DECISION 4 OF 1997: 22 FEBRUARY 1997

ON THE REVIEW OF INTERNATIONAL TREATIES

The petitioner sought *ex post facto* review of certain provisions of Act XXXII of 1989 on the Constitutional Court which, in part, allegedly prevented constitutional consideration of the EC-Hungary Europe Agreement.

The Act provides, *inter alia*, by (i) s. 1(a) that the Court has jurisdiction to conduct a preliminary examination of the constitutionality of international treaties; (ii) s. 21, the Parliament, a standing committee thereof or 50 MPs, or the President of the Republic, or the Government has standing to bring s. 1(a) proceedings; (iii) s. 35(1) the President may request the review of an unpromulgated statute; and (iv) s. 36(1) the Parliament, the President or the Government may seek review of a treaty prior to ratification.

The petitioner submitted, *inter alia*, that (a) as citizens were not permitted preliminary review of a treaty before ratification under s. 21, the effective denial of an *ex post facto* review through an *actio popularis* was contrary to the principles of the sovereignty of the people and of a constitutional state under Art. 2 of the Constitution; (b) this principle was likewise infringed since the Court could not review a treaty *ex officio*: the restriction of fundamental rights by international treaties could therefore occur, taking them beyond the control of citizens and the Court. Thus an obligation assumed under a treaty might create the possibility for a concealed amendment of the Constitution; (c) since by Art. 7(1) the Constitution stood above the provision of an international treaty promulgated by a national legal rule, it was within the Court's remit to review this domestic regulation; and (d) the restriction, limiting the right to initiate proceedings before the Court to certain political actors, was in breach of Art. 8.

Held, rejecting the petition:

(1) Restricting the exercise of the right to initiate preliminary review of constitutionality to the persons entitled in s. 21(1) of the Act was constitutional. According to Art. 32/A(1), the Court had a compulsory jurisdiction only for constitutional examination of legal provisions which concept did not include pre-ratification (thus unpromulgated) treaties. Indeed the Constitution had given the legislator discretion both to define the circle of persons entitled to initiate such proceedings and to decide upon ensuring the existence of preliminary constitutional review. The right to commence proceedings before the Court was a basic constitutional right under Art. 32/A which did not include preliminary review. Further it could not be derived from the principles of the sovereignty of the people or a constitutional state that this realisation would be the precondition (concerning preliminary review of treaties) of guaranteeing for every citizen the right to commence proceedings before the Court. Further the obligation for an *ex officio* procedure did not derive from Arts. 2, 7 or 32/A and it was therefore possible for the Court to proceed *ex officio* against a treaty (page 000, line 00 - page 000, line 00).

(2) According to s. 1(b) of the Act, the Court had jurisdiction to review the constitutionality of a law promulgating an international treaty which included examination of such treaty. The Court derived only one function from the Constitution, *viz. ex post facto* review which was mandatory and, from the historical perspective of its drafting (and that of the Act), universal. The decisions of the Court in which it interpreted its own jurisdiction were binding on everyone as with any other decision, including one made on the basis of the competence achieved by that interpretation. Moreover by examining the constitutionality of international treaties, its constitutional task remained within the limits of *ex post facto* review: thus the examination of the

harmony between the treaty and the Constitution did not interfere with the functions and jurisdiction of the other branches of power (page 000, line 00 - page 000, line 00).

(3) The constitutional requirement for the examination of the constitutionality of international treaties derived from Arts. 7(1) and 32/A. There was no constitutional basis to deal with a law promulgating a treaty differently from any other legal rule when it came to constitutional review. Since it was derived from the Constitution that *ex post facto* review was to cover all kinds of legal rule, this universality could not be restricted even by statute. In this way the examination of international treaties, after they became part of domestic law, fitted into the logic of constitutional review. In those countries where this review process was universal and no specific reference was made to review of international treaties, constitutitonal courts reviewed the latter on the same basis as domestic law (page 000, line 00 - page 000, line 00).

(4) As a result of the foregoing, were the Court to hold an international treaty or provision thereof unconstitutional, it would declare the unconstitutionality of the domestic law promulgating the treaty. Such decision would, however, have no effect on the obligation assumed by the State under international law. Following upon such decision the legislator would be required to harmonise the internal legal norms with Hungary’s international obligations either by notifying the unconstitutional part of the treaty or by the modification thereof or by constitutional amendment (page 000, line 00 - page 000, line 00).

IN THE NAME OF THE REPUBLIC OF HUNGARY!

On the basis of the petition seeking an *ex post facto* review of the unconstitutionality of a legal rule, the Constitutional Court, with the dissenting opinion of Constitutional Court Justice Imre Vörös, has delivered the following

DECISION.

1. The Constitutional Court declares that according to s. 1(b) of Act XXXII of 1989 on the Constitutional Court, the Constitutional Court shall examine the constitutionality of the law promulgating an international treaty.

2. The constitutional review shall cover the examination of unconstitutionality of the international treaty promulgated by law.

3. If the Constitutional Court holds that the international treaty or any provision of it is unconstitutional, it declares the unconstitutionality of the law promulgating the international treaty.

4. The decision of the Constitutional Court in which the Court declares unconstitutional the whole international treaty or any provision thereof has no effect on the obligations assumed by the Republic of Hungary under international law.

5. As a result of the Constitutional Court's decision the legislation should - if it is necessary by amendment of the Constitution - harmonise the internal laws and statutes of the country with the obligations assumed under international law. Hitherto [Until then/By reason thereof] the Constitutional Court shall suspend its proceedings concerning the determination of the date of nullification of the unconstitutional legal rule for a reasonable time.

6. The Constitutional Court rejects the petition to establish the unconstitutional character of ss. 1 (a), 21(1) and 35-36 of Act XXXII of 1989 on the Constitutional Court.

7. The Constitutional Court rejects the petition to amend the part in the Act on the Constitutional Court dealing with the jurisdiction of the Constitutional Court.

The Constitutional Court will publish this decision in the *Hungarian Official Gazette*.

REASONING

I.

1. According to the petitioner, those provisions of Act XXXII of 1989 on the Constitutional Court (hereinafter „the Act") are unconstitutional according to which the jurisdiction of the Court includes the preliminary examination of the constitutionality of international treaties alone and does not make it possible for citizens to exercise their rights deriving from the Constitution concerning the provisions of international treaties within the framework of an *ex post facto* review. It is also unconstitutional, that the Constitutional Court is not entitled to proceed ex officio in case of such kind of *ex post facto* review. According to the petition, the Constitutional Court should have the competence of *ex post facto* review of the law promulgating an international treaty, especially concerning the question of whether the contracting party had the constitutional authorisation to conclude the treaty with the content in question.

According to the petitioner, this inadequate regulation is contrary to the constitutional principle of a constitutional state as declared in Art. 2 of the Constitution, since citizens cannot initiate the constitutional review of an international treaty prior to its ratification and because the Constitutional Court does not have any competence - within the

framework of an *ex officio* procedure - for instituting such proceedings. Due to this inadequate regulation restricting fundamental rights by international treaties could come to be beyond the control of both citizens and the Constitutional Court. In the petitioner's opinion, as a result of the obligation assumed by an international treaty, the possibility is opened [created] for a concealed amendment of the Constitution.

The petitioner contends that the challenged provisions of the Act contain restrictive provisions and these restrictions do not conform with Art. 8 of the Constitution, especially because they retain for certain political actors the right to initiate proceedings before the Constitutional Court. Nevertheless, deriving from the principles of the sovereignty of the people and a constitutional state there is a constitutional requirement that citizens may be guardians of the present social system. A rule which does not comply with these requirements, is unconstitutional.

According to the petitioner, it also derives from Art. 7(1) of the Constitution that the Constitution stands above the provision of an international treaty promulgated by law, since state organs may validly assume international obligations only within the framework of the Constitution and in accordance with the constitutional requirements. Controlling this, then, is within the jurisdiction of the Constitutional Court. Hence, the inadequate and restrictive provisions of the Act are not in harmony with the Constitution, therefore declaring their unconstitutionality is justified and necessary.

2. The provisions of Act XXXII of 1989 on the Constitutional Court challenged by the petition are as follows:

> *Section 1*. The jurisdiction of the Constitutional Court shall comprise the following:
> (a) the preliminary examination of the unconstitutionality of bills, enacted but not yet promulgated statutes, of the Standing Orders of Parliament and of international treaties....
>
> *Section 21*.(1) Subject to the distinction contained in sections 33 to 36, the procedure provided in section 1(a) may be initiated by:

(a) the Parliament, its standing committees, or fifty Members of Parliament,
(b) the President of the Republic,
(c) the Government.

Section 35. (1) Upon the motion of the President of the Republic, the Constitutional Court shall examine the contested provision of any Act enacted by Parliament but not yet promulgated.
(2) If the Constitutional Court declares the contested provision of the Act unconstitutional, the President of the Republic shall not promulgate the Act until the unconstitutionality is eliminated by Parliament.

Section 36. (1) Parliament, the President of the Republic and the Government shall have the right prior to the ratification of the treaty to request the examination of constitutionality of a contested provision of an international treaty.
(2) If the Constitutional Court declares the contested provision of the international treaty unconstitutional it shall not be ratified until the unconstitutionality is eliminated by the organ or the person which conclude the treaty.

3. According to the petitioner, the constitutional provisions violated by the contested provisions are the following:

According to Art. 2(1) of the Constitution, the Republic of Hungary is an independent and democratic constitutional state, and according to para. (2), in the Republic of Hungary all power belongs to the people who exercise their sovereignty through elected representatives or directly.

According to Art. 7(1), the legal system of the Republic of Hungary accepts the generally recognised rules and regulations of international law, and ensures harmony between the obligations assumed under international law and domestic law.

According to Art. 8(2), in the Republic of Hungary statutes contains rules and fundamental rights and obligations [?] but must not impose any limitations on the essential contents and meaning of fundamental right.

4. For adjudicating the petition, the relevant Arts. 32/A(1) and (2) of the Constitution is as follows:

(1) The Constitutional Court examines the constitutionality of legal provisions and performs other functions the law refers to its jurisdiction.
(2) Any law or legal measure found unconstitutional is annulled by the Constitutional Court.

During the constitutional review, the Constitutional Court has obtained and used the opinion of the Minister of Justice concerning the petition.

II.

The Constitutional Court found the petition unfounded; and at the same time interpreted its jurisdiction regarding the examination of the unconstitutionality of international treaties based on the Constitution and the Act.

1. Entitlements to conclude international treaties are regulated by the Constitution as follows:

According to Art. 19(3)(f), Parliament ratifies international treaties that are of major importance for the external relations of the Republic of Hungary; according to Art. 30/A(1)(b), the President of the Republic concludes international treaties and agreements on behalf of the Republic of Hungary (the prior agreement of Parliament, and the countersignature of the Prime Minister is required); according to Art. 35 (1)(j), the Government participates in the determination of foreign policy and concludes international treaties on behalf of the Government of the Republic of Hungary.

Thus, according to the Constitution, Parliament, the President of the Republic and the Government are entitled to conclude international treaties. The Constitutional Court does not have the competence to examine the whole process of concluding an international treaty, since this has mainly political constraints. However this does not mean, that the Constitutional Court does not have the jurisdiction to examine the right to conclude a

treaty. According to Art. 19 (2)(f) of the Constitution, Parliament has the competence to conclude treaties that are of "major significance." The President of the Republic may only conclude treaties falling within the competence of the legislature with the prior agreement of Parliament. The Government may not conclude international treaties which fall within the competence of Parliament. The Constitutional Court may decide on respecting these constitutional restrictions of the process of entering into a treaty, and in this question it can pass a decision even before the conclusion of the treaty. This follows from s. 1(f) of the Act, according to which the Constitutional Court has jurisdiction to eliminate a conflict in connection with the sphere of authority arising between state organs. Infringing the right of concluding a treaty is a formal way of violating the Constitution, which may be examined in all procedures for which the Constitutional Court has the competence even after conclusion of the treaty, *viz.* both during preliminary and *ex post facto* review of constitutionality.

2. The petitioner submits as unconstitutional the fact that the examination of the unconstitutionality of an international treaty prior to its ratification may only be initiated by Parliament, the President of the Republic, and the Government, and that there is no possibility for a popular action [an *actio popularis*] in this case.

According to Art. 32/A(3) of the Constitution, in certain cases determined by law anyone may initiate proceedings before the Constitutional Court. The requirement that is derived from the Constitution is that anyone should have the right to initiate the examination determined by Art. 32/A (1) and (2). This is such a constitutional review which could lead to the declaration of unconstitutionality and the annulment of certain provisions of law. By historical interpretation of Art. 32/A of the Constitution, it is clear that the legislator's intention was that the jurisdiction of the Constitutional Court should include *actio popularis* regarding *ex post facto* review of the constitutionality.

The first drafts of the Act prepared by the Ministry of Justice do not entitle the citizens to initiate *ex post facto* review. This can be concluded from considering Sections 19, 39 and 49 of the Bill published before "the national reconciliation negotiations", on 6 May 1989. Later, the "Bill on the Constitutional Court" dated 29 May 1989 which takes into account the results of the inter-departmental co-ordination, makes it absolutely clear that the *ex post facto* constitutional review may only be initiated by authorities and civil servants determined [designated] by s. 21(2). The only possible action for a citizen is the constitutional complaint (s. 48). During the Opposition Round Table talks, one of the major demands of the opposition - which was also a condition of agreeing to the Bill's wording - was that every citizen should have the right to challenge the constitutionality of legal norms before the Constitutional Court. This condition and the process of reaching an agreement can be traced from [?] the Ministry of Justice in the Bill containing the positions of the negotiating parties in the form of "remarks" regarding certain regulations of law as well as from the document called "Amendment to the Bill on the Constitutional Court" (19 September 1989). In accordance with this, the Bill of 22 September 1989 which was submitted to Parliament declares that anyone may submit a constitutional complaint provided by [as designated in] s. 1(b) of the Act. According to the reasoning of the Minister attached to the Bill, "petitions concerning *ex post facto* review and the petitions requesting the Court to declare unconstitutionality manifesting itself in omission, as well as constitutional complaints in accordance with the conditions determined by law, may be submitted by anyone."

The other main proposal of the Opposition Round Table was that the Court should also review the constitutionality of legislative acts [statutes?]. The Bill of the Ministry of Justice originally stated that in case of declaring unconstitutionality of an act the Constitutional Court should send the decision to the Speaker [Chairman] of Parliament and

by discussing the decision, Parliament either agrees to it or ratifies the Act by a two-thirds majority of the Members of Parliament (s. 46). In accordance with the proposal of the Opposition Round Table, the negotiating parties agreed that all types of regulations might be annulled (including other legal means of state control) in case of unconstitutionality. This universality is expressed by using definite articles in Article 32/A (1) and (2) of the Constitution: the Constitutional Court examines the constitutionality of "legal provisions" and it annuls "the statutes and other legal regulations" in case of their unconstitutionality.

The third demand of the Opposition Round Table was the regulation of nomination and election of judges in a way as the Act currently in force contains.

All three demands were of such significance that the Opposition Round Table had them incorporated into the new Constitution. The reasoning attached to s. 17 of the Act XXXI of 1989 on the Amendment of the Constitution according to which "based upon opinions of experts and politicians it has become clear that this important institution which task is to protect the Constitution has to be established with the content slightly different from the original considerations"; and which lists the above mentioned three demands, refers to it.

Two conclusions can be drawn from the history of the birth of Article 32/A of the Constitution. First of all, that Art. 32/A (1) and (2) of the Constitution are rules regarding the jurisdiction of the Court which basically incorporated the agreement into a statute [law?]- as a result of the relevant debates - on the competence of the Constitutional Court. The incorporation of the rules on competence concerning judicial review is essential. The reason for the fact that only the most basic jurisdictions were incorporated into the Hungarian Constitution may be found in the circumstances of the constitution-making process. The incorporation of other jurisdictions into the Constitution - as it is usual in case of a newly-established constitutional court - is a guarantee and desirable [?].

The other conclusion to be drawn is from the interpretation of Art. 32/A of the Constitution which is as follows: the legislator has to ensure - within the framework of *ex post fact* review - the possibility that anyone may initiate the procedure before the Constitutional Court. The fact that the right to initiate the procedure is granted to everyone "in cases determined by law" - beyond the fact that the law should ensure this right concerning *ex post facto* review - based on historical interpretation, renders possible the prescribing of substantive legal conditions in the Act on the Constitutional Court concerning the initiation of constitutional complaints. This actually happened in s. 48 of the Act; however, only procedural regulation was achieved regarding *ex post facto* review of the constitutionality (s. 37).

Thus, it is Art. 32/A of the Constitution that s. 21(2) of the Act fulfils [to which s.21(2) gives substance], according to which the procedure provided in s. 1(b) may be initiated by anyone. However, it does not follow from the Constitution that the initiation of other procedures for which the Constitutional Court has the jurisdiction should also be open to anyone. The Constitution therefore does not require an *actio popularis* in cases other than *ex post facto* review. Ensuring an *actio popularis* concerning *ex post facto* review, the legislator complied with its constitutional obligation deriving from Art. 32/A(3) of the Constitution, what is more - also in accordance with the wishes of the Opposition Round Table - in s. 1(e) of the Act the legislator ensured further rights of initiation for anyone regarding the elimination of unconstitutionality manifesting itself in omission, without there being any constitutional obligation in this respect.

Accordingly, restricting the exercise of the right to initiate the preliminary constitutional review to the persons entitled by s. 21(1) of the Act is not unconstitutional. Further, the Constitutional Court notes that according to Article 32/A(1) of the Constitution the Constitutional Court has a compulsory jurisdiction only for the constitutional

examination of legal provisions. An international treaty which is not ratified is not yet a legal provision. The Constitution gives the legislator discretion not only in defining the circle of persons entitled to initiate the procedure, but also in deciding on ensuring [?] preliminary review of the unconstitutionality. A further condition of ensuring the right of initiatiation for everyone is that the contested regulation (legal provisions and other legal means of state control) could be available for anyone, hence, it could be promulgated [?]. However the petition is about the constitutional examination of international treaties prior to their ratification, consequently before promulgation, nevertheless, ensuring an *actio popularis* with regard to a norm not yet promulgated would merely be a formal entitlement and inapplicable in practice.

3. Taking into account all the abovementioned facts, the argument of the petitioner is not adequate in the sense that restricting the exercise of the right to initiate the preliminary review of the unconstitutionality of international treaties is contrary to Art. 8 of the Constitution. The right to commence proceedings before the Constitutional Court is a basic constitutional right according to Art. 32/A of the Constitution, and Art. 32/A does not include preliminary review. Neither does it derive from the principle of the sovereignty of the people and a constitutional state that the realisation of these would be the precondition - concerning preliminary review of the unconstitutionality of international treaties - of guaranteeing for every citizen the right to commence proceedings before the Constitutional Court.

4. According to s. 20 of the Act, the Constitutional Court shall proceed based on the petition submitted by the party entitled to submit such a petition. The procedure commenced *ex officio* is a special jurisdiction of the Constitutional Court and according to s. 21 of the Act it is related to the procedure provided in s. 1(c) and (e). According to this, the procedure for the examination of the conformity of legal rules as well as other legal

means of state control with international treaties, and the procedure during which the Constitutional Court shall eliminate the unconstitutionality manifesting itself in omission, are instituted *ex officio*. However, the obligation for an ex officio procedure is not derived neither from Arts. 2, 7 or 32/A of the Constitution concerning the procedures of the Constitutional Court. Thus, that part of the petition asserting the absence of the *ex officio* procedure is also unfounded.

5. Regarding the *ex post facto* review of the unconstitutionality of international treaties the Constitutional Court declared in *Dec. 61/B/1992 AB* (ABH 1993, 831) that based

on s. 1 of the Act the Constitutional Court does not have the jurisdiction to review *ex post facto* international treaties which are "ratified and promulgated." This statement is in conflict with the previous *Dec. 30 of 1990 (XII.15) AB* (MK !990/126 at 2441-2442) made by the Constitutional Court, according to which the law promulgating an international treaty "as a law is not an exception from the legal rules which could be examined by the Constitutional Court", therefore, based on s. 1(b) of the Act, the Constitutional Court has a competence for *ex post facto* review of the law promulgating an international treaty. The above-cited Decision has examined the constitutionality of certain provisions of the international treaty which constituted a part of the law promulgating the treaty. [The Constitutional Court compared ss. 2, 9(1), 10(1) and 17 of the Law Decree promulgating the international treaty with the Arts. 57(1), (5) and 7 (1) of the Constitution, and the Court rejected the petition contending that particular provisions of the Law Decree were unconstitutional, because "although the Constitutional Court has the competence for the constitutional examination of the Law Decree, according to the Judges [Bench] of the Constitutional Court [Justices], the unconstitutional application of the regulation does not directly rely on the Law Decree" but on failing to pass the executive order of the treaty. ?]

In the reasoning of the Constitutional Court's Decision, the Court agreed with the positions of the Ministries in the fact that the Constitutional Court has the competence for *ex post facto* review of the international treaty. The statement of the Constitutional Court in this respect is obviously inconsistent since *ex post facto* review provided in s. 1(b) of the Act, cannot be divided into international treaty "by itself" and international treaty "constituting a part of" the law promulgating the treaty in question; as indeed, the Constitutional Court did not make this distinction in its decision either. Hence, based on the current petition, the Constitutional Court had to eliminate this inconsistency present in its previous decisions, and the Court had to make its position absolutely clear on whether it has the jurisdiction for the constitutional examination of international treaties.

Chapter III of the Constitutional Court's *Dec. 53 of 1993 (X.13) AB* (MK 1993/147 at 8795) contains statements which are important concerning the Constitutional Court's competence regarding the relationship between domestic and international law. According to this, the first sentence of Art. 7(1) of the Constitution states that "the generally recognised rules" of international law are part of Hungarian law even without separate transformations. Such an act of general transformation was performed by the Constitution itself. Thus, the generally recognised rules of international law are not part of the Constitution but they are "assumed obligations." The fact that the assumption and transformation is contained in the Constitution does not alter the hierarchical relationship of the Constitution, domestic and international law. This general internalisation of obligations does not absolutely preclude certain "generally recognised rules" from also being defined by other agreements, regarding which a separate transformation takes place.

The second sentence of Art. 7(1) - the harmonisation of the assumed international obligations and domestic law - applies to every „assumed" international obligation, including the generally recognised rules. In addition, the harmonisation must be achieved

for the whole of domestic law, the Constitution included. Thus, Art. 7(1) of the Constitution, mandates the harmonisation of the obligations derived from the Constitution, international law - by agreements or directly - as well as domestic law; in ensuring their harmony, attention must be paid to their particular characteristics.

According to this decision, in order to fulfil Art. 7 of the Constitution, all three levels - domestic law, international law and the Constitution - must be examined together and interconnected. That is, "the question whether the assumed international obligation is in harmony with the Constitution must necessarily be raised and answered"; further: "it is of no moment whether the constitutional review of the legal rule is preliminary or *ex post facto*, neither may proceed without an examination of the harmony between the internal legal rule, international agreement, and the Constitution." (MK 1993/147 at 8794-8795.)

6. As a result of the abovementioned provisions of the Constitution and the previously cited Decisions of the Constitutional Court, the Constitutional Court examines the constitutionality of an international treaty not only under s. 1(a) of the Act within the framework of preliminary review, but also according to s. 1(b) of the Act in the form of *ex post facto* review. If this would not be so, this would not only mean the irreparable infringement of Art. 7(1) of the Constitution but it would also be in conflict with Art. 32/A (1) and (2) of the Constitution.

The Constitutional Court derives only one function from the Constitution, namely, the *ex post facto* review, this is mandatory and - as we have already referred to it concerning the historical interpretation - universal. During the drafting of the Act and the Constitution there did not come to light even a single reference on the part of the legislator which would have aimed at excluding any type of legal rule - for instance laws promulgating international treaties - from *ex post facto* review. The circumstance that - especially related to the circumstances of drafting and passing the Act - the legislator did not at that time

consider this particular case of *ex post facto* review separately, does not affect on the Constitutional Court's right to interpret its jurisdiction. The decisions of the Constitutional Court in which the Court interprets its competence are binding on everyone, just like any other decisions - including those made on the basis of the competence achieved by such an interpretation. By interpreting its jurisdiction, the Constitutional Court aims to fulfil its special task: in addition, the Court considers the models of other constitutional courts from of which the Constitutional Court adopts those solutions which are also required for completing its tasks concerning constitutional case-law. The Constitutional Court refers to preliminary review and also to the restrictive interpretation of its jurisdiction for abstract constitutional interpretation; additionally, to the determination of constitutional requirements with regard to the application of the examined legal rule in the framework of *ex post facto* review or to various solutions for the *ex nunc* annulment of the unconstitutional legal provision. The determination of "constitutional obligations", for instance, incorporated the solution of "constitution-conform interpretation" into the Hungarian law, which is generally applied by the constitutional courts of the world, but it very rarely has a statutory basis, and applied it for the Court's previously stated position regarding jurisdiction to interpret laws. In accordance with its previous decisions interpreting the jurisdiction of the Court, the Constitutional Court in the present case besides fully completing its task derived from its jurisdiction for *ex post facto* review, takes into account foreign models of examining the constitutionality of international treaties. Finally, the Constitutional Court also refers to the fact that by examining the constitutionality of international treaties its constitutional task remains within the boundaries of *ex post facto* review. Since it examines exclusively the harmony between the international treaty and the Constitution, it does not interfere with the functions and jurisdiction of other branches. The fact, that s. 1(b) of the Act does not contain special

procedural regulations for cases when the challenged law promulgates an international treaty, does not have an effect on the competence of the Constitutional Court regarding the examination of such laws. Parliament has provided the Constitutional Court with several other jurisdictions in statutes other than the Act, without actually providing separate procedural regulations. However, it does not follow from this that the Constitutional Court would not have been entitled to act in order to protect the rights of the municipalities or the autonomy of universities, or to form its procedure in a way so as to fulfil those [?] functions being within its competence. Concerning the examination of international treaties, general procedural rules of *ex post facto* review are valid; and the Constitutional Court pays attention to the specific characteristics of the international treaty in case of declaring the consequences of the unconstitutionality.

According to the Constitutional Court's *Dec. 53 of 1993 (X.13) AB* (MK 1993/147), Art. 7(1) of the Constitution requires the examination of the constitutionality of international treaties, then it necessarily derives also from Art. 32/A. There is no constitutional basis dealing with the law promulgating an international treaty different from any other legal rules concerning constitutional examination. Since it derives from the Constitution that *ex post facto* review shall cover all kinds of legal rule, this universality may not be restricted even by a law.

Section 1(a) of the Act therefore, does not mean that the Constitutional Court may examine only preliminarily the unconstitutionality of certain provisions of an international treaty, but it means that besides the *ex post facto* review which derives from the Constitution, the unconstitutionality of an international treaty may also be examined preliminarily under the Act and on certain conditions set out therein. From that fact that s. 1(a) of the Act specifies the preliminary examination of international treaties, it does not follow that in sub-s. (b) the legislator should have had to mention the law promulgating a

treaty, as a special type of law; and we cannot come to the conclusion that the legislator would have aimed to exclude the *ex post facto* review of this source of law. Regarding the preliminary review of the unconstitutionality, it was necessary to specify the different types of legal rules which may be examined, because it was not possible to mark the bill, enacted but not yet promulgated statutes, and the Standing Orders of Parliament with a comprehensive name. To mark international treaties separately was especially required, since treaties do not necessarily appear in the form of a Bill: in addition, and contrary to the above-mentioned, the aim of the legislator was to restrict the examination to certain provisions of the international treaty. This is the reason why s. 30 (1)(a) and (b) of the Act specifies the different types of legal rule which could be examined during a norm control.

If the international treaty - and so the law promulgating it - contains a provision which is a “generally recognised rule of international law” at the same time according to Art. 7 of the Constitution, that is, the treaty merely repeats the provision which was previously incorporated into the domestic law by the Constitution, then by examining the constitutionality of this provision we should take into account all those restrictions which the Constitutional Court *Dec. 53 of 1993 (X.13) AB* (MK 1993/147) also took into consideration. The generally recognised rules of international law do not stand at the same level as the Constitution in the legal hierarchy, but the constitutional obligation of “ensuring the harmony with the domestic law” has to be fulfilled in a way that the Constitution needs to be interpreted with respect to these specific rules of international law. (MK 1993/147 at 8798-8799.)

7. In order to confirm the foregoing, the Constitutional Court refers to the fact that concerning the relationship between domestic and international law, in the development of European law, there is a tendency that the dualist-transformation system is replaced by the monist system. According to the monist-adoption concept, the concluded international

treaty constitutes a component of national law without further transformation, that is it is applicable directly and enjoys supremacy over domestic law. This system is required by European integration, and for this reason, even those members of the EU which still follow the transformation system (*e.g.* Germany, one of the founding members, Italy, and the Scandinavian countries which subsequently joined to the European Union) apply the law of the European Union directly, without transformation, and they ensure superiority over national law with the exception of the Constitution. As a result of this, the constitutional courts exercise their entitlement [?] regarding constitutional examination concerning international treaties (international law) and the decisions of international organisations - due to the adoption system - automatically becoming the part of the domestic law.

The examination of international treaties - after they become the part of domestic law - fits into the logic of constitutional review. Therefore, in those countries where there is no specific regulation concerning this - due to the universality of the constitutional review - the constitutional courts examine the constitutionality of them in exactly the same way as in the case of domestic law.

The Constitutional Court states that the constitutional examination of international treaties is also conducted by constitutional courts of those countries as well where, as the main rule, the Court follows the dualist-transformation system and further in the case of international treaties becoming part of domestic law with the help of this technique. Article 59 of the German Basic Law (hereinafter „GG") for instance prescribes the dualist-transformative system. The German Federal Constitutional Court, despite the fact that it does not have the competence for preliminary review, extended its practice to examine international treaties prior to their ratification. The German Constitutional Court first examined a law ratifying an international treaty (prior to its promulgation) in 1952. [*BVerfGE* 1, 281; and 396 (413)] Later the Constitutional Court established its practice

according to which the law promulgating a treaty may be the subject of *ex post facto* review as well as of constitutional complaint, thus the international treaty becomes an indirect subject of the procedure. On the basis of thereof, the Constitutional Court examined, for instance, the constitutionality of the basic agreement between the Federal Republic of Germany and the German Democratic Republic [*BVerfGE* 36, 1]; the European Community Treaty [*BVerfGE* 52, 187 (199)]; certain laws of property of the treaty [?] uniting the Federal Republic of Germany and the German Democratic Republic [*BVerfGE* 84, 90 (113)]; regarding the Act promulgating the Maastricht Treaty, the Court examined the question whether the legal meaning of the direct election of the Members of the Bundestag under the GG, as well as democracy, and people's sovereignty became redundant due to the supranational nature of the EU [*BVerfGE* 89, 155].

From these decisions, the following position becomes clear: the German Constitutional Court besides exercising its constitutional power concerning *ex post facto* review "naturally" - especially with regards to European Union treaties - must not give up any part of its task to protect the Constitution; this function, then, extends to every way of exercising sovereignty under the GG. On this basis of this, the Constitutional Court -besides examining the law promulgating a treaty - retaining the submission of the EU law under constant control.

A similar practice is followed by Greece where the transformation technique is also applied.

8. To summarise, the Constitutional Court declares:

According to s. 1(b) of the Act, the Constitutional Court shall examine the constitutionality of the law promulgating an international treaty. The constitutional review shall cover the examination of unconstitutionality of the international treaty promulgated by law. If the Constitutional Court holds that the international treaty or any provision of it is

unconstitutional, it declares the unconstitutionality of the law promulgating the international treaty. The decision of the Constitutional Court in which the Court declares unconstitutional the whole international treaty or any provision thereof has no effect on the obligations assumed by the Republic of Hungary under international law. As a result of the Constitutional Court's Decision the legislature should harmonise the internal laws and statutes of the country with the obligations assumed under international law; either by giving notice the unconstitutional part of the international treaty, or by achieving the modification of that part, or if it is necessary by amendment of the Constitution. Hitherto [By reason thereof/Until then] the Constitutional Court shall suspend its proceedings concerning the determination of the date of nullification of the unconstitutional legal rule for a reasonable time.

9. Based on the foregoing, the Constitutional Court rejected the petition to establish the unconstitutional character of ss. 1(a), 21(1), 35 and 36 of the Act. Under s. 1 of the Act and other provisions creating the jurisdiction of the Constitutional Court there is no provision according to which the Constitutional Court is entitled to amend any statute. Hence, the Constitutional Court - due to its lack of authority - rejected the petition to amend the part of the Act dealing with the jurisdiction of the Court.

VÖRÖS, J., dissenting: According to my opinion, the Constitutional Court does not have the competence for the ex post facto review of an international treaty.

1. Sections 1(a) and 21(1), together with ss. 30(1) and 36 of Act XXXII of 1989 on the Constitutional Court (henceforth "the Act") entitle the Constitutional Court to examine preliminary the unconstitutionality of international treaties exclusively prior to their ratification. On the basis of s. 1(b) of the Act and with regards to s. 1(a), there is no possibility for an *ex post facto* review: by incorporating the international treaty into the

domestic law, hence, by enacting it by Parliament in the form of a Hungarian Act, the treaty does not lose its specific characteristic - concerning the Constitutional Court's procedure - that it was concluded as an international treaty, and it was not passed by the Hungarian legislation but concluded by the agreement of two or more parties of international law.

2. The position of the petitioner contending that this solution is unconstitutional is unfounded, since Art. 32/A of the Constitution does not provide the Constitutional Court with the jurisdiction to examine the unconstitutionality of all kinds of legal rule. Regarding the nature of the norm in Art. 32/A (different from other norms in the Constitution which are directly applicable - such as human rights - and immediately become rights by appearing in the Constitution), it is a norm coming into force and applicable indirectly (with the transmission of other laws), sets out the main characteristics of the institution established by itself, explicitly leaving the detailed regulation to a separate statute. In case of such a norm, the institution in question may only be introduced into practice by passing a separate Act. This solution has also appeared in the Constitution concerning the State Audit Office (Art. 32/C of the Constitution), and the Parliamentary Commissioners (Art. 32/B).

With regards to the Constitutional Court, this separate statute is the Act on the Constitutional Court - which had already contained all the provisions that were needed by the Constitutional Court to commence its functions - however, concerning the jurisdiction in connection with international treaties s. 1(a) of the Act is the relevant provision. By excluding international treaties *expressis verbis* from the subjects of *ex post facto* review, and allowing the preliminary examination exclusively and only up to the ratification of the treaty, this provision is not contrary to Art. 32/A of the Constitution, but executes it in accordance with the Article. It would be an inconsistency and unconstitutional if Art. 32/A contained the word "all," *i.e.,* it would make the constitutional examination of all kinds of

legal rules the task of the Constitutional Court. Due to the absence of this, it is not unconstitutional if s. 1(a) of the Act does not provide the Constitutional Court with the jurisdiction to undertake the *ex post facto* review of international treaties. Article 32/A, as a matter of fact, declares the constitutional obligation, that a constitutional court should operate and should examine - with scope and conditions not precisely defined here - the constitutionality of legal provisions, as a minimal jurisdiction, and that it should annul the provisions were found unconstitutional.

3. In my opinion, without a statutory basis, the Constitutional Court may not exercise a jurisdiction not granted to it by the legislator. As I previously expounded my stand several times [in dissenting opinion to *Dec. 36 of 1992 (VI.10) AB*: MK 1992/59 at 2034; in dissenting opinion to *Dec. 17 of 1993 (II.19) AB*: MK 1993/31 at 1617-1618; in dissenting opinion to *Dec. 38 of 1993 (VI.11) AB*: MK 1993/75 at 4148-4149; in concurring opinion to *Dec. 60 of 1994 (XII. 24) AB*: MK 1994/124 at 4291], the exercise of such a jurisdiction may be challenged from the point of view of legal certainty.