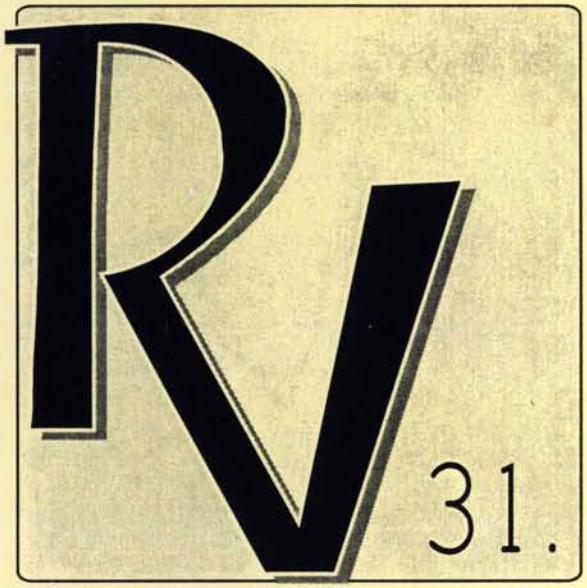

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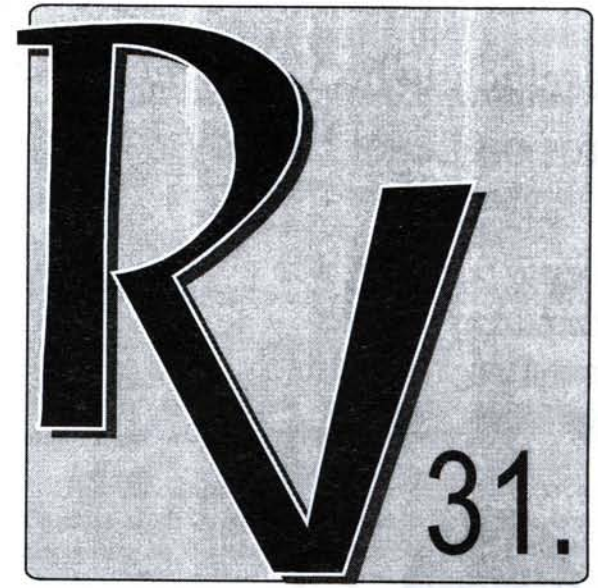

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The Issue of Superiority: National versus Community Legislation

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I. The Constitutional Arrangement of Legislative Power

After 1990 Parliament very quickly regained its traditional significance and modern parliamentary institutions were rapidly revived or adopted.

The fundamentals of the new political system after the collapse of Communist rule were set by the so-called round-table discussions in 1989. This negotiating style ensured the peaceful character of the political transition from a one-party dictatorship to a modern parliamentary democracy. The results of the negotiations between the Communist party and the opposition movements[1] were transposed into the Constitution by the last National Assembly of the Communist era. Although in formal terms the old Constitution of 1949 has remained in effect, the whole structure of it has been radically transformed, establishing new institutions – like the president of the republic, the constitutional court and democratic local governments – and procedures.

The new version of the Fundamental Law restored Parliament's significance and role in the constitutional system. According to Chapter II of the Constitution, Parliament has constitution-making powers: with a two-third majority of its members, the National Assembly may approve the Constitution or modify its text,[2] pass acts, conclude international treaties of outstanding importance, decide on the declaration of a state of war and peace, declare a state of national crisis or a state of emergency and decide on the use of armed forces both abroad and within the country. Parliament has wide-ranging appointment competences, since it elects – among others – the president of the republic, the prime minister, the members of the Constitutional Court, the parliamentary ombudsmen, the president and vice-president of the State Audit Office, the president of the Supreme Court and the general prosecutor.

[1] In practice, the round-table had three sides; beside the governing Hungarian Socialist Labour Party (MSZMP), and the opposition parties and movements, there was a so-called 'Third Side' consisting of the representatives of the usually pro-communist trade unions and other civil organisations.

[2] Article 19 (3) a) of the Constitution. To put a new constitution into effect, the text should be confirmed by a compulsory referendum. To amend the Constitution no referendum is needed.

As to the legislative power of Parliament, legislation may be initiated not only by the government, but also by MPs. The exclusive authority to pass legislation is vested in Parliament.

Just after the opening session of the newly elected National Assembly in 1990, a very vivid parliamentary life began which had a beneficiary effect on the development and use of parliamentary internal organisations and procedures. The understandable democratic enthusiasm of the early 90s promoted Parliament to become the centre of political discussions and decision-making.

The first parliament of the post-Communist era was at the same time an arena-type parliament and an active legislator. The representatives of the re-emerging historic as well as the newly established parties carried out intense political discussions as if they had done so for many decades. While the parliamentary democracy, based on the majority support of the government, strengthened the adversarial style of the discussions, the need to form and maintain a coalition government supported the political cooperation between the parties represented in Parliament.

Since Hungary became an independent state regaining its complete sovereignty only a few years ago, national sovereignty has great respect in the country.[3] It is true for Parliament as well: the National Assembly recovered its real place in the political system only recently, therefore its autonomy is of high value in the eyes of Hungarians.

II. Hungary's way to the European Union: the Accession Process

Yet since the very beginning of the transition period to the new democracy, there has been a wide consensus amongst the political actors on the country's accession to the European Union. Many people see this process as the "return to Europe" in political terms and as the final moment of the change of political system. As to the EU, the political intent to admit the new Central and East European countries appeared to be there, though everybody expected a long and difficult accession process.

The first step of the process was the so-called 'Europe Agreement', a bilateral international treaty between Hungary and the European Community in 1991 (but it only entered into effect in 1994). In 1993, during the Danish

[3] Harmathy, Attila: *Constitutional Questions of the Preparation of Hungary to Accession to the European Union.* In.: A.E. Kellermann et al. (Eds.): EU Enlargement: The Constitutional Impact at EU and National Level. T.M.C. Asser Institute, The Hague, 2001. p. 322.

presidency, the EC determined the political and economic conditions to be met by Hungary for joining European integration. In the same year, the National Assembly issued a resolution saying that the Government has to report each year to Parliament about the implementation of the 'Copenhagen criteria', as the accession conditions are known. Theoretically, this control mechanism has kept the Legislature informed in EC/EU matters. It is necessary since Parliament, as the main lawmaking body, has had an important role in the whole process; the criteria referred to above have required Hungary to apply the entirety of the acquis communautaire from the outset and in full (*ab initio* and *in toto*). This requirement has involved an intensive, wide-ranging and one-sided law harmonisation process, because Hungary has to make its own legal system compatible with EU law.

Thus, Parliament's contribution to the accession process has two major spheres: the law approximation through EU conform legislation, and the control of the Executive, which carries out the accession negotiations with the European Commission.

In the latter, very early on Parliament tried to strengthen its own position to be informed as well as to exert strong influence over the Government in shaping its EU policy when in 1992 it set up the Committee of the European Communities' Affairs. Although it had specific powers and duties, it became a standing parliamentary committee only two years later, in 1994 (as the committee of 'European integration affairs'). In this way, like in the Member States of the EU,[4] there is a standing committee dealing with the EU affairs. In its scope of responsibility, the committee monitors – in general – the harmonisation of EU law, and the preparation for the membership, and examines the matters concerning Hungary's relations with the EU. It may initiate bills, hold hearings of experts, government members and officials and coordinate the work of EU subcommittees of the other standing committees.

Although the Committee of European Communities' Affairs has a naturally pre-eminent role in exercising parliamentary control over EU matters, the National Assembly also has several different ways of counterbalancing the Government's dominance in formulating the national European policy.[5]

It is to be noted that the other parliamentary standing committees have tried to retain their own influence over the segments of this policy formulating process, at least in their special field of activity – all of them have set up a separate sub-committee on European integration affairs. As for the ordinary

[4] See *European Affairs Committees. The Influence of National Parliaments on European Policies*. The European Centre for Parliamentary Research and Documentation. Brussels, 2002

[5] For instance, in 2002 a so-called 'Grand Commission' was set up in order to create a political consensus among the parliamentary parties, although it is not seen as a standing committee of the National Assembly.

legislative process, all harmonisation of laws and draft versions are forwarded to the respective specialised standing committee.

Certainly, the plenum, as the main decision-making body of Parliament, has also developed some forms and channels of control and influence. Actually, most EU laws go to Parliament, while the rest is transposed by government decrees in the national legal system. Another parliamentary instrument is the so-called 'political debate day', which is a special parliamentary one-day session for a free political discussion about a specific issue. In recent years, the preparation for EU accession was the subject of such a political debate on three occasions (in 1995, 1999 and 2002).

Hungary submitted its formal application for European Union membership in 1994, and the accession negotiations with the EU began four years later. Since then, considerable lawmaking activity has been carried out in order to comply with the requirement of approximation of the national legal system to EU law.

The most important cornerstone of the law harmonisation process was the amendment of the Hungarian constitution, inserting those paragraphs into the text that make the country's accession to the EU possible. Since European Union membership has considerable effects on national sovereignty, it was necessary to give constitutional way for the transfer of national competences to the EU institutions. Although the constitutional repercussion of the membership is not a formal requirement of the community law – we can say that the constitutional arrangement of the accession is the private business of each Member State – but actually it was a precondition of Hungary's joining.

The aim of the amendment of the fundamental law was to give constitutional consent for accession and to avoid the requirements coming from the European Treaties possibly being declared by the constitutional court as unconstitutional.

Nevertheless, the content and the form of the draft amendment generated acute political debates. Some people and politicians realised only at this stage that accession would have a great impact on national sovereignty and a vast influence on the internal politics. The controversy was fuelled also by the fact that the Government attached a few other proposals to the EU related clauses that had no direct connection with the accession.

The major elements of the amendment proposal were as follows:

– The 'integration clause': This is the heart of the whole amendment, since this article gives general consent for accession to the European Union. According to this clause, Hungary, as a Member State of the EU, 'may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations' conferred by the

founding treaties, and, furthermore, 'these powers may be exercised independently and by way of the institutions of the European Union'.[6]

– The legislative-executive relations: This clause of the constitutional amendment has given the Government the power to represent national interests in those EU institutions which are based on the participation of the national executives. The new article of the fundamental law requires that a new law on the relationship between the Parliament and the Government concerning the EU affairs be made. According to the constitution, this law has to be passed by a two-thirds (i.e. qualified) majority.

– The change of the election system: As a new element of the election system, there was a need to regulate the rules and procedures of the election of the members of the European Parliament. But the constitution contains only a reference to it, stating that an act of Parliament shall be passed on this subject. As it is known, each Member State has to provide the right to active as well as passive voting at local elections for permanent residents who are citizens of another member country, therefore these rules had to be amended too.[7]

– Compulsory referendum: Although the confirmation of accession directly by the people is not an EU requirement, the whole process will have such a strong effect on the constitutional and political system that there was a political consensus on holding a compulsory referendum about accession. To avoid a constitutional objection against the referendum postponing its date, a separate constitutional provision determined its question and date.

Turning to the real influence of Parliament on the accession process, we can say that the formal ways of parliamentary cooperation is one thing, but the other side of the coin is that to what extent is the Legislature able to exercise real control over the Executive in EU affairs. Currently, Parliament has no mandatory power to give instructions to the Government regarding what point of view it should represent in the Council of Ministers in Brussels. As the National Assembly may only give non-binding opinions on the appointment of Ministers and State Secretaries, it has the right to express its own opinions and proposals on European affairs. But the Government, as it can determine the agenda of parliamentary work, enjoys a high degree of autonomy in policymaking. Above all, Parliament has had only a relatively loose control of and participation in the activities at the European level so far. Whereas it has established its own links to the competent bodies and politicians[8], it is doubtless that the Government and its

[6] Constitution, Article 2/A (1).

[7] But only Hungarian citizens can be elected to be mayors and presidents of county assemblies. Act LXI of 2002 on the constitutional amendment, Article 7.

[8] See, for example, the practice of the regular discussions on the integration process with delegations of the EP and other EU institutions, or the meetings with delegations of other national parliaments and ambassadors.

ministries have a decisive role in planning and implementing the Hungarian EU policy.

Nonetheless, there is a growing awareness amongst politicians that the activities of the EU institutions have a great impact on all policies and the day-to-day life of internal politics. But until now, the main attention was focused on the integration process, without the opportunity of participating in EU decision-making and influencing European policies.

III. The Role of National Parliaments in the European Union

After the declaration on the Future of the European Union attached to the Nice Treaty, the political agenda of the integration was restructured. The discussions about the future governance of the EU have, for a long time, been dominated by the problem of the democratic deficit of the Union. Many scholars say that this problem has generated the whole movement of the constitutionalization of the EU.[9] The role of national parliaments in European-level decision-making has been at the centre of these controversies, since a lot of political theories lead the legitimacy of the Union back to the democratic character of the Member States' legislatures.[10] But the general tendency of the development of the European architecture is the permanent strengthening of the national executives at the expense of the parliaments. The more powers are transferred to the EU institutions, the more functions the national parliaments lose, while the governments of the member countries as EU legislators gain more and more legislative power and political significance. In addition to these tendencies, it is noteworthy that the legislatures only slightly contribute, if at all, to EU law- and policymaking.

The classical separation of Legislative, Executive and Judiciary powers does not prevail in the European Union, where the major legislative functions are exercised by the Council of Ministers, which consists of the representatives of the national governments. In the absence of effective and strong parliamentary control over the work of the Council and of a strong European Parliament, the democratic deficit causes a lot of headaches for the politicians and officials involved in EU matters. As they seek the means of increasing the democratic legitimacy of the EU, they want to exploit the democratic character of the national parliaments as sources of legitimacy. It is unavoidable, since the

[9] Grimm, Dieter: *Does Europe Need a Constitution?* European Law Journal, Vol. 1. No. 3. November 1995. p. 284.
[10] See, for example: Pernice, Ingolf: *The Role of National Parliaments in the European Union.* WHI-Paper 5/2001, Berlin, p. 3.

European Parliament – even though its powers will be increased[11] – alone is hardly able to provide enough legitimacy, because it does not and will not have decisive role in EU policymaking.

As for the present situation, the national parliaments have only indirect effects on EU matters, even if the enthusiasts of a closer union or a federation of the European countries frequently refer to them as being indispensable actors of European integration and further development.

At the moment, the national parliaments, usually as constitution-making authorities, have the power to ratify the European Treaties[12] and their amendments: In practice, it is a subsequent approval and legitimacy of the European construction and the directions of future development.

Secondly, the cooperation of the legislatures of the Member States is necessary for the effective implementation of EU legislation.[13] They have to fill the frameworks set by the EU directives, albeit in many cases it means only a rubber stamp function. Besides that, it is worth noting that they must take care of the compatibility of the domestic lawmaking with that of the European Union.

Another field of parliamentary influence is the control of the executive's activity in EU affairs. Its procedural arrangements and practical intensity vary from one country to another, ranging from a mere subsequent informing of Parliament (e. g. in Spain) to the giving of a compulsory mandate to the government officials working in the relevant EU institutions, mainly in the Council (like in Denmark).

The first European Affairs Committee was set up by the German Bundesrat in 1957 in order to scrutinize the activity of the German government in EEC matters. Since then, all the Member States have established their own respective parliamentary committees.[14] But the formal reaction to what had taken place in the EU institutions was not enough, since 'the traditional scrutiny mechanisms were ill-equipped' to deal with the suddenly growing EU legislation after the Single European Act and the Maastricht Treaty, so at the beginning of the 90s, every Member State parliament reinforced its capacity to control EU affairs.[15]

Sometimes other forms of influence of the national parliaments are mentioned like the parliamentary scrutiny reserve, the national legislatures'

[11] See the *Draft Constitution: citizens' guide.* European Commission, Secretariat General, Task Force "Future of the Union and institutional questions". Manuscript. 20 June 2003. p. 12. The Draft Constitution strengthens the EP's powers as co-legislator by extending the co-decision procedure to new policy areas.
[12] The Article 313 of the revised EC Treaty stipulates that the Treaty "shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements".
[13] Pernice, ibid. p.6.
[14] See footnote 6., p. 10.
[15] Westlake, Martin: *The European Parliament, the National Parliaments and the 1996 Intergovernmental Conference.* Political Quarterly, March 1995, Vol. 66. No.1.

impacts on the European appointment policies (nominations and appointments of the leading positions of European institutions), as well as on the EU annual budget, but these are so indirect instruments that they do not mean real power for the legislatures.

Overall, these forms of cooperation seem to be insufficient in a European context where the supranational governance becomes more and more powerful and wide-ranging without getting enough legitimacy and thus bringing about serious democratic deficit, whereas the weakening national parliaments retain their direct accountability and democratic nature.

Under these circumstances, most European political leaders see the national parliaments as possible and desirable sources of legitimacy of which the EU is so much in need.[16]

The intention of exploiting the national parliaments' legitimacy basis can be demonstrated by the fact that a special declaration on the role of the national parliaments was attached to all the Maastricht, the Amsterdam and the Nice Treaties. Similarly, this subject became an important issue of the European political agenda, and the literature of EU law and political science has been engaged in a wide discussion about it producing proposals in huge number.

Actually, the Constitutional Convention[17] set up a separate working group on this topic. The Working Group IV in its final report recommended to keep national parliaments informed by obliging the European Commission to forward directly to them all consultative texts and legislative proposals which would make them able to monitor the principle of subsidiarity. Another proposal is the making of closer cooperation and increased exchanges between the national parliaments and involving them in the preparation of broad European policies.[18]

Finally, almost all these efforts are involved in the protocol attached to the Constitutional Treaty on the role of the national parliaments. [19] The Protocol stresses the importance of informing the national legislatures about the EU matters in a more effective way and in a wider range proposing that all Commission consultation documents and annual legislative programmes and any other policy strategy (green and white papers and communications) should be forwarded to the national parliaments, and all legislative proposals, and even, the agenda and outcome of meetings of the lawmaking bodies should be transmitted to them in proper time prior to their consideration in the relevant institutions in Brussels. Another priority is the strengthening of the

[16] Maurer, Andreas: *Nationale Parlamente in der Europäischen Union – Herausforderungen für den Konvent.* Integration, Jg. 25. 1/2002. p.22.
[17] The Laeken Declaration of the European Council decided on the establishment of the Constitutional Convention with the aim at drawing a draft constitution for the EU submitted to the Intergovernmental Conference of 2004.
[18] See footnote 6., p.8.
[19] Protocol on the Role of National Parliaments in the European Union.

interparliamentary cooperation encouraging regularly organised negotiations between the European and national parliaments, and within the COSAC.[20,21]

In addition, the Convention has accepted a separate protocol on the application of the principles of subsidiarity and proportionality that sets up the procedure through which the national parliaments can control the compliance with these principles. This mechanism is of great value concerning the national parliaments' role, since it is an instrument to preserve their own legislative authority against the abuse of power by the EU. According to the procedure, any national parliament may send the legislative bodies of the EU their reasoned opinion stating that a proposal does not comply with the principle of subsidiarity (*ultra vires*), and, a fixed number of the national parliaments can force the Commission to review its own proposal. Ultimately, the Court of Justice has the jurisdiction to decide on the case whether the principle has been infringed or not, so the legislatures of the Member States obtain a legal guarantee to retain their own competences.

Certainly, there is a great variety between the Member States according to the strength of the parliamentary influence and scrutiny of EU related matters and the capacity of the national parliaments to influence their government's policy represented at European level. In some countries, the parliament has weak policy influence, and is kept informed about EU matters only afterwards, and to a limited degree, particularly if the government determines in a restrictive way what kind of documents must be given to the parliament. In other Member States the parliament may impose a binding position for the government's stance in the Council. These varieties depend largely on the traditional significance and the original institutional setting of the various parliamentary systems in the member countries.[22]

[20] The Conference of European Affairs Committees is known as COSAC (after its French acronym). It is a cooperative body of the relevant parliamentary committees of the Member States since 1989.
[21] Stuart, Gisela–Knowles, Wanda–Pottebohm, Silke: *Zwischen Legitimität und Effizienz: Ergebnisse der Arbeitsgruppen „Einzelstaatliche Parlamente" und „Verteidigung" im Konvent.* Integration, 26. Jg. 1/2003.
[22] Hegeland, Hans–Neuhold, Christine: *Parliamentary participation in EU affairs in Austria, Finland and Sweden: Newcomers with different approaches.* European Integration online Papers (EioP), Vol. 6 (2002) No. 10. http://eiop.or.at/eiop/texte/2002-010a.htm.

IV. The Issue of Superiority: Who is the Ultimate Authority?

Since the European Court of Justice declared in the Costa v. ENEL case that the European Community had acquired 'real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community'[23], the question has arisen in almost all Member States whether this transfer brings the result that the Union has exclusive powers and absolute supremacy in the areas covered by the founding treaties, or, the Member States preserve their sovereignty and remain the 'masters of the treaties'. In the last decades the case law of the ECJ has improved the doctrines of the direct effect of the community law in the Member States, as well as the supremacy of the community law in the event of its conflict with the national legal acts.[24] If we add to these principles the requirement of the direct applicability of the rules of the EU law in all the Member States,[25] a supreme legal system seems to emerge. Nevertheless, the recognition of the EU law's primacy is not such a simple thing without theoretical and practical problems even in the Member States, and it also raises problems not seen before in the candidate countries.

It is a widely accepted view that the European Union is a *sui generis* legal system that is complementary to the national laws and interacts with them. Since it has its own legal sources, its legal acts also have a direct effect on the citizens of the Member States, instead of the contracting parties' voluntary implementation, and its institutions enjoy a considerable autonomy, sometimes it is said that the EU law is beyond the traditional dichotomy of the national and the international law, being a so-called supranational law which is in close interaction with the legal systems of the member countries.[26]

The recent development of the European Union based partly on the case law jurisprudence of the European Court of Justice has already affected the sovereignty and constitutional structure of the Member States. This is a more acute issue at the present stage of the 'ever closer union' that is in the period of the constitutionalization of the EU.

But even if European integration is a much deeper and stronger cooperation of the associating countries that does not fit into the classical patterns of international law, why is the national sovereignty of the Member States affected by the EU law so greatly that many speak about the post-national era or the death of the nation-state? The direction and guidelines of the development are

[23] Case 6/64, Costa v ENEL (1964) ECR 585 at 593.
[24] Cairns, Walter: *Introduction to European Law.* Cavendish Publishing Limited, London–Sydney, 1997. pp. 93-102 and pp. 104-105.
[25] Article 189 of the EC Treaty.
[26] Hargitai József: *Nemzetközi jog és szupranacionális jog.* Magyar jog, 2003. Április p.196.

ultimately determined by the Member States, and the EU institutions exist on the basis of the 'limited individual empowerment" principle.

The explanation is that the expansion of the majority rule in the decision-making, the growing volume of the EU laws having primacy over the national legal systems and the constitution-building of the EU establishing a European constitutional order with its own direct legitimacy affect the traditional national sovereignty of the Member States. The more powers and responsibilities are conferred onto the European Union earlier belonging to national competences, the more limitations are imposed on the national sovereignty of the member countries. Eventually, this process might lead to the absorption of the European nation states by the EU and to the creation of a superstate. And, according to this argumentation, since the EU lacks the democratic accountability and the necessary legitimacy, the process itself endangers the rule of law and constitutional democracy.

The question of supremacy over the national legal system can be raised in the candidate countries, such as Hungary, as well, where national sovereignty was limited for so long during the cold war and where, thereby autonomy and self-determination are highly respected values. Moreover, these countries will soon join a European Union presumably having a constitution and a well-developed legal system never seen before.

On joining the European Union, the traditional equilibrium between the Legislative and the Executive will be changed, because of the shift of legislative competences from Parliament to EU institutions in which the national governments will represent the country. Hungary's government form is a parliamentary democracy, which is based on the power balance between Parliament and the Government. In this construction, the Government must hold a majority in Parliament; otherwise it will be toppled sooner or later. Since Parliament's legislative powers are reduced by membership, this balance may be changed in favour of the Executive, which escapes from parliamentary scrutiny in all the policy areas that are to be transferred to the EU.

In this study, I examine this phenomenon from the particular view of the future role of the Hungarian National Assembly as the national parliament of a candidate country. From this perspective, the relationship between the EU and the national legislation has at least three areas. The issue of supremacy may arise in relation to the national 'ordinary' legislation, to the connection between the European and the national parliament, and to the national constitution's position as the ultimate source of the (state) authority.

Firstly, the supremacy of the primary and secondary sources of the EU law over parliamentary lawmaking can easily be understood. Although Hungary applies the so-called dualist system in incorporating the relevant international law in the domestic legal system, the place of international legal acts is well-

determined in the constitutional order when the fundamental law sets the principle that Hungary 'accepts the generally recognised principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law'.[27] Its direct impact on the hierarchy of the legal acts is that the legal norms of the assumed and ratified international treaties have precedence over the legal acts of domestic law, including the acts of Parliament. In the case of EU law, the treaties and the regulations have a direct effect, which means that these norms do not need separate national legal acts in order to be transposed into the national legal system. It means that the founding treaties, EU regulations and directives, will be exceptions to the dualist approach.

However, some conflicts might potentially arise between the Community and the national legislation. As I mentioned, the scope of responsibility of the EU institutions is based on the principle of limited individual empowerment, which seems to be a proper guideline of how to distinguish between the competences of the Member States' parliaments and the European lawmaking bodies. But paragraph 308 of the TEU empowers the Union to take all the measures necessary to achieve the objectives and goals of the EU, which clause has been interpreted widely by the ECJ applying the doctrines of implied powers and effet utile.[28] As it is usually argued, this way of interpretation ensures the flexibility of the EU.[29] Theoretically, the tenets of proportionality and subsidiarity should restrain the exaggerated expansion of EU powers, but the Community lawmaking activity on a specific policy area based on such an expanding reading of the Treaty might potentially bring about the resistance of the National Assembly which would regard it as abuse of power. The draft constitution designs a special procedure for such conflicts, in which the national parliaments may initiate the review of the Commission's proposal, preserving their own legislative authority in this way. It points out that the effect of the primacy of the Community law over the national legislation is not an absolute principle but is confined to the policy areas transferred to the EU by the Member States. But even in these areas, the legislatures have not lost their powers: in case of EU directives, the relationship between the Community and the national legislation resembles that of the framework acts of the federal legislation and the individual laws of the Member States in a federal state. After all, in all policy

[27] Constitution, Article 7 (1).

[28] Maazel, Ilann Margalit: *What is the European Union?* B.Y.U. Journal of Public Law, Vol. 16. No.2. 2002.

[29] The new Constitutional Treaty will expectably retain the flexibility clause asserting that the Union may take all the appropriate measures necessary to attain any of the objectives set by the Constitution, provided that:
– they are within the framework of the policies defined in the Constitution;
– the Council acts unanimously on the proposal of the Commission, and
– the EP has given its consent to them.
See footnote 11.

areas where the European Union has not received any power from the member countries, the national legislations have remained the supreme legislative authorities.[30]

Another aspect of the question of who the ultimate decision-making power is, that is, another field of the relationship between the national parliaments and European Union, is the place and role of the European Parliament. A considerable number of the proposals on the democratisation and the future governance of the EU prefers the strengthening of the position of the European Parliament amplifying its co-decision powers and thereby moving its character closer to the traditional concept of the nation-state legislatures.[31]

Considering the role and place of the European Parliament in the European architecture, the real question is whether or not the EP can substitute the national parliaments. Many say that the strengthening of the EP could provide for a new, direct legitimacy of the EU filling the 'democracy gap'. Another hope is that the parliamentarisation of the EU would reduce the dissimilarities of European-level governance and parliamentary democracy, which is the dominant form of government in the Member States.

Nevertheless, the European Parliament can hardly be regarded as a real parliament in classical terms. According to the definition of the Interparliamentary Union, "a national parliament or legislature is an assembly constituted in conformity with the laws of a sovereign State that represents the whole population of the State and no other population, functions on the territory of that State, and is endorsed, according to domestic law, with legislative powers and oversight of the Executive".[32] But why could this concept not apply to a body established by international treaties, or, in other words, is it possible to abandon the State as such from the definition of parliament? Many scholars say that the state-orientation of the classical terms of parliament is the only obstacle to overcome regarding the European Parliament as a real legislature. But it

[30] The powers conferred on the Union are frequently divided into three groups:
Only a few matters fall within the exclusive powers of the EU institutions, like the conservation of the biological resources of the sea or certain aspects of policy setting fishing conditions, etc.
Most powers of the EU belong to the category of concurrent powers. In this range, both the EU and the national authorities may issue legal acts, but the national legislation cannot be in contrast with that of the Council and the Commission.
Employment, education or vocational training are so-called complementary powers where – at least in theory – the powers and duties of the EU and the Member States are separated from each other. *EU Law and National Constitutions. Community Report, FIDE London, 2002.* London, Manuscript, p. 21.

[31] Norton, Philip: *National parliaments and the European Union: where to from here?* In. Craig, Paul–Harlow, Carol (eds.): Lawmaking in the European Union. Kluwer Law International, 1998. pp. 216-217., Maurer, Andreas: *National Parliaments in the European Architecture: Elements for Establishing a democratic and efficient Mechanism.* The Federal Trust for Education and Research, March 2003., Pernice, Ingolf: *The Role of National Parliaments in the European Union.* WHI-Paper 5/2001, Berlin. pp. 12-13.

[32] *Parliaments World Directory 2003.* Interparliamentary Union, 2003. p.1.

seems to be an unfounded view. Although it is true that the term 'parliament' might have several different definitions, some features should be indispensable otherwise this concept would not be appropriate to describe any institution for social sciences. Thus, the representative nature, the highest legislative power or the exercise of public authority cannot be abandoned as definitive elements. The EP meets a few of these requirements, but it does not fulfil others. Whereas the direct election of MEPs lends some representative character to it, many doubt the existence of a European people that could give enough legitimacy to the European Parliament; and, although the EP's power is continuously growing, it does not have the highest legislative powers.

But even if these objections are appropriate, they do not pose any problems, unless we want the EP to take over the role of national parliaments. It is not certain at all that we should make the EU a European-level parliamentary democracy, even if that is the usual form of government on the Continent. Instead, the EP might be given a special function not similar to that of the national parliaments. A stronger EP can hardly be a real rival for the national legislatures, since its strengthening is not a zero-sum game; the latter bodies will not weaken if the European Parliament receives new functions, because it is strengthening at the expense of the Council of Ministers.[33] The European Union is a supranational level of governance; therefore it should not be expected to comply with the models of national governments.

The most contested issue of the supremacy concerning the relationship of the EU and the national sovereignty is the Parliament's constitution-making power. Certainly, this problem can only be conceptualised if the national legislature has constitution-making power. This is the case in Hungary, where Parliament may pass the new constitution, though this decision needs the confirmation of a compulsory national referendum (i.e. the parliament is the *pouvoir constituant* only together with the people). As for the constitutional amendments, Parliament may amend the constitution in cases where no referendum is needed.

The crucial issue in this context is whether the supremacy of EU law extends also to the constitutional rules of the member countries. Does the Community law prevail over the national constitutions? A few scholars suppose yes.[34] They argued that in a lot of countries – mainly in those that apply the monist system – the constitution contains a general clause acknowledging the direct effect and the primacy of EU law over domestic law.[35] Nonetheless, in most cases it is

[33] Horváth, Zoltán: *Az Európai Parlament elhelyezése politikaalakító szerepe alapján*. Európai Tükör, 2003. 3. pp. 136-137, 146.

[34] Such opinions are cited in Rochère, Jacqueline de la –Pernice, Ingolf: *European Union Law and National Constitutions. General Report to FIDE XX Congress 2002 in London*. WHI – Paper 17/02. pp. 21-22. Some scholars share this view in the Hungarian legal literature too. E.g. Vörös Imre: *Az EU-csatlakozás alkotmányjogi: jogdogmatikai és jogpolitikai aspektusai*. Európa 2002, 2002. Június; and Hargitai: ibid.

[35] For example in the Spanish, French or the Dutch constitution.

uncertain whether the constitutional rules themselves fall within the scope of these clauses. A few examples demonstrate that the constitutional courts in the various countries are reluctant to recognise the absolute superiority of EU law over the national constitution, and at least in some areas of the fundamental law, they want to preserve their own jurisdiction.[36] It is also noteworthy that most Member States had to make their constitutions in accordance with the Maastricht Treaty.[37] Although it is true that the signatory countries undertook an international law obligation to ratify the TEU, but in constitutional terms, the Treaty can have direct effect and primacy over the domestic law only if it is not contrary to the national constitution.

The constitutional jurisdiction of the various Member States produces certain limitations on the absolute superiority of the EU law; for example, the republican form of the state, the fundamental principles of the constitution, or the guarantees of basic rights can be untouchable spheres for EU legislation. In certain countries the constitutional court has manifestly reserved its own power to guard the national sovereignty in these areas.[38]

The issue of superiority might emerge also in Hungary after its accession. Pursuant to the Hungarian Constitution, '[t]he Parliament is the supreme body of State power and popular representation in the Republic of Hungary', which exercises its powers on the base of the people's sovereignty.[39] Parliament has the right to conclude international treaties, but it may undertake obligations in this way only within the constitutional frameworks. The Constitutional Court declared its power of reviewing the constitutionality of all international obligations undertaken by any national organ.[40] However, as the European Court of Justice in the Foto-Frost v. Hauptzollamt Luebeck-Ost case (1987) confirmed its earlier claim that the national authorities 'have no jurisdiction to declare that acts of Community institutions are invalid',[41] there seems to be an unsolvable legal paradox because the complete responsibility for constitutional review of the constitutional courts and the exclusive judicial review of the ECJ over EU legal acts cannot be brought in accordance with each other.[42] Actually, as the

[36] See the famous Maastricht judgement of the German Constitutional Court or the Frontini judgement of the Italian Constitutional Court or other stipulations. Rochère, Jacqueline de la – Pernice, Ingolf: ibid. p. 29., MacCormick, Neil: *The Maastricht-Urteil: Sovereignty Now*. European Law Journal, Vol. 1. No. 3. November 1995. pp. 259-260.

[37] Harmathy: ibid. p. 319. For a comparative view on the constitutional preconditions of the effect of the founding treaties and their modifications see Rochère, Jacqueline de la –Pernice, Ingolf: ibid. pp. 12-15.

[38] See, for example, the so-called Solange I. and II. decisions of the German Constitutional Court (37 BVerfG 271 (1974), 73 BVerfG 339 (1986), or its Maastricht decision cited above.

[39] Constitution, Article 19, Sections (1)-(2).

[40] 4/1997. (I. 22.) AB határozat

[41] Maazel: ibid. p. 254.

[42] As MacCormick writes, '[I]t must then follow that the constitutional court of a Member State is committed to denying that its competence to interpret the constitution by which it was established can

ECJ is regarded as the ultimate power in the fields of the EU activities, as the national constitutional courts are the final arbiters of the constitutionality of all legal acts having effect in that country. In theory, if an EU legal act is declared unconstitutional, the national government has only two ways out: it has to reach a constitutional amendment adjusting the constitutional norms to those of the European acts, or, it has to escape from its international obligation. The problem is that the necessary constitutional amendment cannot be guaranteed, and, conversely, the Member State may not refuse the implementation of the EU law without breaching the founding treaties.

A typical problem deriving from this contradiction is to identify the valid law to be applied for individual cases by the courts. According to a resolution of the Hungarian Constitutional Court, if the judge finds that the legal rule relevant in the given case is in conflict with the constitution, he is bound to suspend its procedure and refer to the Constitutional Court for judicial review. However, the ECJ declared in its well-known decision taken in the Simmenthal case that the national courts have to apply immediately and directly the relevant rules of the Community law, even if it is in contradiction with the national legislation.[43] Obviously, the national court cannot be able to comply with both requirements, since they contradict each other.

Epilogue

Under the rapidly changing circumstances, the newcomers of the Union can get in a very difficult situation in which they cannot follow automatically the examples of the older Member States in the issue of superiority. Presumably, the new member countries want to meet every condition and requirement of the European Union, whereas they cannot recognise the Community law as standing over their national sovereignty. Fortunately, the collision between the EU law and the national constitution will probably occur only in extreme cases, because the possible conflicts can be flexibly handled by political means. Moreover, new legal doctrines might produce theoretical ammunition to answer the problems set out above. I think that the draft constitution passed by the Constitutional Convention in June 2003 opened a way to this direction. This proposal acknowledges the Member States' right to abandon the Union, which shows that the member countries seem to preserve their 'final' sovereignty being able to get

be restricted by decisions of a tribunal external to the system, even one whose interpretative advice on points of EC law the constitutional court is obliged to accept under Article 177 EC. Conversely, the European Court of Justice is by the same logic committed to denying that its competence to interpret its own constitutive treaties can be restricted by decisions of Member State tribunals.' MacCormick: ibid. p. 265.

[43] Case 35/76, Simmenthal v Italian Minister for Finance '976) ECR 1871.

back all their competences conferred upon the EU earlier. This arrangement can be conceptualised in different ways; it might be explained by that the nation-states have a so-called 'double sovereignty' distinguishing the 'core' and a 'secondary' sovereignty from which the latter can be transferred to the European Union. Or, it can be said that the member countries transfer only certain 'rights' or competences deriving from their national sovereignty, whereas they preserve the sovereignty itself.

Whatever theoretical solutions evolve, the special problems of the candidate countries related to their accession and law harmonisation point out that the process of the 'ever closer union' and the development of European constitutionalism entails that a lot of questions be answered in the near future.

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Publication Research Group for Legal History of the Hungarian Academy of Sciences at the Department of Hungarian Legal History Eötvös Loránd University

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