22 Enforceability of the European Convention on Human Rights by Ordinary Courts in Hungary

An Analysis of a Newly Opened Procedural Path and its Constitutional Framework

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22.1 Introduction

Intergovernmental conferences on the future of the European Court of Human Rights repeatedly underline the importance of the principle of subsidiarity as well as the responsibility of domestic authorities (first and foremost the courts) in the European system of the protection of human rights.[1] The most recent Brighton Declaration issued by the High-Level Conference on the Future of the European Court of Human Rights urged state parties to ensure effective implementation of the Convention at national level by enabling and encouraging national courts and tribunals to take into account the relevant principles of the Convention, having regard to the case law of the Court, in conducting proceedings and formulating judgments; and in particular enabling litigants […] to draw to the attention of national courts and tribunals any relevant provisions of the Convention and jurisprudence of the Court.[2]

This article aims to present a newly established instrument for human rights' protection in the Hungarian legal order (22.5) and to analyse its potential effectiveness in the light of Hungary's modified constitutional framework. The aforementioned new instrument consists in the competence vested in ordinary courts[3] to refer any piece of legislation to

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1 *See* Brighton Declaration (19-20 April 2012, <www.echr.coe.int/NR/rdonlyres/8AC14EA9-A92B-4875-A76A-4E21A8B3AC5A/0/ENG_20120418_BRIGHTON_DECLARATION_FINALE.pdf>, accessed on 30 October 2012), Izmir Declaration (26-27 April 2011, <www.echr.coe.int/NR/rdonlyres/E1256FD2-DBE5-41E8-B715-4DF6D922C7B6/0/20110428_Declaration_Izmir_EN.pdf> (last accessed on 30 October 2012) and Interlaken Declaration (19 February 2010, <www.eda.admin.ch/etc/medialib/downloads/edazen/topics/ europa/euroc.Par.0133.File.tmp/final_en.pdf> (last accessed on 30 October 2012).

2 Brighton Declaration (note 1.), para. 9 c) iv).

3 For the purposes of the present article, this expression refers to the civil, criminal, administrative and labour courts which are governed together by Art. 25 of the Fundamental Law and by the Act CLXI of 2011 on the Organization and Administration of Courts and which all come under the supervision of the Curia.

the Constitutional Court if they perceive that the domestic law in question violates the European Convention on Human Rights (hereinafter 'Convention' or 'ECHR'). This referral is obligatory whenever the judge takes note of a potential conflict between the applicable domestic law and the Convention. Hence, for the first sight it seems that it provides litigants with unprecedented possibility to enforce their Convention rights even against national legislation.

However, in order to assess the potential effectiveness of this mechanism in providing greater protection of ECHR rights and freedoms at national level, we have to examine, in the following, the constitutional status of the ECHR and its case law (22.2) as well as the rank of the Convention within the hierarchy of norms (22.3) in the Hungarian legal system, together with already existing, albeit limited possibilities of ordinary courts to enforce Convention rights (22.4) and also the limits of the enforcement of the Convention via this new provision which are inherent in the Fundamental Law and in the Act on the Constitutional Court (22.6).

22.2 The Status of the Convention and Its Case Law in the Hungarian Legal System

Both the former Constitution of Hungary[4] and the newly adopted Fundamental Law[5] follow a dualistic approach as regards the status of international law in the domestic legal system. This approach did not flow explicitly from Article 7(1) of the former Constitution, which stipulated only that "[t]he legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law" but left open the method of this harmonization. However, the Constitutional Court clarified the nature of the relation between international and domestic law. According to its case law generally recognized principles of international law […] constitute part of the Hungarian law without any specific (further) transformation. The transformation was

4 Act XX of 1949 on The Constitution of the Republic of Hungary (repealed as of 1 January 2012 by Art. 31, para. (3), point *a)* of the Transitional Provisions to the Fundamental Law of Hungary), <www.parlament.hu/angol/act_xx_of_1949.pdf> (last accessed on 24 October 2012).

5 The Fundamental Law of Hungary (25 April 2011), in force since 1 January 2012, amended on 18 June 2012, 29 October 2012 and 21 December 2012. (A fourth amendment is also pending before the Parliament since 8 February 2013.) For the English translation of the version incorporating 18 June 2012 amendments, *see* <www.mkab.hu/rules/fundamental-law> (last accessed on 24 October 2012). For other translations which reflect the original version only, *see* <www.venice.coe.int/docs/2011/CDL-REF(2011)019-e.pdf>. <http://nemzetikonyvtar.kormany.hu/download/0/00/50000/Alaptörvény_angol.pdf> or the annex of Lóránt Csink, B. Schanda, A. Zs. Varga (Eds.), *The Basic Law of Hungary. A First Commentary* (National Institute of Public Administration, 2012, Clarus Press, downloadable from <www.nki.gov.hu/images/nemzetkozi/the_basic_law_of_hungary.epub>).

effected in general (that is, without enumeration or specification of the rules concerned) by the Constitution itself.[6]

As far as other sources of international law are concerned, the Constitutional Court holds[7] that an international treaty with a generally binding content must be promulgated in an internal source of law in order to make the legal norm contained in the treaty applicable to Hungarian subjects of law.[8]

The Fundamental Law is more straightforward in announcing dualistic treatment of international law. Similarly to the former Constitution, its Article Q (2) declares as a general principle that "Hungary shall ensure the conformity between international law and Hungarian law". This provision also precises and makes explicit (as compared with the text of the former Constitution) that the aim behind this undertaking is "to fulfil [Hungary's] obligations under international law". As far as the method of the harmonization between international and national law is concerned, paragraph (3) of the same Article differentiates (in line with the Constitutional Court's case law) between 'generally recognised rules' and 'other sources' of international law. With respect to the first, it provides that "Hungary shall accept the generally recognised rules of international law" (*i.e*. these rules are binding without any further legislative step), whereas "[o]ther sources of international law shall become part of the Hungarian legal system by promulgation".

The Convention has been promulgated by the Act XXXI of 1993.[9] Accordingly, it became part of the Hungarian legal system and it is to be applied, its provisions are to be observed as the Supreme Court of Hungary (renamed Curia as of 1 January 2012) also confirmed in some recent cases.[10] It is still unsettled, however, whether this 'observation' means direct applicability of Convention rules in legal disputes or whether these norms may only serve

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6 Decision 53/1993. (X. 13.) AB of the Constitutional Court. For an English summary of the decision, *see* <www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1993-3-015?fn=document-frameset.htm$f=templates$3.0> (last accessed on 24 October 2012).

7 Decision 30/1998. (VI. 25.) AB of the Constitutional Court, <www.mkab.hu/letoltesek/en_0030_1998.pdf> (accessed on 24 October 2012).

8 For the position of the 'old' Constitution, *see also* T. Molnár, '7. § [Nemzetközi jog és belső jog; jogalkotási törvény]', *in:* A. Jakab (Ed.), *Az Alkotmány kommentárja* [Commentary on the Constitution], Századvég, Budapest, 2009, para. 43. *See also,* P. Sonnevend, 'Report on Hungary', *in:* G. Martinico & O. Pollicino (Eds.), *The National Judicial Treatment of the ECHR and EU Laws – A Comparative Constitutional Perspective*, Europa Law Publishing, Groningen 2010, pp. 253-254 and P. Bárd, 'Hungary', *in:* L. Hammer & F. Emmert (Eds.), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe*, Eleven International Publishing The Hague, 2012, p. 225.

9 <www.njt.hu/cgi_bin/njt_doc.cgi?docid=19100.29566> (last accessed on 24 October 2012).

10 *See e.g.*, the Judgment P*fv.*V.20.485/2008/4. (15 May 2008) of the Supreme Court [Legfelsőbb Bíróság], <http://ukp. birosag.hu/portal-frontend/stream/birosagKod/0001/hatarozatAzonosito/20485_2008_4/> (last accessed on 20 February 2013) and the Judgment K*fv.*VI.37.232/2011/13. (6 February 2012) of the Curia [Kúria], <http://ukp.birosag.hu/portal-frontend/stream/birosagKod/0001/hatarozatAzonosito/37232_2011_13/> (last accessed on 20 February 2013). The case law database of the Hungarian courts is available at <www.birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara>.

as additional arguments in the interpretation of domestic law, through which the Convention takes effect.[11]

The case law related to the Convention also exerts a certain (although limited, as we will see later) binding authority in Hungarian law. Section 13(1) of the Act L of 2005 on the Procedure Related to International Treaties[12] provides that for the interpretation of an international treaty, regard shall be had also to the decisions of the organ vested with the competence to rule on a dispute arising out of the international treaty in question. Accordingly, the Constitutional Court declared several times that it builds on the case law of the European Court of Human Rights when interpreting and clarifying the content of a certain provision of the Convention.[13] Ordinary courts also try to have due regard to the Convention case law and tend increasingly to refer to Strasbourg cases in their judgments where relevant.[14]

22.3 The Rank of the Convention within the Hierarchy of Norms of the Hungarian Legal System

The position of the Convention within the hierarchy of norms is not regulated explicitly by national legislation. However, from the case law of the Constitutional Court and from

11 The Judgment Kfv.VI.37.232/2011/13. of the Curia (cited above, note 10) held that "these rights do not apply in themselves, but only through specific substantive and procedural rules, through the guarantees provided by these rules. Therefore the State ratifying the Convention has to adopt such laws that guarantee the effective application of these rights in the particular procedures". Panel presidents of the Supreme Court's Civil Division also discussed this issue during their regular monthly conference held on 8 December 2010, but the views remained divergent.

12 <www.njt.hu/cgi_bin/njt_doc.cgi?docid=94249.208566> (last accessed on 24 October 2012).

13 *See* decision 166/2011. (XII. 20) AB, <http://public.mkab.hu/dev/dontesek.nsf/0/96D6A34170E7C464C1257A250047D9F3?OpenDocument> (last accessed on 24 October 2012), as well as decision 43/2012. (XII. 20.) AB, <http://public.mkab.hu/dev/dontesek.nsf/0/065D43D1183D5A48C1257AE8004C12E8?OpenDocument> (last accessed on 20 February 2013) of the Constitutional Court. *See also* decision 61/2011. (VII. 13.) AB, <http://public.mkab.hu/dev/dontesek.nsf/0/396A20885611E675C1257ADA0052B3E3?OpenDocument> (last accessed on 20 February 2013) where the Constitutional Court declared that "it follows from the *pacta sunt servanda* principle (enshrined in Art. 7(1) of the Constitution and Art. Q (2)-(3) of the Fundamental Law) that the Constitutional Court must follow the Strasbourg case law and its level of protection even if it would not necessarily result from the Constitutional Court's own 'precedents' ". *See*, however, the concurring opinion of Judge Bragyova annexed to decision 166/2011. (XII. 20.) AB in which he contests that the Convention would be a directly applicable international treaty in the Hungarian legal system and that the case law of the European Court of Human Rights would be binding in the interpretation of the Convention.

14 In the public case law database of the Hungarian courts (*see* note 10) which was established in 2007 but contains several judgments even from the 1990s, the author of the present article found only three cases from before 2009 referring to Strasbourg case law (and not merely to the text of the Convention itself), whereas in the period after 2008 the number of such cases increased tenfold. Cases concerning (at least partly) the Act XXXI of 1993 on the promulgation of the ECHR reflect a similar tendency of increasing awareness about Convention law: before the Supreme Court, their number was 29 between 1993 and 2003, whereas above 120 between 2004 and 2012. For a recent Supreme Court judgment where the analysis of the European Court of Human Rights' case law was of great importance, *see e.g.,* Kfv.X.37.783/2009/6, the judgment on the Magyar Gárda [Hungarian Guard] (in relation to this case, *see also Vona v. Hungary*, no. 35943/10, communicated on 14 March 2012 by the European Court of Human Rights.

some statutory provisions on the legal consequences of a conflict between a domestic law and an international treaty, we can deduce that the Convention is situated on an infra-constitutional but supra-statutory level – although the clarity of its supra-statutory position was adversely affected[15] by the legislative modifications entered into force on 1 January 2012.

The infra-constitutionality may be deducted from the fact that the commitment to fulfil international obligations and to ensure harmony between international and Hungarian law flows from the Fundamental Law (or, before 2012, the Constitution) itself. This interpretation is reinforced by a decision of the Constitutional Court which held that contractual obligations assumed under international law outside the scope of international *ius cogens* rules may not be enforced as far as their unconstitutional content is concerned.[16] This implies the supremacy of the Fundamental Law over the Convention transformed into the Hungarian law (at least as far as those Convention rules are concerned which do not form part of the international *ius cogens* norms).[17]

On the other hand, the supra-statutory nature of the Convention was based by the doctrine[18] on (repealed) Section 45(1) of the Act XXXII of 1989 on the Constitutional Court.[19] According to this Section, if the Constitutional Court establishes that a law or another legal instrument of state administration at the same or lower level than the law promulgating the international treaty conflicts with the international treaty, it annuls in whole or in part the law or the other legal instrument of state administration contrary to the international treaty.

Consequently, even if a statute (the highest ranking norm under the Constitution) was in conflict with the Convention, the Constitutional Court could (and had to) annul it since the Convention was also promulgated by a law of same (statutory) level. This

15 *See* Section 22.6 of the present article.

16 Decision 30/1998. (VI. 25.) AB of the Constitutional Court (*see* note 6). Concerning the applicability of former Constitutional Court decisions after the entry into force of the Fundamental Law, decision 22/2012. (V. 11.) AB (<http://public.mkab.hu/dev/dontesek.nsf/0/4B19749B95B3B750C1257ADA00524F52?OpenDocument> (last accessed on 20 February 2013) confirmed that findings and principles contained in those decisions remain valid if the underlying regulation in the Fundamental Law is identical or very similar to that of the former Constitution (section III, point 3.1 of the decision).

17 Infra-constitutionality does not imply, however, that a more protective conflicting interpretation of a right guaranteed by both the Fundamental Law and the Convention would necessarily be unconstitutional. *See*, the decision 75/2008. (V. 29.) AB of the Constitutional Court which effected a change in the jurisprudence of the Constitutional Court after (and partly in view of) the *Bukta and Others v. Hungary*, ECHR (2007), no. 25691/04, III Judgment.

18 *See*, Molnár 2009, para. 61.

19 <www.njt.hu/cgi_bin/njt_doc.cgi?docid=11002.15306>, repealed as of 1 January 2012 by Section 69(3) of the Act CLI of 2011 on the Constitutional Court. For an English translation provided by the Constitutional Court, *see*, <www.unhcr.org/refworld/country:"NATLEGBOD,"HUN,"4c345b5b2,0.html> (last accessed on 24 October 2012) .

was exactly the case in the decision 166/2011. (XII. 20) AB[20] where the Constitutional Court – upon the petition of the President of the Supreme Court, András Baka and for the first time in its history – annulled several statutory provisions because they violated the Convention.

22.4 Limits of Convention-Conform Interpretation and Procedural Possibilities of Ordinary Courts to Enforce Convention Rights under the Old Act on the Constitutional Court

As mentioned above, ordinary courts try to have due regard to the Convention and its case law to the extent possible, even if judgments are eventually based on national law that ordinary courts are bound to apply.[21] In most cases the Convention is cited as an additional argument only. It also happens, although very rarely, that courts use the Convention as a means for giving domestic legal provisions a slightly different (more generous, protective or flexible) interpretation.[22]

However, when harmonious interpretation arrives to its limit (*i.e.* domestic law cannot be interpreted in a Convention-conform manner), the courts do not have the competence to

20 *See* note 13. For a short overview (in English) on the petition, the decision of the Constitutional Court and the related subsequent events, *see* US Department of State, Bureau of Democracy, Human Rights and Labor: Country Reports on Human Rights Practices for 2011, Hungary at <www.state.gov/documents/organization/ 186571.pdf>, p. 8 (last accessed on 31 October 2012). For a more detailed analysis of the judgment, *see* M. Tóth, 'Az Alkotmánybíróság határozata a kiemelt ügyek egyes büntetőeljárási szabályairól', *Jogesetek Magyarázata (JeMa)* 2, 2012, pp. 10-19.

21 As to the author's knowledge, to date there has been no judgment the reasoning of which would have been built exclusively on the Convention or the statute promulgating it (without reference to any other domestic legal provision).

22 *See e.g.*, the Judgment 25.P. 22.432/2008/80. of the Fejér County Court [Fejér Megyei Bíróság] (*see* <http://ukp.birosag.hu/portal-frontend/stream/birosagKod/0700/hatarozatAzonosito/22432_2008_80/> (last accessed on 20 February 2013) that relied extensively on the ECHR case law in granting Section 2(3) of the Code of Civil Procedure (just satisfaction for the violation of the requirement of deciding a case in a reasonable time) a more favourable interpretation, which even contradicted grammatical interpretation of the provision in question. Namely, it held that length complaints may also be examined where the proceedings have not yet terminated if it is alleged that there has already been unreasonable delay (*see e.g.,* Commission's report of 9 December 1991 in *Mlynek v. Austria*, no. 15016/89, Decisions and Reports (DR) 242-C, or *Uoti v. Finland*, no. 61222/00 of 9 January 2007, para. 27). The argument built on Hungary's constitutional duty to respect its obligations assumed under international law and on the legislature's intention (expressed in the explanatory memorandum to the law enacting Section 2(3) of the CCP) to harmonize national law with international conventions. However, the first instance judgment was quashed by the Judgment 5.Pf.20.736/2010/6. of the Metropolitan Court of Appeal [Fővárosi Ítélőtábla] (*see* <http://ukp.birosag.hu/portal-frontend/stream/birosagKod/2201/hatarozatAzonosito/20736_2010_6/> (last accessed on 20 February 2013)). The Court of Appeal agreed, in principle, that "due regard must be had to the practice of the European Court of Human Rights" but held that the intention of the legislature was surely not to subject pending cases to the continuous control of another court of similar level. Consequently, it limited the applicability of the claims under Section 2(3) of the CCP to terminated proceedings (in line with the grammatical interpretation).

set aside national law that violates the Convention and to base their judgment directly on the ECHR.[23] A strikingly clear example for this is the series of cases about the display of the five-pointed red star.

In the *Vajnai v. Hungary* case,[24] the European Court of Human Rights held that, for a restriction on the display of that symbol to be justified, it was required that there was a real and present danger of any political movement or party restoring the communist dictatorship. It considered that a blanket ban on the use of that symbol might also restrict its use in contexts in which no restriction would be justified and that the ban in question was too broad in view of the multiple meanings of the red star.[25] Nevertheless, according to the most recent authoritative jurisprudence of some Hungarian courts (including the Supreme Court) the wording of the relevant provision of the Criminal Code must be deemed to be clear and unambiguous; it does not leave any margin for Convention-conform interpretation. Consequently, the Supreme Court reopened the very case examined by the European Court of Human Rights in *Vajnai* and quashed the conviction of the applicant in that specific case[26] but upheld a similar conviction of the same person (Mr Vajnai) in a subsequent case with almost exactly identical circumstances – despite the fact that the European Court of Human Rights clearly established that such a conviction violates the ECHR.[27] In this latter case, the defence counsel argued that the Supreme Court should acquit the accused on the ground of absence of 'dangerousness to the society' (an element without which an act does not constitute a crime according to the Criminal Code). The Supreme Court did not follow this interpretation of the provision in question, although it would have been in line with a former Supreme Court judgement[28] and with

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23 Unlike, *e.g.,* French courts, *see* E. L. Abdelgawad & A. Weber, 'The Reception Process in France and Germany', *in:* H. Keller & A. Stone Sweet (Eds.), *A Europe of Rights. The Impact of the ECHR on National Legal Systems*, Oxford University Press, 2008, p. 117. Another interesting example is that of the Italian courts who also used to set aside national law in a certain period, applying the *Simmenthal* doctrine to ECHR law as well, *see* G. Martinico & O. Pollicino, 'Italy. The impact of the European Courts on the Italian Constitutional Court', *in:* P. Popelier, C. Van de Heyning & P. Van Nuffel (Eds.), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts*, Intersentia, Portland, 2011, pp. 275-276.

24 *Vajnai v. Hungary*, no. 33629/06, ECHR 2008.

25 *See Fratanoló v. Hungary*, 3 November 2011 no. 29459/10, para. 25.

26 *See* the Judgment Bf*v.*I.1.117/2008/6. of the Supreme Court of 10 March 2009, <http://ukp.birosag.hu/portal-frontend/stream/birosagKod/0001/hatarozatAzonosito/1117_2008_6/> (last accessed on 20 February 2013). Concerning the possibility to reopen a (criminal) case decided upon by the European Court of Human Rights, *see* Sonnevend 2010, p. 255.

27 *See* the Judgment Bf*v.*II.37/2011/5. of the Supreme Court of 23 June 2011. A summary of the judgment was published (in Hungarian) in the Bulletin of the International Department of the Supreme Court, *see* <www.kuria-birosag.hu/sites/default/files/hirlevel/hirlevel-1107.pdf> (last accessed on 30 October 2012), p. 35. For an analysis and overview of the five-pointed red star cases, *see also,* Zs. Körtvélyesi, 'A Legfelsőbb Bíróság ítélete a vörös csillag használatával kapcsolatos rendőri fellépésről és a strasbourgi mérce alkalmazásáról', *Jogesetek Magyarázata* 4, 2011, pp. 26-33.

28 Bf*v.*III.1.037/2006/5.

the interpretation of some other inferior courts.[29] It held that "the possibility proposed by the defence counsel is excluded, as it would mean such a control of legislation which is out of the competence of the criminal courts". It also declared that ordinary courts "do not have the right to establish that a criminal law provision is unconstitutional or conflicts with an international treaty; this belongs to the competence of the Constitutional Court" and that "the Supreme Court cannot apply […] the decision of the European Court of Human Rights as a precedent, it is precluded from doing so by Hungarian legislation".[30]
A similar approach is reflected by the *Fratanoló* judgment[31] which reported that "[t]he [Pécs] Court of Appeal held[32] that positive Hungarian law did not permit the domestic courts to apply the holding of Vajnai as such." In this latter case the European Court of Human Rights was satisfied that the application did not substantially differ from the *Vajnai* case and, given the absence of a scrutiny of the proportionality of the interference (precluded by the Hungarian courts' interpretation), concluded again that there has been a violation of Article 10 of the ECHR.[33]
In the light of the jurisprudence outlined above, we can reiterate that ordinary courts may only give effect to the ECHR inasmuch as national legislation leaves them some margin for Convention-conform interpretation.[34] They cannot set aside a domestic law violating the Convention. Under the old Act on the Constitutional Court, they could not even request the Constitutional Court to do so, since the right to initiate such review of conformity with an international treaty was reserved for a limited group of state organs or persons (the Parliament, its standing committees or any MP, the President of the Republic, the Government or its members, the President of the State Audit Office, the President of

29 *See* City Court of Szentendre [Szentendrei Városi Bíróság], 3.B.102/2004/53, <http://ukp.birosag.hu/portal-frontend/stream/birosagKod/1411/hatarozatAzonosito/102_2004_53/> (last accessed on 20 February 2013) and County Court of Baranya [Baranya Megyei Bíróság], 3.Bf.121/2008/5, <http://ukp.birosag.hu/portal-frontend/stream/birosagKod/0200/hatarozatAzonosito/121_2008_5/> (last accessed on 20 February 2013). It is worth noting that the judgment of acquittal of the City Court of Szentendre was confirmed, although with different reasoning, on third instance by the Metropolitan Court of Appeal. In its Judgment 3.Bhar.159/2008/7. (<http://ukp.birosag.hu/portal-frontend/stream/birosagKod/2201/hatarozatAzonosito/159_ 2008_7/> (last accessed on 20 February 2013) the Metropolitan Court of Appeal did not share the opinion of the first instance court about the absence of dangerousness of the criminal offence in question to the society. Instead it held (taking one step back in the logical chain) that the act of the accused (*i.e.* displaying and selling goods with the picture of the five-pointed red star on them and with the simple aim of financial gain) did not even constitute a crime due to the lack of intention to disseminate totalitarian ideology.

30 *See* the Judgment Bf*v*.II.37/2011/5, note 27.

31 *Fratanoló*, note 25, para. 8.

32 *See* the Judgment Bhar.II.2/2010/4. of the Court of Appeal of Pécs (5 March 2010), <http://ukp.birosag.hu/portal-frontend/stream/birosagKod/2203/hatarozatAzonosito/2_2010_4/> (last accessed on 20 February 2013).

33 *Fratanoló*, note 25, paras 26-28.

34 As some opposing judgments show (*see* note 29 *supra*), the jurisprudence is not wholly settled as to whether the Criminal Code regulation on the display of the five-pointed red star leaves such room for Convention-conform interpretation, but this fact does not seem to affect the validity of the principle ("no possibility for *contra legem* Convention-conform interpretation") in general.

the Supreme Court and the Chief Prosecutor)[35] not including the courts.[36] A pragmatic, although centralized way to circumvent the restrictive list of potential initiators could have been for the ordinary courts to request the President of the Supreme Court to consider the initiation of the aforesaid review. This happened during the national procedure preceding the *Fratanoló* judgment:[37] the Court of Appeal of Pécs [Pécsi Ítélőtábla] suspended the procedure and asked the President of the Supreme Court to consider lodging a petition for review with the Constitutional Court. However, the President of the Supreme Court decided (for reasons not specified in the publicly accessible judgment of the Court of Appeal) not to initiate such procedure and sent the file back to the Court of Appeal which, in turn, convicted the accused[38] – in violation of the Convention, as the subsequent *Fratanoló* judgment shows.[39]

22.5 A New Path for Ordinary Courts to Enforce Convention Rights against Conflicting National Law

In the light of the foregoing, one can duly estimate as being of fundamental importance the provision which entitles (and even obliges) ordinary courts to have domestic law contrary to an international treaty annulled by the Constitutional Court.

According to Section 32(2) of the new Act CLI of 2011 on the Constitutional Court[40] (in force since 1 January 2012), examination of conflicts with international treaties "may be requested by one quarter of Members of Parliament, the Government, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights". This first sentence of the provision is thus an optional possibility ('may be requested') open for a restricted group of persons, still not including ordinary courts. The second sentence states,

35 *See* Section 21(3) of the Act XXXII of 1989 on the Constitutional Court (for the English translation of the Act *see*, note 19).

36 *See also,* Sonnevend 2010, p. 259.

37 *See* note 25.

38 *See* the Judgment Bhar.II.2/2010/4. of the Court of Appeal of Pécs, note 32.

39 As to the knowledge of the author of the present article, so far ordinary courts have only tempted once to refer a law to the Constitutional Court for review of conventionality this way. There are cases in which ordinary courts referred legislation to the Constitutional Court not as violating the Convention but as unconstitutional and used the Convention case law to adduce their argument. *See e.g.,* a referral from the Pécs City Court [Pécsi Városi Bíróság] concerning the regulation of the freedom of assembly in the light of the *Bukta* case (*see* note 17), *see*, the decision 75/2008. (V. 29.) AB of the Constitutional Court, <www.mkab.hu/letoltesek/en_0075_2008.pdf> (last accessed on 20 February 2013), or another referral from the Szentendre City Court [Szentendrei Városi Bíróság] about the display of the five-pointed red star following the *Vajnai* Judgment (*see* note 24). *See* the case III/03491/2012 (note 47) still pending before the Constitutional Court since August 2009]. It is important to precise that in these cases the courts could not and did not ask the annulment of the relevant laws directly on the ground of their conflict with the Convention. They invoked the ECHR only in an indirect way, *i.e.* via the provisions of the Constitution.

40 <www.mkab.hu/rules/act-on-the-cc> or <www.venice.coe.int/docs/2012/CDL-REF(2012)017-e.pdf>.

however, that [j]udges shall suspend judicial proceedings and initiate Constitutional Court proceedings if, in the course of the adjudication of a concrete case, they are bound to apply a legal regulation that they perceive to be contrary to an international treaty.
Hence, the possibility (and even the obligation, as the mandatory nature of this procedural step is clear from the wording of the Section) is open for any judge since the beginning of 2012 to initiate the examination of any piece of legislation that conflicts with an international agreement, including the Convention.
Section 32 procedure (Examination of Conflicts with International Treaties) must be distinguished from the more 'traditional' Section 25 procedure (Judicial Initiative for Norm Control in Particular Cases),[41] mostly as far as their potential outcome is concerned. In this regard, they differ greatly: Section 25 procedure may lead to the declaration of unconstitutionality of the impugned law and/or to the exclusion of its application, whereas the legal consequences of Section 32 procedure may vary depending on the rank of the national law which contradicts the international treaty.
Different sanctions applicable in Section 32 procedure are contained in Section 42. Before examining them, we have to take note of a mistake in the English translation of that Section. Namely, in translations available on the internet site of the Constitutional Court or of the Venice Commission[42] the beginning of both paragraphs of Section 42 is identical,[43] whereas in Hungarian these paragraphs regulate diametrically opposite situations. Therefore, we propose the following translation (suggested modification is indicated in italic):
Section 42 (1) If the Constitutional Court declares that such a legal regulation is contrary to an international treaty which, according to the Fundamental Law, shall not be in conflict with the legal regulation promulgating the international treaty, it shall – in whole or in part – annul the legal regulation that is contrary to the international treaty.
(2) If the Constitutional Court declares that *a legal regulation, with which another legal regulation promulgating an international treaty shall not be in conflict according to the*

41 Section 25 provides that "[i]f a judge, in the course of the adjudication of a concrete case in progress, is bound to apply a legal regulation that he or she perceives to be contrary to the Fundamental Law, or which has already been declared to be contrary to the Fundamental Law by the Constitutional Court, the judge shall suspend the judicial proceedings and, in accordance with Article 24(2) b) of the Fundamental Law, submit a petition for declaring that the legal regulation or a provision thereof is contrary to the Fundamental Law, and/or the exclusion of the application of the legal regulation contrary to the Fundamental Law".

42 *See* note 40.

43 Differences are indicated in italic:
"Section 42 (1) If the Constitutional Court declares that such a legal regulation is contrary to an international treaty which, according to the Fundamental Law, shall not be in conflict with the legal regulation promulgating the international treaty, it shall – *in whole or in part – annul the legal regulation that is contrary to the international treaty.*
(2) If the Constitutional Court declares that such a legal regulation is contrary to an international treaty which, according to the Fundamental Law, shall not be in conflict with the legal regulation promulgating the international treaty, it shall – "*in consideration of the circumstances and setting a time-limit – invite the Government or the law-maker to take the necessary measures to resolve the conflict within the time-limit set*."

Fundamental Law, is contrary to the international treaty concerned, it shall – in consideration of the circumstances and setting a time limit – invite the Government or the lawmaker to take the necessary measures to resolve the conflict within the time-limit set.

We can summarize the different legal consequences of the procedure of examination of conflict with international treaties as follows. On the one hand, if the law promulgating an international treaty has a higher rank in the hierarchy of norms than the law which violates the international treaty itself, than this lower-ranking law shall be quashed by the Constitutional Court. On the other hand, if the international treaty has been promulgated by a lower-ranking law, a higher-ranking law which violates the international treaty cannot be annulled by the Constitutional Court. Instead, it shall invite the Government or the legislature to resolve the conflict. The next section of this article will discuss how the above regulation may apply to the ECHR, but before turning our attention to this question, let us examine first the practice of the Section 32 procedure.

One cannot perceive any proliferation of petitions based upon Section 32(2) so far. According to the database of the Constitutional Court,[44] from 1990 until the end of 2012 judges initiated 351 procedures before the Constitutional Court altogether. Out of 351, only a dozen raised some issue of conformity with an international treaty. In theory, Section 32(2) (in force since the beginning of 2012) may be or could have been applied in only four cases.

The first of them, case III/01177/2012,[45] is pending before the Constitutional Court since May 2009 and the petition was amended (made conform to the Fundamental Law) in April 2012. It concerns Section 15(3) of the Act CXXX of 2003 on the Co-operation with the member states of the European Union in Criminal Matters, according to which the arrest for surrender (upon a European arrest warrant for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order in the issuing member state) and the provisional arrest for surrender may not be replaced by other constraint measures restricting personal liberty. According to the petitioner judge, such a mandatory arrest is in contradiction with the right to liberty enshrined in Article 9(1) of the International Covenant on Civil and Political Rights, in Article 5 of the ECHR as well as in Articles I and IV of the Fundamental Law. The judge points out that the relevant recommendations of the Committee of Ministers of the Council of Europe[46] also underscore the presumption of innocence and the presumption in favour of liberty. Both presumptions require that the remand in custody shall be the exception rather than the norm and there shall not be a mandatory requirement that persons suspected of an offence (or particular classes of such persons) be remanded in custody. Since alternative, more

44 <www.mkab.hu/hatarozat-kereso>.

45 <http://public.mkab.hu/dev/dontesek.nsf/0/C59EAB855426E203C1257ADA005251FE?OpenDocument> (last accessed on 14 February 2013).

46 *See* Resolution (65) 11, point 1.(a) and Recommendation Rec (2006)13, Appendix, point 3.[2].

proportionate measures (*e.g.* home detention curfew) may be applicable to 'ordinary' suspects (*i.e.* persons not subject to European arrest warrant) the regulation is allegedly also discriminative and violates Article XV of the Fundamental Law (equality before the law, prohibition of discrimination). Despite the above arguments relying extensively on international obligations, the judge did not initiate the examination of the provisions' conformity with an international treaty as such. Instead, the petition requests a declaration of unconstitutionality and the annulment of the provision in question. The judge argues that Section 15(3) of the Act CXXX of 2003 is unconstitutional because it violates both the above-mentioned Articles (concerning substantially the right to liberty and the prohibition of discrimination) and Article Q (obligation to ensure conformity between national and international law, fulfilment of obligations assumed under international law) of the Fundamental Law.

The second petition, registered as III/03491/2012,[47] was lodged with the Constitutional Court in August 2009 and requests the annulment of points b) and c) of Section 269/B (1) of the Criminal Code prohibiting the display of the five-pointed red star. The case was initiated subsequently (and with reference) to the *Vajnai* judgment of the European Court of Human Rights[48] and the petition follows a quite similar line of argumentation. However, it explicitly renounces to initiate examination of conflict with an international treaty (namely the ECHR) since ordinary courts were not allowed to submit such requests before 2012. Instead, it alleges that the impugned (disproportionate and unnecessary) provision violates the principle of legal security and the freedom of expression and is thus unconstitutional.

The third case concerning an alleged conflict with the international law is dated from January 2012 and bears the number III/02045/2012.[49] Here, the petitioner judge was of the opinion that Sections 268(1) and 305(1) of the Criminal Procedure Code violate Article XXVIII (1) and (3) of the Fundamental Law (right to an independent and impartial tribunal established by law, to a fair and public trial within a reasonable time and to defence) as well as Article 6(1) of the Convention. According to the Sections concerned, the judge may order *ex officio* to obtain further evidence or to complete the insufficient indictment. For the petitioner, these provisions confuse the respective roles of the judiciary and the prosecution and are contrary to the principles of equality of arms and fair trial. The reasoning of the petition explicitly alleges infringement of Article 6(1) of the Convention but the judge turned to the Constitutional Court with reference only to Section 25 of the Act on the Constitutional Court. With its decision 3242/2012. (IX. 28.) AB (adopted on

47 <http://public.mkab.hu/dev/dontesek.nsf/0/E652EF23DE71F1E9C1257ADA00524809?OpenDocument> (last accessed on 14 February 2013).

48 *See* note 24.

49 <http://public.mkab.hu/dev/dontesek.nsf/0/AF5B2B8F87E284B1C1257ADA00524F9A?OpenDocument> (last accessed on 14 February 2013).

28 September 2012) the Constitutional Court dismissed the petition as ill-founded. Essentially, it held that the clarification of the facts and the indictment facilitates a properly informed and well-founded decision-making, therefore it serves the interest of both parties and the possibility for the court to order such clarification *ex officio* does not violate any fundamental rights.

The fourth case, lodged with the Constitutional Court in August 2012 under no. III/03289/2012[50] also concerned the Criminal Procedure Code. This time the petitioner judge (by the way the same person as in the second and third case described above) requested the declaration of unconstitutionality and annulment of Section 310(1). The latter provision regulates the amendment or expansion of the indictment if the prosecutor deems, with regard to the charge contained in the indictment or the facts related thereto, that the accused is guilty of having committed a different or another criminal offence than the subject of the indictment. According to the petitioner, such an unlimited possibility to expand or modify the initial charges infringes the right to a fair trial and the right to defence of the accused. He relied on Article XXVIII(1) of the Fundamental Law and on Article 6(1) of the Convention but, similarly to the case discussed above, turned to the Constitutional Court with reference to Section 25 procedure. Regarding the outcome of the case, the Constitutional Court did not share the petitioner's concerns and dismissed the petition as ill-founded with its decision 3376/2012. (XII. 15.) AB (adopted on 15 December 2012). The reasoning pointed out that the possibility provided for the prosecutor is not unlimited: it is subjected to the condition that the indictment shall be connected, even in its amended or expanded form, to the facts underlying the original indictment. For the Constitutional Court, the regulation strikes a fair balance between state interest and the right to a fair trial. All the more so because the limited possibility for amendment of the indictment is accompanied by other procedural guarantees (*i.e.* adjournment, time for the accused to prepare his defence), too.

The above brief overview intended to present the practice of the Section 32 procedure, but we must conclude that there is not yet any. In the two cases already decided, the Constitutional Court simply stated at the outset that it conducted the procedure pursuant to Section 25 of the Act on the Constitutional Court and then, rather surprisingly, did not say a word about international law or ECHR issues – despite the fact that both petitions explicitly alleged the violation of Article 6(1) of the Convention. As far as the other two petitions are concerned, the one about the display of the five-pointed red star renounced in a straightforward manner to initiate examination of conflict with the ECHR and the other one also concentrates on the issue of unconstitutionality.

50 <http://public.mkab.hu/dev/dontesek.nsf/0/2DB999D4B55610C3C1257ADA00524999?OpenDocument> (last accessed on 14 February 2013).

22.6 The Limits of This New Procedural Path

As promising as it may be, the effectiveness of Section 32 procedure for examination of conflicts with international treaties seems therefore to be limited in several respects.
Firstly, so far it appears to be of only subsidiary nature compared with Section 25 procedure (judicial initiative for norm control in particular cases) in the practice of the ordinary courts and in the interpretation of the Constitutional Court.
Regarding the ordinary courts, they seem to be either not fully aware of the new possibility created by Section 32 or not really willing to make use of it if the issue may also be subject of a traditional review of constitutionality. Be that as it may, neither presumption is acceptable, since Section 32(2) contains an unconditional obligation to refer every collision between national and international law to the Constitutional Court and the courts are supposed to be perfectly abreast of this obligation.
In a similar vein, the already decided two cases show that the Constitutional Court does not perform an examination of collision with an international treaty if the case may also be treated as a constitutionality issue.[51] However, the Fundamental Law and the Act CLI of 2011 on the Constitutional Court themselves would seem to suggest a different interpretation and treatment. According to Article 24(2)f) of the Fundamental Law, examination of conflicts between national law and international treaties is a self-standing competence and duty of the Constitutional Court, there is no indication of any such subsidiarity in the text. It is true that Section 52(1) of the Act on the Constitutional Court provides that the petition shall contain an explicit request, whereas the above-mentioned petitions did not request explicitly the declaration of infringement of an international treaty. However, Sections 32(1) and 52(2) make clear that the examination of conflicts between national law and international treaties may be performed even *ex officio*. Besides, according to point d) of Section 52(1) a petition shall be considered explicit if it clearly indicates the provisions of an international treaty that are violated. Consequently, if a judge's petition clearly specifies an alleged violation of an international treaty (even without explicit request for annulment or declaration of incompatibility, as it was the case in the above-mentioned four procedures) the Constitutional Court should not, especially in the light of Articles Q and 24(2) f) of the Fundamental Law, omit to address (at least briefly, if the petition seems

51 This standpoint was *expressis verbis* confirmed by two other recent decisions concerning, respectively, the registration for elections, *see* 1/2013. (I.7.) AB, <www.mkab.hu/letoltesek/en_0001_2013.pdf> (last accessed on 20 February 2013), section III, point 10 and the law on the protection of the families, *see* 43/2012. (XII.20.) AB, <http://public.mkab.hu/dev/dontesek.nsf/0/065D43D1183D5A48C1257AE8004C12E8?OpenDocument> (last accessed on 20 February 2013), section IV, point 2. In these decisions, the Constitutional Court found unnecessary to perform a formal examination of collision with an international treaty, as the regulation under scrutiny was found clearly unconstitutional already under the Fundamental Law. It is important to note, however, that (unlike the two decisions, III/02045/2012 and III/03289/2012 cited above in notes 48 and 49) the Constitutional Court took due account of and analysed thoroughly the case law of the ECHR.

to be manifestly ill-founded in that respect) the merits of the international law issue. For even if a petition has to be dismissed as ill-founded with regard to constitutionality matters, it may not always be necessarily superfluous to examine alleged violation of the Convention, too. A blatant example for this is the situation of an eventual discrepancy between the case law of the Constitutional Court and that of the European Court of Human Rights (*e.g.* concerning the display of the five-pointed red star, *see,* the decision 14/2000. (V. 12.) AB of the Constitutional Court and the *Vajnai* and *Fratanoló* judgments of the European Court of Human Rights).

Secondly, the potential effectiveness of a Section 32 procedure also seems to be seriously compromised as far as its legal consequences and the protection of fundamental rights are concerned. According to Article I (3) of the Fundamental Law, rules related to fundamental rights and obligations shall be defined by statutes. Under the regulation of the former Act on the Constitutional Court statutes could also be annulled if found to be in violation of the ECHR, as their rank was not higher than that of the statute promulgating the Convention (*see,* section 22.3 above *in fine*). As we have seen, from this legal construction the doctrine deduced the supra-statutory nature of the ECHR. Now, instead of reinforcing this supra-statutory rank, the new Act on the Constitutional Court and its constitutional framework made the potential outcome of a Section 32 review of conformity with the ECHR rather uncertain and ambiguous. Without any identifiable reason, Section 42(1) of the (new) Act CLI of 2011 on the Constitutional Court contains a different wording on legal consequences of a conflict between a domestic law and an international treaty from that of the former Act on the Constitutional Court. Whereas the former Act allowed the annulment of "a law or another legal instrument of state administration at the same or lower level than the law promulgating the international treaty", the Act currently in force allows for such an annulment where the domestic law infringing international obligations "shall not be in conflict [, according to the Fundamental Law,] with the legal regulation promulgating the international treaty".

The problem with this is that although the Fundamental Law prohibits that any lower-ranking law conflict with a higher-ranking one,[52] it does not prohibit at all (at least

52 *See* Art. T(3), Art. 15(4), Art. 18(3), Art. 23(4) and Art. 32(3) of the Fundamental Law.

53 The principle of legal security is inherent in Art. B) (1), according to which Hungary is a state governed by the rule of law. According to the case law of the Constitutional Court, *see* the decision 21/2001. (V. 21.) AB, <http://public.mkab.hu/dev/dontesek.nsf/0/5117DE59C65AA869C1257ADA00529FE7?OpenDocument> (last accessed on 20 February 2013), principle of legal security is infringed if conflicts between equal-ranking legal norms cannot be resolved with interpretation. However, the simple fact of a resolvable collision between equal-ranking legal norms is not unconstitutional, *see* the decision 35/1991. (VI. 20.) AB, <http://public.mkab.hu/dev/dontesek.nsf/0/2274971D344C7E27C1257ADA00529A74?OpenDocument> (last accessed on 20 February 2013). *See also* T. Győrfi & A. Jakab, '2. §. [Alkotmányos alapelvek; ellenállási jog]', *in:* A. Jakab (Ed.), *Az Alkotmány kommentárja* [Commentary on the Constitution], Budapest, Századvég 2009, para. 175; and A. Vincze, '32/A. § [Az Alkotmánybíróság]', *in:* A. Jakab (Ed.), *Az Alkotmány kommentárja*, Budapest, Századvég 2009, para. 110.

literally)[53] that a particular statute conflicts with another one of similar rank.[54] Hence, according to grammatical interpretation, neither paragraph (1) (annulment of a domestic law in violation of an international treaty) nor paragraph (2) (invitation of the Government or the lawmaker to resolve the conflict) of Section 42 would apply in case of a conflict between the statute promulgating the ECHR and another statute.[55]

Supposedly, this lacuna is not deliberate but due to a mistake of legislative editing. The explanatory memorandum to the relevant Bill (*i.e.* T/4424 on the Constitutional Court) initiated by the Constitutional, Judicial and Standing Orders Committee of the Parliament makes no mention at all of this issue, of the reasons behind the modification.[56] Moreover, László Salamon, president of the Committee at the material time, argued before the Parliament that the legal consequences of a conflict between a domestic law and an international treaty will remain the same as before.[57]

For the time being and in lack of any already adopted Constitutional Court decision applying Sections 32 or 42, we cannot but guess whether the Constitutional Court will opt for interpreting Section 42 in a way that makes possible the annulment of a statute in violation of the ECHR. Nevertheless, an interpretation of this kind would be in line with Article Q of the Fundamental Law that enshrines Hungary's obligation to ensure the conformity between international and national law. Some of its recent decisions also let us suppose that the Constitutional Court will continue to play an active role in enforcing our obligations assumed under an international treaty and that the annulment of a statutory provision in breach of the ECHR will remain a surely conceivable legal sanction. As the Constitutional Court recently held: "levels of already adopted values, principles, guarantees and requirements cannot be reduced in a constitutional state governed by the rule of law, and their enforcement cannot become less rigorous."[58] However, it is also conceivable that the Constitutional Court opts for a much simpler solution, which would consist of trying not to make use of Section 42 if possible and preferring annulment on the ground of unconstitutionality (*i.e.* violation of Art. Q of the Fundamental Law due to the incoherence between national and international law) to annulment on the ground of conflict with an international treaty.

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54 With respect to the hierarchy of legal norms, the Fundamental Law does not make difference between 'ordinary' and 'cardinal' statutes.

55 Undoubtedly, lower-ranking laws violating the ECHR may still be annulled as the Convention has been promulgated by statute, with which decrees of various forms shall not be in conflict according to the Fundamental Law.

56 *See* <www.parlament.hu/irom39/04424/04424.pdf>.

57 <www.parlament.hu/internet/plsql/ogy_naplo.naplo_fadat?p_ckl=39&p_uln=118&p_felsz=22&p_szoveg=&p_felszig=22>.

58 *See* section IV, point 7 of the decision 45/2012. (XII. 29.) AB, <http://public.mkab.hu/dev/dontesek.nsf/0/ B139EF59DD213D0BC1257ADA00524EC0?OpenDocument> (last accessed on 20 February 2013). *See* also, section III, point 3.3. of the decision 1/2013. (I. 17.) AB of the Constitutional Court, <www.mkab.hu/ letoltesek/en_0001_2013.pdf> (last accessed on 20 February 2013).

22.7 Conclusion

Vesting ordinary judges with the competence to initiate scrutiny over the conformity of a national law to an international treaty is something unprecedented in the Hungarian legal system. This possibility may have a very favourable effect on the enforceability of ECHR rights at domestic level, which is otherwise considerably hindered by the limits of harmonious interpretation, by the impossibility for judges to set aside domestic legal provisions which violate the Convention, however flagrant the violation may be.

It is very unfortunate, however, that at the same time with the introduction of the possibility of a promising new procedure, the possible legal consequences of a collision with an international treaty concerning fundamental rights (hence promulgated by statute, according to Article I (3) of the Fundamental Law) became much more uncertain and subject to interpretation than before.

The effectiveness of this new procedure (and, consequently, the enhanced protection and enforcement of Convention rights on domestic level) depends largely on the attitude and the activity of ordinary judges in referring such issues to the Constitutional Court and on the interpretation adopted by this latter as far as the nature of the procedure (subsidiarity or not) and the possible legal consequences (whether a conflicting statute may be annulled and on which ground) are concerned. So far, the practice of the first year of this new provision shows a rather reluctant start on behalf of both the ordinary courts and the Constitutional Court.