international law in the beginning phase could be explained by the lack of the own case-law of the HCC. Thus, with time, references to international law could be substituted with references to precedents.

Precedents (former own cases)

This was the most widely used method (38 out of 40). Only the first two cases did not contain references to former own cases, most likely because there were no cases to be quoted at all. Mostly, precedents were mentioned as individual cases (to be followed, or to be distinguished which means a negative use of interpretation), but in a rhetorically stronger version, the HCC sometimes talked about the "permanent and coherent case law of the Constitutional Court" and mentioned a long list of cases in brackets (even though on one occasion they simply stated that there was a "permanent and coherent case law" on a certain legal issue, but no actual case was mentioned at all, see Dec. 17/1994 (III.29) AB).

Doctrinal analysis of legal concepts or principles

In 22 out of the 40 judgments we found such arguments. This type of argument mainly seemed to appear when the HCC was trying to avoid giving any explanation: 'the legal concept means this or that', just as a stipulation without any explanation, the style of mentioning such arguments was axiomatic (not showing any doubts). We could not help but sometimes ask ourselves in an astonished manner: 'where did you get this from?'.

According to their exact topic, these arguments can be categorised into three groups: (1) abstract-general legal axioms about the whole legal order, (2) constitutional concepts, (4) criminal law concepts.

Ad 1. Examples of the abstract-general legal axioms concern the whole of the legal order. In Dec. 4/1993 (II.12) AB we find: "It is a principle which is accepted in different legal branches: legal declarations ought to be qualified or evaluated not according to their labelling, but according to their content". Even more general is Dec. 38/1993 (VI.11) AB when it states that "the unity of legal order requires [not having contradictions within the legal order]".

Ad 2. General constitutional concepts (democracy, the rule of law, sovereignty, constitution) are especially suited for this doctrinal type of argument, as lawyers have a general idea about them, objective teleological arguments would too easily lead to ideological quarrels, and harmonising arguments are also difficult to use for these concepts as normally these (explicitly not defined concepts) are used as an aid to interpret the concrete provisions (and not the other way around). Examples include *inter alia* Dec. 11/1992 (III.5) AB when stating that "legal certainty is a fundamental element of the rule of law", Dec. 52/1997 (X.14) AB when stating that "it follows from the [principle of] rule of law that the constitutional organs have to co-operate" or Dec. 52/1997 (X.14) AB when stating that "it is a necessary conceptual element of direct democracy that the institution which is designed to implement it [i.e., the referendum - A.J.] is under the influence of the affected, i.e. the citizen (or a certain number thereof)." And finally, a deferential doctrinal argument from Dec. 46/1994 (X.21) AB: "The Constitutional Court cannot review and annul any provision of the Constitution. If a provision has become part of the Constitution by the votes of two thirds of MPs, then it is conceptually impossible to establish unconstitutionality."

In some cases less abstract constitutional concepts received quite detailed definitions without the origins of those definitions being clarified. In Dec. 27/1998 (VI.16) AB the HCC stated that "The free mandate is the basis of the status of MPs. Free mandate means that the elected MP becomes independent [....]". The explanation of the concept was then continued over six lines. In Dec. 24/2000 (VII.6) AB yet another doctrinal thesis without any reference to its origin: "An unjustified delay qualifies as a breach of the duty to decide within reasonable time." And finally, a conceptual-doctrinal explanation from the area of fundamental rights: "exercising the right of self-determination 'in the name of someone' is [...] conceptually excluded" (Dec. 36/2000 (X.27) AB).

Ad 3. Some general ideas or concepts of criminal law were also used without their sources being explained. E.g. in Dec. 11/1992 (III.5) AB: "the state power to punish has to remain within the same limits at the time of the judgment,

as what it was at the time of perpetration" or in Dec. 39/1997 (VII.1) AB: "The petitioner misunderstands the presumption of innocence. It is namely a procedural principle, and it is not an obstacle for disciplinary bodies of different instances to establish the statutory disciplinary punishments -- even before the final judicial decision."

Linguistic-logical formulae based on silence

We only found a few arguments belonging to this category and they had the form of *argumentum a contrario.* One type was when a the lack of a single word was the argument, like in the dissenting opinion in Dec. 4/1997 (I.22) AB which showed how a different text would justify the competence of the HCC: "If Art. 32/A contained the word 'all' [then the HCC would have the competence to review the acts implementing international treaties]." Another type was when the lack of a rule was the argument, like in Dec. 3/2004 (II.17) AB, in which the lack of subordination rules meant a certain legal status of independence: "The Constitution does not contain any provision about the subordination of the Prosecution Service to the Parliament or any other organ (e.g. Government or minister of justice). [...] Therefore, according to the current rules, the Prosecutor General is not subordinated to any other organ."

Teleological/purposive arguments referring to the purpose of the text

Objective teleological arguments were very common (32 out of the 40 judgments). They appeared (1) in different structures, (2) in different degrees of abstraction and (3) in different topics.

Ad 1. The most usual structure was when the argument explicitly stated the purpose behind the rule or the institution in general, and then followed the right interpretation accordingly. E.g. in Dec. 8/1992 (I.30) AB when stating that "this rule serves the continuous functioning of the state organisation" or in Dec. 36/1992 (VI.10) AB when stating that "the point [of this rule] is that none of the participants can decide on his or her own, thus he or she has to form a consensus with the others." In other judgments, however, the establishment of the purpose was not a separate step and was just be implied, like in Dec. 46/1994 (X.21) AB when stating that "the capacity of the army to function requires that, during their service, members of the armed forces do not participate in organisations which oppose the statutory task of the armed forces." Here, the "capacity of the army to function" was used in the reasoning without having before been established.

Sometimes the purpose was used in a positive way, i.e. stating the purpose and then concluding from it to the corresponding interpretation. E.g. in Dec. 64/1993 (XII.22) AB: "the establishment of the status of local authorities as property owners was a conscious decision, it was a consequence of the decision of the constitution-maker to establish a liberal democratic political system which is based on a multiparty system." Other times, however, it was used in a negative way, i.e. it was shown that a certain interpretation would contradict the purpose of the rule and therefore could not be selected. E.g. in Dec. 62/2003 (XII.15) AB "[this interpretation] would contravene the purpose and function of the competences of the President of the Republic, and also the system of division of powers which is based on balances and mutual control." or in Dec. 36/1992 (VI.10) "the enlargement of powers [of the President of Republic] cannot [result in] exercising political power without [political] responsibility".

This negative use could even have the form of *argumentum ad absurdum*, when not just the interpretation, but also the consequences of a certain interpretation were shown and then the interpretation was rejected because these consequences contradicted the purpose of the norm: "the deprivation of fundamental rights on the basis that these rights could be abused is as constitutionally unacceptable as imprisoning the majority of the population with the justification that the growth of criminality has to be stopped." (Dec. 35/1994 (VI.24) AB). Or in rhetorically less strong versions, but still having the structure of *argumentum ad absurdum*: "it will lead to draining the competence of the President of the Republic in Art. 26(2) Constitution, if there are no procedural rules guaranteeing the possibility of a discussion on the merits [of the bill which was rejected by the President of the Republic]" (Dec. 62/2003 (XII.15) AB).

Ad 2. Sometimes a very general purpose was established, like the "democratic functioning of the state organisation" in Dec. 47/2007 (VII.3) AB, in Dec. 36/1992 (VI.10) AB or in Dec. 48/1991 (IX.26) AB; the end of power concentration in Dec. 62/2003 (XII.15) AB ("The regime which was set up in 1989 ended the party-state-like concentration of power..."). The whole of these general purposes was called in Dec. 47/2007 (VII.3) AB the constitutional value system: "constitutional value system is the sum of values which appear or which can be deduced from the Constitution". And an example of a fully fledged explicit argument in this style: "[the constitutional

amendment] elevated the most important provisions on referenda to that of constitutional rank in order to express that the direct exercise of power by the people is of paramount importance" (Dec. 52/1997 (X.14) AB).

Other times, the established (or implied) purpose was less abstract, like in Dec. 24/2000 (VII.6) AB: "The smooth local governance requires...." or in Dec. 47/2007 (VII.3) AB "the scope of autonomous decisions by the President of the Republic is very narrow, exactly in order to protect the constitutional institution of the President of the Republic".

Ad 3. The topics in which objective teleological arguments were used, were manifold. It could be state organisation, where the purpose of certain organs or institutions was established and then used in order to interpret a constitutional provision. The HCC was especially keen to speculate about its own purpose and function as the "guardian of the Constitution" in order to enlarge its own competences (Dec. 4/1997 (I.22) AB, Dec. 36/1992 (VI.10) AB, Dec. 42/2005 (XI.14) AB). In other judgments, the HCC used the insight that the purpose of qualified majority (organic) laws is to ensure political consensus (Dec. 4/1993 (II.12) AB, Dec. 1/1999 (II.24) AB). Or a fully fledged explicit objective teleological argument about the function of local governments: "The citizens elect the local council for the exercise of local autonomy, and therefore the competences of the local authorities lie with the local council." (Dec. 24/2000 (VII.6) AB).

But objective teleological arguments were also used for the interpretation of fundamental rights provisions. Democracy as such was mentioned as the purpose of freedom of expression in Dec. 36/1994 (VI.24) AB, the autonomy protection as the function of private property in Dec. 64/1993 (XII.22) AB and in Dec. 43/1995 (VI.30) AB.

We found some arguments which were at the borderline of objective teleological and subjective teleological arguments: they mentioned the "intention of the constitution maker", but if this intention was so abstract that no actual attempt was made to discover any original intent, then we counted them as objective teleological argument. E.g. in Dec. 3/2004 (II.17) AB, the judgment referred to the "intention of the constitutional maker", but only the texts of the amendments were used in order to discover it.

Teleological/purposive arguments referring to the purpose of the Constitution-maker (incl. *travaux préparatoires*)

Strangely, subjective teleological arguments appeared more frequently with the passing of time since the actual making of the constitution in 1989.[34] The lack of references in the beginning can most likely be explained by the fact that the *travaux préparatoires* did not reflect much of an understanding of constitutionalism, only very few people were reading Western legal literature and only two or three participated in the 1989 process (thus most of the debate was not led by them). The first occasion in our sample (but to our knowledge also in general) was the Dec. 4/1997 (I.22) AB, and then references became more frequent. We could not discover any plausible explanation as to why they began to be accepted in 1997.

A typical use was the reference to the ministerial explanation *(miniszteri indokolás)* of constitutional amendments. In Hungary, government bills have explanations attached to them which are written by ministerial bureaucrats in order to assist MPs when they are voting (thus the official audience of these explanations is the Parliament, and not the general public, but they are available to the general public, and judges do sometimes refer to them). We found such references in Dec. 52/1997 (X.14) AB; Dec. 4/1999 (III.31) AB; Dec. 49/2001 (XI.22) AB and Dec. 4/1999 (III.31) AB.

On one occasion, the protocols of the opposition roundtable of 1989 were quoted. This happened in 1997, even though at that time the protocols had not been published yet,[35] (however the president of the HCC had an example of the protocols at home, as he had been one of the participants of the roundtable). On another occasion the original (and later modified) drafts of the ministry of justice from 1989 were quoted in order to discover the meaning of the text of the constitution (Dec. 62/2003 (XII.15) AB).

[34] Some of the subjective teleological arguments did not refer back to 1989, but to the intention *(travaux préparatoires)* behind later constitutional amendments.

[35] They were published 2-3 years later in 8 volumes, see András Bozóki (ed.): *A rendszerváltás forgatókönyve. A kerekasztal-tárgyalások 1989-ben* (The Scenario of the Regime Change. The Roundtable Talks in 1989), Budapest, Magvető [vols 1–4], Új Mandátum [vols 5–8] 1999–2000.

Non-legal (moral, sociological, economic) arguments

Non-legal arguments appeared in very different topics, in fundamental rights, but also in state organisation issues (the balance was surprising for us, as we thought that fundamental rights suited this type of argument better). Some of these arguments were based on social sciences, like criminology (Dec. 23/1990 (X.31) AB on the use of the death penalty), administrative sciences (when defining 'control' in Dec. 48/1991 (IX.26) AB), but natural sciences also appeared (an opinion by the Hungarian Society of Psychiatrists as the decisive (!) argument in a dissenting opinion for the acceptability of a statute in 36/2000 (X.27) AB; the question of biological components of homosexuality in Dec. 21/1996 (V.17) AB).

Moral arguments appeared in two forms. Either as social morality (the moral opinion of society), like in Dec. 21/1996 (V.17) AB about the growth of moral pluralism as an argument for the acceptability of homosexuality. But at other times, rather critical morality dominated, like in the abortion case ("human life as a value", "the moral value of humans" in Dec. 64/1991 (XII.17) AB), the death penalty case (human life as the "highest value" in Dec. 23/1990 (X.31) AB), the lustration case (exposing lies is "a moral duty" according to Dec. 60/1994 (XII.24) AB). Critical morality was basically the moral intuition of the judges or sometimes authors were quoted from the history of philosophy (like Hobbes or Spinoza in Dec. 23/1990 (X.31) AB).

The most used non-legal argument was a reference to the "special historical circumstances" which justified (or which were special, but which still did not justify) a certain interpretation (Dec. 8/1992 (I.30) AB, Dec. 11/1992 (III.5) AB, Dec. 4/1993 (II.12) AB, Dec. 60/1994 (XII.24) AB, Dec. 35/1994 (VI.24) AB).

The most surprising result here was that non-legal arguments almost died out after 1996 (as opposed to subjective teleological arguments which appeared exactly at this time, without any apparent connection between the two tendencies). It seemed that in the beginning, the HCC very much preferred these arguments, but later either for legitimacy concerns or because the results were already in precedents which could be quoted more easily, the HCC did not use them any more (or hardly). We found 10 judgments with non-legal arguments, and only one of them dates after 1996.

References to scholarly works

We found one reference to an ICCPR Commentary (by Manfred Nowak) which was used to interpret international law, which was in turn used to interpret the Constitution (Dec. 55/2001 (XI.29) AB). In another case, we found a reference to the principles of a future draft constitution (the principles were adopted in 1996 by the Parliament, but the actual new constitution which was supposed to be based on these principles was never adopted) in Dec. 62/2003 (XII.15) AB, and according to the introductory study[36] we qualified this reference as a scholarly reference. Although a few other scholarly references were found to assist in the interpretation of statutes,[37] we did not count them as we focussed on constitutional reasoning.

Out of the 40 judgments, we therefore only found two judgments in which references were made to legal scholarship in order to interpret the Constitution (but we did not find any references to contemporary Hungarian constitutional scholarship). The question is of course why such references were missing, if most of the judges were actually law professors (even if most of them were not constitutional law professors, but civil law or criminal law professors). The reasons were probably manifold. On the one hand, it probably did not seem *legitimate* to rely on such works, on the other hand judges probably did not want to elevate outsiders to the same level as they were, and finally, the most relevant and usable genre, the scholarly commentary was missing in Hungary until 2009 (commentaries of the Constitution were rather just copy-pasted collections of different parts of past judgments).[38]

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[36] András Jakab, Constitutional Reasoning. A European Perspective on Judicial Reasoning in Constitutional Courts, *German Law Journal* (forthcoming), available at http://ssrn.com/abstract=1956657.

[37] E.g. in Dec. 36/2000 (X.27) AB a reference to the works of the (deceased) law professor Szladits from 60 years before the judgment (i.e., from pre-socialist times).

[38] There were numerous critical case notes in different law journals (esp. Fundamentum), but a commentary is normally more helpful than a case note when deciding cases.

References to foreign (national) law

There was a relatively strong presence of references to foreign national law (16 out of the 40 judgments). As to their function, some of them were only mentioned for reasons of contrast, but most of the time they were mentioned in order to justify the choice of interpretation. Sometimes, however, no such role could be attributed to the reference to foreign law. The most blatant example for the last type is Dec. 60/1994 (XII.24) AB which explained in a very (!) detailed manner the German legal situation on lustration without actually using it in any way in the reasoning (it rather consciously ignored the German arguments, it did not even do distinguish the Hungarian case from the German one). The function here was probably just to show that the HCC had very thoroughly considered its opinion.

As to their form, sometimes precise legal references were used, like in Dec. 35/1994 (VI.24) AB or in Dec. 23/1990 (X.31) AB which quoted US Supreme Court cases, in Dec. 4/1997 (I.22) AB quoting BVerfG decisions, in Dec. 4/1999 (III.31) AB quoting French and UK parliamentary standing rules, Dec. 62/2003 (XII.15) AB quoting Romanian, Polish and British parliamentary standing rules, Dec. 17/1994 (III.29) AB referring to the Swedish rules on the competence of ombudsman.

At other times, however, we only found very vague phrases without concrete references, like "in most European legal orders" in Dec. 21/1996 (V.17) AB, "based on many judgments of foreign constitutional courts" or "in modern constitutions and case laws of constitutional courts" in Dec. 64/1991 (XII.17) AB, "[the HCC] conducted a comparative research of the constitutions of constitutional democracies" in Dec. 11/1992 (III.5) AB , "as generally practised in the constitutional courts of the world" in Dec. 4/1997 (I.22) AB, "constitutions of democratic states" in Dec. 38/1993 (VI.11) AB or the "trend in the laws of European democratic countries" in 36/1994 (VI.24) AB.

Yet other times just a quote in a foreign language was mentioned without its origin being explained, like Dec. 8/1992 (I.30) AB referring to the "clear and present danger" test.

On the basis of the explicit references, no clear geographic orientation could be discovered, but if we have a look at the general phrases, then "modern constitutions" or "general trends of Western democracies" basically almost always meant Germany (even if the German solution was actually unique, it was presented as "the" Western constitutional solution).[39] This was accordingly criticised in the literature.[40]

Other methods/arguments

References to Hungarian legal history were made relatively often (Dec. 48/1991 (IX.26) AB; Dec. 4/1999 (III.31) AB; Dec. 62/2003 (XII.15) AB; Dec. 3/2004 (II.17) AB; Dec. 20/2005 (V.26) AB; Dec. 42/2005 (XI.14) AB). The function in the reasoning was very similar to references to foreign national law: the court showed that its decision was well considered (well researched).

A methodologically flawed, but nevertheless used argument was when the HCC inferred from the *fact* of a certain political practice (official honour awarding practice) that it was constitutionally *allowed* to continue this practice (Dec. 47/2007 (VII.3) AB). Finally, another argument (if we can qualify it as an argument at all) which is difficult to qualify was used in Dec. 21/1996 (V.17) AB which stated that there is no rule for such cases, but that the HCC could decide on a case-by-case basis.

Combined arguments

[39] On German constitutional influence in general see László Sólyom, Aufbau und dogmatische Fundierung der ungarischen Verfassungsgerichtsbarkeit, *Osteuropa-Recht* 2000. 230-241; Georg Brunner – Herbert Küpper, Der Einfluß des deutschen Rechts auf die Transformation des ungarischen Rechts nach der Wende durch Humboldt-Stipendiaten. Das Beispiel Verfassungsgericht, in: Holger Fischer (ed.), *Wissenschaftsbeziehungen und ihr Beitrag zur Modernisierung. Das deutsch-ungarische Beispiel*, München, Oldenburg 2005, 421–449. The influence can be explained partly by a traditional (centuries old) intellectual orientation amongst Hungarian lawyers, partly by the similar constitutional situation (i.e. a post-dictatorial constitutional court) and partly by the generosity of German scholarship funds for visiting fellowships in Germany (DAAD, MPG and Humboldt Scholarships).

[40] Catherine Dupré, *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity*, Hart, 2003, 171; Pokol Béla, Aktivista alapjogász vagy parlamenti törvénybarát? A magyar alkotmánybíráskodásról, *Társadalmi Szemle* 1992/5. 67–78.

Sometimes, different types of arguments were interwoven. This occurred when the *telos* for the objective teleological argument was established by another argument, e.g. in Dec. 25/1999 (VII.7) AB when it is stated that "based on the comparative overview of constitution making processes [...] the function of referendum is almost exclusively the acceptance or the rejection of the adopted text of the constitution".

But the most frequent combined argument type was the use of proportionality tests in fundamental rights cases, which we qualified a doctrinal argument (the test itself is a doctrinal figure) and a teleological argument (the application of proportionality necessarily implies teleological considerations).[41] Such arguments were found in e.g. Dec. 21/1996 (V.17) AB, Dec. 11/1992 (III.5) AB and Dec. 60/1994 (XII.24) AB.

Results

The Constitution did not contain any explicit reference to its own interpretation. As an indirect reference, Art. 7(1) mentioned that "The legal system of the Republic of Hungary accepts the generally recognised rules of international law, and shall harmonise the country's domestic law with the obligations assumed under international law." and *inter alia* one of our analysed judgments, Dec. 4/1997 (I.22) AB considered it an obligation to interpret domestic law (incl. the Constitution) in conformity with international law.

Another indirect reference was Art. 8(2) stating that "[i]n the Republic of Hungary rules pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the core contents [*Wesensgehalt* – A.J.] of fundamental rights." This provision was seen as an obligation to interpret fundamental rights provisions in its light.

The methods of interpretation were thus basically freely chosen by the HCC (without a clear algorithm about in which situations or for which topics which arguments should be chosen), the most important ones being the references to precedents (38 out of 40), the objective teleological arguments (32 out of 40) and the harmonising (32 out of 40) arguments. Other, often used arguments were the doctrinal-conceptual ones (22 out of 40), the comparative law arguments (16 out of 40) and the references to international law (17 out of 40). All of the other types of arguments appeared in 10 or less out of 40 (incl. non-legal, literal-textual and subjective teleological arguments). Some of the arguments were basically non-existent (in only 1 or 2 judgments), such as references to scholarly works, arguments based on silence, analogies, establishing/debating the text of the Constitution, and arguments about the applicability of the Constitution.

The Weight of the Arguments

The weight of the arguments was entirely unclear, there were no explicit rules or generally accepted doctrines about this. It appears that judges only referred to methods which favoured their preferred outcome, thus they never really measured the weights of the arguments against each other. Even when referring to foreign (national) law or to Hungarian legal history, it often remained unclear whether they were mentioned as decisive arguments, or whether only as auxiliary (secondary) arguments in order to make the decision more plausible and to place rhetorically more emphasis on the reasoning.

We could only make one observation: The permanent case law *(jurisprudence constante)* was stronger than just one decision (otherwise it would be unnecessary to quote many cases, but they did often quote a series of cases).

Judicial Candour and Judicial Rhetoric

There were quite a few non-legal arguments, and some of them were explicitly moral references. The value judgments were consequently relatively transparent.[42] We could not discover any significant correlation between the length of the opinions and the use of non-legal (incl. moral) arguments.

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[41] For the details of such qualifications see András Jakab, Re-Defining Principles as 'Important Rules'. A Critique of Robert Alexy, in: Martin Borowski (ed.), *On the Nature of Legal Principles* [ARSP Beiheft 119], Stuttgart, Steiner 2009, 145-159. Available also at http://ssrn.com/abstract=1918421.

[42] It was admitted even in interviews, see A nehéz eseteknél a bíró erkölcsi felfogása jut szerephez [In hard cases the moral opinion will play a role. Interview with László Sólyom, the President of the HCC] *Fundamentum* 1997/1. 31–44.

Majority opinions normally dealt with most of the arguments of the petitions (or at least those which were quoted at the beginning of the judgment). Opinions of legal scholars were, however, not dealt with explicitly (see above the very few references to scholarly works), even though on the basis of the reasoning they were likely to be well known to the judges of the HCC (or at least to their clerks).

The language was quite technical and also at the same time very abstract (scholarly professorial style). Some of the passages were even difficult for lawyers to understand if they were not specialised in constitutional law.

The target audience of the reasoning of the judgments was twofold. The primary audience was politicians (sitting in the legislature or in the government), but at the same time, because of the professorial style, judgments not only wanted to communicate the actual content but they also wanted to communicate the intellectual superiority of the judges over the politicians. The other (secondary) audience seemed to be the HCC itself: in a very detailed manner, concepts were explained with the likely purpose of making it clear to all judges (and their clerks) how cases should be decided in the future (building a *Verfassungsdogmatik*). Doctrinal explanations often went well beyond the actual case.

Ordinary judges were not part of the target audience, as there was no constitutional complaint against judicial decisions (thus judges were not forced to apply the decisions of the HCC; they just had the option of doing so by suspending procedures and initiating a concrete review, but neither the HCC nor the ordinary courts perceived it as an essential channel of communication). The academia was not an intended audience either, even though they were definitely aware of the different critical voices in the literature. Also foreign courts were not perceived as audience: the HCC did not consider itself important enough to be listened to abroad.

Length, dissenting and concurring opinions

As a trend, the length of the opinions grew during the period, which can probably be explained by the growing number of precedents (and the more and more sophisticated *Verfassungsdogmatik* based on these precedents) to which they had to react. The length did not show any strong correlation with the topic (only a weak one: fundamental rights judgments tended to be slightly shorter). It appears that judgments became longer when a new intake of judges arrived at the court (beginning of the period and then after 1998 when the 9 years mandate of the first judges expired). This may have been because the old judges wanted to teach their new fellows, or because the new judges felt the need to explain their positions to their fellow judges.

It was possible to submit dissenting or concurring opinions, and in the majority of the cases (25 out of 40) there were dissenting or concurring opinions. We could not discover any specific factor though which could explain when and why dissenting or concurring opinions were submitted. The fact that there were no dissenting or concurring opinions does not mean, though, that these judgments were generally accepted later: the judgments on transitional justice (Dec. 11/1992 (III.5) AB) and Dec. 30/1992 (V.26) AB)) were some of the most criticised judgments of the HCC in the literature,[43] even though no separate opinions were submitted to them.

Framing of Constitutional Issues

Because of the possibility of *actio popularis*, petitioners were not forced to conceptualise their cases as fundamental rights issues. Thus very general constitutional principles (esp. ‘the rule of law’ and ‘democracy’) could play a relatively big role in all types of cases. This seemed constant throughout the whole period.

Key Concepts

The most popular arguments used by the HCC in its 40 most important judgments were references to ‘the rule of law’ (29 out of 40), ‘democracy’ (27 out of 40) and ‘proportionality’ (21 out of 40). The next group of relatively popular arguments mentioned *Wesensgehalt* (14 out of 40), privacy (12 out of 40), equality (12 out of 40), human dignity (11 out

[43] E.g. Tamás Győrfi e.a., 2. § [Alkotmányos alapelvek, ellenállási jog] (Basic Constitutional Principles; Right of Resistance), in: András Jakab (ed.), *Az Alkotmány kommentárja* (Commentary on the [Hungarian] Constitution), Budapest, Századvég 2nd ed. 2009, marginal numbers 130–139 with further references.

of 40), the parliamentary form of government (11 out of 40). The third (not-so-popular) group included freedom of expression (7 out of 40), autonomy of local governments (6 out of 40), references to 'nation' (6 out of 40) the separation of church and state (4 out of 40). Some arguments were basically non-existent, such as references to independence (or sovereignty, 2 out of 40) or to the republican form of state (1 out of 40). Only one more substantive argument arose frequently, the right to life, which was mentioned in 5 out of 40 judgments (Dec. 23/1990 (X.31) AB, Dec. 64/1991 (XII.17) AB, Dec. 46/1994 (X.21) AB, Dec. 36/2000 (X.27) AB, Dec. 47/2007 (VII.3) AB, and in many more uncounted cases in which only Art. 54 of the Constitution was quoted, but not because it contained the right to life, but because it also contained the right to human dignity). The rest of the arguments (*nullum crimen,* personal freedom etc) were rather unique, thus we did not count them.

We only counted the cases in which the argument was actually used, not just mentioned. E.g. the HCC often quoted Art. 2(1) of the Constitution which referred to "a democratic state based on the rule of law" also when it just wanted to use "the rule of law" in the reasoning: in such cases the mentioning of "democratic" was not counted. But we did also count those cases in which eventually, after an explanation or analysis of the concept, the HCC decided that a certain key concept did *not* contribute to the solution of the case.

'The rule of law' was used in the sample in the formal senses of legal certainty (esp. clarity of legal rules) and primacy of the constitution, but also in the material sense of separation of powers. The rule of law did include in the Hungarian constitutional understanding the protection of fundamental rights (esp. access to justice, *nullum crimen*), but in this sample it was only used rarely in that sense (rather the actual fundamental rights were mentioned). One of the judgments explicitly rejected the idea that the rule of law would be based on (moral) justice (Dec. 11/1992 (III.5) AB: "The rule of law based on formal principles is to be preferred against justice which is always partial and subjective.")

'Democracy' included the social preconditions of democracy (pluralism of ideas, open public debates, see the cases where freedom of expression was also mentioned) and it did also included local democracy. In the Hungarian conceptualisation, only the national level had sovereignty (sub-state entities did not). The concept of nation in Hungarian legal terminology was not unified, sometimes it was ethnic, and sometimes it was civic.[44] In the sample, most of the arguments referred to the President of the Republic as a symbol of the "unity of the nation", where the nation was meant in the civic sense.[45]

Both *Wesensgehalt* and proportionality were often mentioned but, if used as fundamental rights tests, they basically merged: "the necessary and unavoidable nature [of the measure] could not be proven, thus it breaches the essential core [*Wesensgehalt* – A.J.] of the fundamental right" (Dec. 46/1994 (X.21) AB).[46]

Human dignity had two peculiarities (both developed in Dec. 23/1990 (X.31) AB).[47] On the one hand, it was stated that it cannot be separated from the right to life, as the two fundamental rights form a unity of illimitable rights. On the other hand, human dignity was said to have an "equality function", i.e. one of the consequences of human dignity is non-discrimination.

By procedural fundamental rights, presumption of innocence, access to justice and the usual rights of Art. 6 ECHR are meant. And finally, what we counted as "fed" arguments in the Table were arguments referring to the 'autonomy of local governments' (Hungary is a unitary state).

From the above mentioned constitutional concepts, the following were *explicitly* mentioned in the text of the Constitution (the Hungarian Constitution was one-layered, thus there were no *Ewigkeitsklausel* or alike): 'the rule of law' (also 'primacy of the constitution'), 'democracy' (also 'sovereignty of the people'), 'republic', 'separation of state and church', 'nation', 'autonomy of local governments', '*Wesensgehalt'*, 'human dignity', 'equality', 'non-discrimination', 'access to justice', 'fair trial', 'presumption of innocence', 'freedom of expression'.

Concepts which were created by *Verfassungsdogmatik* (i.e. not mentioned in the text of the Constitution) were, however, the following: 'legal certainty', 'separation of powers', 'parliamentary democracy', 'proportionality',

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[44] Helge Hornburg, The Concept of Nation in the Hungarian Legal Order, in: András Jakab – Péter Takács – Allan F Tatham, *The Transformation of the Hungarian Legal Order 1985-2005,* The Hague e.a., Kluwer Law International 2007, 507.

[45] Virág Kovács, 29. § [A köztársasági elnök általános funkciója] (Art. 29 – The General Function of the President of the Republic), in: András Jakab (ed.), *Az Alkotmány kommentárja* (Commentary on the [Hungarian] Constitution), Budapest, Századvég 2nd ed. 2009, para 16.

[46] For more details on the doctrine of fundamental rights tests in Hungary see Jakab – Sonnevend (n. 2) 86-88.

[47] For details see Catherine Dupré, *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity,* Hart Publishing, Oxford 2003.

'procedural fundamental rights' (in general, particular rights were explicitly mentioned), 'privacy' (in general, partial rights were explicitly mentioned).

All these concepts, if used, were used with normative force (either in order to interpret other provisions or to be applied on their own), not just as a rhetorical device. The only clear tendency we could discover was that the use of 'human dignity' became rarer when the mandate of the first judges ended in 1998. Until that point, human dignity was also used in cases in which it was not entirely necessary, e.g. when another (more specific) fundamental right could have also been applied instead of human dignity. The new judges seem to have preferred explicit concrete fundamental rights instead.

C. Comparative Analysis

Authors should write this part after having read the first drafts of the other country reports.

1. Can you see any major differences in the applied key concepts, typical arguments etc. as compared to the other countries as seen in the country reports? How can this be explained?
2. Please also consider: (1) the possible correlation between procedural aspects of constitutional review and the style of reasoning, (2) differences in political theory in the countries (relative roles of courts and legislature), (3) differences in legal culture, including legal theory, (4) differences in personnel (including training and background) for explaining the differences in constitutional reasoning.
3. Hypotheses to be tested: (1) 'Without a full posterior constitutional review and a great amount of cases, the conceptual sophistication in constitutional law (*Verfassungsdogmatik*) remains underdeveloped' (2) 'The bigger and/or economically stronger the country, the more likely foreign law is to be rejection of the use of foreign law' (3) 'The older the Constitution is and the more difficult it is to amend it, the more likely the judges are to use purposive arguments instead of literal arguments' (4) 'The more academics are sitting in a court, the longer and more detailed the judgments / the more abstract the judgments / the more references to academic literature'
4. As a conclusion, list a handful of important general unwritten premises (implied presuppositions) that you think a foreign lawyer needs to know in order to understand a judgment of your constitutional court. E.g. 'the Constitution says something about every single legal case', 'constitutional law should only be considered, if it is an important political issue'.

D. Evaluation, Pathology and Criticism

Reasoning

The biggest problems with the reasoning seemed to be the following:[48]

1. Some of the doctrinal figures appeared in the reasoning out of the blue. In the beginning phase, of course, there were no precedents to refer to. But references to (even foreign) legal scholarship or to foreign and international case-law would probably have been better than nothing. If such references were not possible, then it should have been made clear that the doctrinal figure was an invention of the HCC (e.g. the 'unity of life and human dignity'), and the reasons for this should have been explained.
2. The references to legal scholarship were very meagre. It is a waste of dialogue/resources and a sign of arrogance not to react to contemporary domestic constitutional scholarship, but to quote foreign authors and to quote non-legal authors.
3. The weight of the arguments remained unclear. But this is most likely a usual feature of most constitutional courts.
4. When referring to foreign law or to legal history, the HCC should have made it clear that these were not binding, but were being used only as an inventory of ideas (or in order to establish the *telos* of a certain institution).

Megjegyzés [sz9]: I have not written this part yet, as there are no other country reports yet. Some probable future elements of this part are below on the margin.

Megjegyzés [sz10]: All hypotheses seem to be plausible on the basis of this study (but no certain statement can be made without knowing the other studies), except for this very last one: The HCC was packed with academics, but we hardly found any references to scholarly works.

Megjegyzés [sz11]: Probably: 1. The audience is politicians and the HCC itself (but not ordinary judges). 2. Rule of law does not include any element of justice. 3. Human dignity is connected to the right to life and it also justifies equality. 4. *Actio popularis* led to a conceptualisation where fundamental rights are less emphasised and general principles (the rule of law, democracy) are more emphasised. 5. In the majority of the cases you either find references to international law or to foreign national laws (non-sovereigntist style of reasoning, references to sovereignty in the sense of independence are missing). 6. Hungary had just transitioned from socialism to the rule of law, democracy and market economy; it inherited nominally the former socialist constitution of 1949, but most of its content was changed in 1989.

[48] For more details on critical points 3-6, see Zoltán Szente, The interpretive practice of the Hungarian Constitutional Court – A critical view, *German Law Journal* [forthcoming]. Szente explains some of the argumentative mistakes with the party-political bias of the judges.

5. The usual objections against the use of comparative law could be brought also against the HCC: it remained unclear when and from which countries (why from those countries) the arguments came.[49] Sometimes contradicting conceptual elements were imported from different countries.[50]
6. Sometimes, it remained unclear how one step followed from the previous one in an argumentation. Arguments were sometimes just mentioned, but not integrated in the whole of the reasoning of the judgment.
7. And finally, a very technical issue: The HCC mostly referred to its own judgments via page numbers of its official yearbook (available on its website, but the early versions are in picture-format and consequently not electronically searchable). In the era of the internet, however, either the paragraphs of the judgments should have been numbered (like the ECJ does it), or clear numbered headings with texts should have been used. In this way, both search and referencing would have been easier. Luckily, since the 1 January 2012, new judgments (when published in the gazette of the HCC, *Az Alkotmánybíróság határozatai*) have numbered paragraphs, thus referring to them has become much easier.

As to positive features, the following could be mentioned:
1. The pervasive use of the objective teleological method. According to the view of the present author, this method is the key of legal interpretation in general, and also of constitutional interpretation.[51] Objective teleological argumentation avoids the dangers of formalism without descending into a fully fledged moral or political argumentation that might be perceived as inappropriate for a court of law.
2. The wide use of foreign law and international law is a good method (esp. in a small country) for avoiding the detachment of domestic discourse from international developments.
3. Repeating the petitions at the beginning of the judgments makes the use of arguments more transparent.

The HCC in General

The HCC as an institution had positive effects on Hungarian political and legal culture. On the one hand, the institution of separate opinions contributed to leaving behind the socialist (Montesquieuean) view of judges, by showing that different interpretations are possible, it became more obvious that *reasons* had to be given for one interpretation being chosen over the others. On the other hand, it also made it clear that there are limits on politicians, they cannot do everything even if they are in government. This is a very important insight which is not at all obvious in a society after the end of a dictatorship. And finally, the HCC contributed to connecting Hungarian constitutional culture to Western values of constitutionalism.

The doctrinally unexplained decisions (see above) and the fact that these decisions sometimes were made against both public opinion and moral common sense (esp. judgments on transitional justice) contributed to the legitimacy of criticising even the existence of the HCC openly.[52] Smarter compromises (or even agenda setting) could have further strengthened its institutional standing and the ideas of constitutionalism in Hungarian society and public discourse.

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[49] Zoltán Szente, Unsystematic and incoherent borrowing of law. The use of foreign judicial precedents in the jurisprudence of Hungarian Constitutional Court, 1999-2010, in: Tanja Groppi – Marie-Claire Ponthoreau (ed), *Constitutional Cross-fertilization. The Use of Foreign Precedents by Constitutional Judges* (2013) [forthcoming].
[50] E.g. mixing the German doctrine of human dignity (conceptually *absolute*, Kantian or Christian origins) with Dworkin (a concept based on comparison with others: "*same* concern and respect"). See Dec. 23/1990 (X.31) AB. Similarly also László Sólyom, The Hungarian Constitutional Court and Social Change, *Yale Law Journal*, 1994, 222-237, esp. 229. The combination of the absolute *Unantastbarkeit* and the comparative "same concern and respect" was never explained and reflected upon.
[51] András Jakab, What makes a good lawyer?, *Zeitschrift für öffentliches Recht* 2/2007. 275-287, also available at http://ssrn.com/abstract=1918420.
[52] Most questions of transitional justice have nevertheless been solved in the meantime, except for the one of the former Hungarian *Stasi*-agents. This one, however, is unlikely to be solved in the near future (as opposed to most other post-communist EU member countries), as the biggest political parties are all sabotaging any attempt to reveal the list of former *Stasi*-agents. See http://www.komment.hu/tartalom/20120305-velemeny-ungvary-krisztian-ugynokaktak-nyilvanossaga-a-magyar-politika-csodje.html.