

Fruzsina Gárdos-Orosz | Kinga Zakariás (Eds.)

The main lines of the jurisprudence of the Hungarian Constitutional Court

30 case studies from the 30 years of the Constitutional Court (1990 to 2020)



Nomos

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Preface

Both judicial review and constitutional interpretation have a vast and growing body of literature. Constitutional interpretation is one of the standard topics of constitutional scholarship.¹ However, even the most recent literature has not dealt extensively with a jurisprudence that has undergone two constitutional transitions in the last 30 years, as was the case with Hungary in 1989–1990 and 2010–2012.²

As regards the concrete past of the literature on constitutional jurisprudence, one only needs to mention Georg Brunner and László Sólyom (eds), *Verfassungsgerichtsbarkeit in Ungarn: Analysen und Entscheidungssammlung 1990–1993*.³ This book includes an introduction that is still one of the main works which provide an understanding of the early development of democratic Hungary.⁴

When it comes to access to Hungarian constitutional case law in English, András Holló, one of the former presidents of the HCC and Árpád Erdei, one of the former vice-presidents of the HCC, has published a

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- 1 Susan J. Brison and Walter Sinnott-Armstrong, *Contemporary Perspectives On Constitutional Interpretation* (Routledge, 2020); Erin Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Edward Elgar, 2018); András Jakab, Arthur Dyeve, and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press, 2017) or Zoltán Sente and Fruzsina Gárdos-Orosz (eds), *New Challenges to Constitutional Adjudication in Europe* (Routledge 2019).
 - 2 Academic interest in Hungary, furthermore, has adjusted to the spread of populist politics in Europe and the wider world over recent decades. Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago University Press, 2018), or Nadia Urbinati, *How Populism Transforms Democracy* (Harvard University Press, 2019) or Fruzsina Gárdos-Orosz, Zoltán Sente (eds.), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (Routledge, 2021).
 - 3 Georg Brunner and László Sólyom (eds), *Verfassungsgerichtsbarkeit in Ungarn Analysen und Entscheidungssammlung 1990–1993* (Nomos Verlagsgesellschaft: Baden-Baden 1995).
 - 4 Georg Brunner, ‘Vier Jahre ungarische Verfassungsgerichtsbarkeit’ in George Brunner and László Sólyom (eds), *Verfassungsgerichtsbarkeit in Ungarn* (Nomos: Baden-Baden 1995), 13; László Sólyom, ‘Zum Geleit zu den Entscheidungen des Verfassungsgerichts der Republik Ungarn’ in George Brunner and László Sólyom (eds), *Verfassungsgerichtsbarkeit in Ungarn* (Nomos: Baden-Baden 1995), 59.

Preface

collection of cases in English.⁵ We must also mention the translations of HCC cases on the homepage of the HCC and the translations and briefs of the Codices, which are very useful but not part of the academic analysis.

The book in the reader's hands builds on a methodological innovation that allows the jurisprudence of the HCC to become visible through the headnotes and their explications. The emphasis we put on the crystallization of the legal principles in the headnotes is a unique approach in case analysis which we recommend is applied to other jurisprudence and comparative work in forthcoming similar projects.

It is to be noted, in sum, that our book follows a unique approach because it contains a methodologically well founded selection of case law.⁶ It focuses on one of the most significant contemporary challenges to constitutional democracies, bringing together pre-eminent scholars of law from almost all Hungarian law schools to provide insights into the various doctrinal solutions applied by the HCC.

1. *The goals of the book*

The collection offers a retrospective presentation of the practice of the HCC since its foundation and over the past three decades, acknowledging that between 1990 and 2011 this practice was determined by the Constitution, while from 1 January 2012, it has been based on the FL (Fundamental Law).

An example of the genre that we present here is a review of the case law of the GFCC, Jörg Menzel and Ralf Müller-Terpitz (eds), *Verfassungsrechtsprechung: Ausgewählte Entscheidungen des Bundesverfassungsgerichts in Retrospektive*.⁷

The present collection features legal analyses of significant cases. After presenting the facts on which the decision is based, the authors provide a doctrinal analysis of the decision, including an explanation of the background of the case and its consequences. The primary purpose of this

5 András Holló and Árpád Erdei, *Selected decisions of the Constitutional Court of Hungary (1998–2001)* (Akadémiai Kiadó: Budapest 2005).

6 Similarly to András Jakab and Sebastian Schmid, 'Die Rundfrage über die gelungensten und misslungensten Entscheidungen des VfGH seit 1920' (2021) 76 *Zeitschrift für öffentliches Recht*, 1.

7 Jörg Menzel and Ralf Müller-Terpitz (eds), *Verfassungsrechtsprechung Ausgewählte Entscheidungen des Bundesverfassungsgerichts in Retrospektive* (3rd ed., Mohr Siebeck: Tübingen 2017).

collection of analyses is to present the relevant content of the Constitution, and the FL as explored by the HCC in the specific case. Accordingly, the authors highlight the reasoning behind the decision and recognise the new legal principles, introduced as a Headnote (in Hungarian case law this is not provided by the HCC itself),⁸ and provide a thorough doctrinal analysis. Our ultimate aim is to record the milestones of the 30 years of practice of the HCC and to describe the main tendencies in its decision-making. We suggest that what we might term the ‘landmark decisions’ of the HCC mirror the constitutional change that is at the heart of the current debate in international scholarship.

2. A Detailed Synopsis

2.1. Synopsis

The English-language collection is based on the volume entitled “Constitutional Jurisprudence: 100 Landmark Decisions of the Constitutional Court 1990–2020”,⁹ which contains the 100 HCC decisions that are the most significant according to the majority of Hungarian full professors of constitutional law (i.e. the majority of expert opinion). The editors narrowed this selection down to 30 decisions of international interest, selected to explain the main lines and the main turns and shifts in the jurisprudence, and the different legal character of the jurisprudence at different points in time. According to our legal approach, a decision by the HCC can be considered a ‘landmark decision’ if it introduced or further developed a new doctrinal standard, or expanded or transformed the meaning of the relevant provision of the Constitution or the FL. The collection, therefore, places particular emphasis on highlighting the relevant headnotes when analysing each decision.

The headnotes highlighted in the analyses of the decisions are interwoven through the collection, so—it is hoped—the individual examples of case law deriving from the different eras of the institution will eventually paint a valuable picture of the practice of the last thirty years. To make

8 Kinga Zakariás, ‘Az elvi tételek kiemelésének kérdése az alkotmánybírósági gyakorlatban’ [Underlining the Headnotes in the Constitutional Court Jurisprudence] (2019) 10 *Pázmány Law Working Papers*, 1.

9 Fruzsina Gárdos-Orosz and Kinga (eds), *Az alkotmánybírósági gyakorlat: Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990–2020. I-II.* (Társadalomtudományi Kutatóközpont – HVG-ORAC: Budapest 2021).

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this picture as nuanced as possible, within the scope of the Background and the Aftermath part of the case study, each analysis also includes both the previous and the new constitutional court practice relevant to the constitutional issue under discussion.

2.2. Basic structure of the case studies

The analyses of the decisions not only examine a particular decision in a narrow sense, but also previous decisions and the general background and the aftermath of the judgment in a broad sense. The analysis of a decision in a narrow sense focuses on the interpretation of the decision itself. The task of the decision analysis in a broad sense is to create a more comprehensive legal context, to place the analysed judgment in the context of the practice of the HCC. Decision analysis, in a broader sense, provides a framework for the analysis. Accordingly, the chapters follow the following structural scheme: title, a summary of the significance of the decision, presentation of the background (including the legal context and the previous decisions), presentation of the motion, description of the operative part and the reasoning, doctrinal analysis, aftermath (both the legal context and later decisions), and bibliography. Each structural element (except for the significance of the decision) is separated under a distinct subheading, and these subheadings are highlighted in bold.

The main title contains the number of the HCC decision and the name given by the editors, and the subheading contains the key phrase of the unofficial headnotes.

The aim of the analysis of the decision—to describe the ‘landmark decisions’ and the most important tendencies of the 30-year practice of the HCC—is facilitated by emphasizing the significance of the decision at the beginning of the chapter. This places the decision in the context of the practice of the HCC.

The analysis of the decision in the broadest sense begins with the presentation of the previous decisions related to it. Based on the significance of the decision—in the spirit of a retrospective approach—it is necessary to look back at the antecedents of the HCC decision: the Hungarian and international legal environment, and the economic, social, and legal historical background.

The analysis of the decision in the narrow sense begins with a brief description of the motion, which shows the jurisdiction of the HCC, the reasons for initiating the proceedings, and the legal provisions or judicial decisions that the petitioner is challenging.

The decision of the HCC is separated from its reasoning. Therefore the decision is worded clearly in the first paragraph of this part.

The most important part of this subsection is the reasoning (*ratio decidendi*) supporting the operative part of the decision in order to reconstruct the content of the referred provision of the Constitution or the FL. This section presents the majority position, starting from a broad interpretation of the concept of *ratio decidendi* (all the legal principles that contribute to the substantiation of the operative part are included here).

The emphasis on the headnotes given separately at the beginning of each part helps the reader to recognize the new content. The interpreted provision of the Constitution or the FL is always indicated in parentheses at the end of the headnote. The headnote indicates the content of the interpreted provision and what requirement arises from it in the specific case. Headnotes are highlighted as subheadings, and their content is explained in detail during the reconstruction of the decision's reasoning. The location of the statement of the HCC is cited carefully in order to provide guidance for foreign readers, judges and the academic community, including students.

This section contains a doctrinal analysis of the reasoning supporting the decision, taking into account the dissenting and parallel opinions and the positions in the literature, the main task of which is to assess the solutions developed in the decision. The emphasis is on conflicting positions, so the names and sources of the representatives of the different views appear only in footnotes.

This section contributes most to achieving the aims of the collection of analyses, which is to present the impact of the HCC decision on the change in legal doctrine; consequently, it deals with it in great depth, with each headnote being covered.

The aftermath of the decision is the counterpart to the background section insofar as it provides an overview of the impact of the decision on the economic, social and regulatory environment (e.g. legislative amendments). It also serves as an apex stone, completing the analysis by providing feedback on the significance of the decision.

The Hungarian and English language sources are indicated in the bibliography, which will help those interested in getting to know the broader context of the topic and delving into specific details.

For the sake of better understanding we have simplified some legal terms throughout the book. Every legal provision is referred to as an "article" no matter what appears in the official translation. We have also made a list of abbreviations, including the most frequently used legal documents. In some cases we have simplified the legal references in the

Preface

doctrinal explanation—for which we accept full responsibility—so as to provide the reader with a comprehensive explanation in English.

3. Acknowledgements

We owe special thanks to Csilla Fedinec who helped us with all this and other preparatory work. We would also like to thank Bálint Gárdos, George Seel and Michael Webb for the language review of the English texts. Special thanks goes to the reviewer of the Hungarian book that forms the basis of this collection, Prof. Dr. Peter Paczolay, former president of the HCC, current Hungarian national judge of the ECtHR. We would like to thank the Constitutional Court of Hungary for providing us with important statistical accounts on the examined period. Last but not least, we thank the Center for Social Sciences, Budapest for its generous support.

Budapest, 2021 October

The Editors

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List of Abbreviations

CJEU

Court of Justice of the European Union

old Civil Code

Act IV of 1959 on the Civil Code

Civil Code

Act V of 2013 on the Civil Code

old Criminal Code

Act IV of 1978 on the Criminal Code

Criminal Code

Act C of 2012 on the Criminal Code

old Civil Procedure

Act III of 1952 on Civil Procedure

Civil Procedure

Act CXXX of 2016 on Civil Procedure

Criminal Procedure

Act XC of 2017 on Criminal Procedure

Constitution

Act XX of 1949 on the Constitution of the Republic of Hungary

EU

European Union

FL

Fundamental Law of Hungary

GFCC

German Federal Constitutional Court

HCC

Hungarian Constitutional Court

ECHR

European Convention on Human Rights

List of Abbreviations

ECtHR

European Court of Human Rights

old HCC Act

Act XXXII of 1989 on the Constitutional Court

HCC Act

Act CLI of 2011 on the Constitutional Court

ICCPR

International Covenant on Civil and Political Rights

TEU

Treaty on European Union

TP

transitional provisions of the Fundamental Law