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On the Possibility of Constitutional Court's Review of Directives on Unifying the Case Law in the Republic of Hungary

Abstract. The present study undertakes the review of one of the essential authorities of the Hungarian Constitutional Court: the issue of abstract subsequent norm control, which is currently amongst the most significant questions. The possibility of the constitutional review of the Supreme Court's directives on unifying the case law is subject to debate in legal literature and in the intercourse between the two organs as well. This study intends to elicit the nature of the problem through the elaboration of relating regulation and by utilizing certain Constitutional Court decisions concerning the subject. It will arrive at the conclusion that the present regulation also gives scope to the Constitutional Court review of directives on unifying the case law. The paper gives a survend evaluation of the solutions involved in the draft of the new Constitutional Court Act too.

Keywords: Constitutional Court, Supreme Court, directives on unifying the case law, constitutional control, hierarchy of legal sources, the principle of the separation of powers.

In the Republic of Hungary, the Constitutional Court, since the beginning of their operation, 1st January 1990, have significantly restricted the legislative activity of the Parliament and the Government, because the body has enforced the provisions of the Constitution against actual-political influences without any compromise. Beside these two branches of power, however the Constitutional Court has relatively few points of contact with the third branch: the courts. Because the Constitutional Court may review or refuse the review of the directives of the Supreme Court, the Supreme Court may come into on unifying the case law conflict with the Constitutional Court. It is of special actuality at present, because the reform of the regulation on the Constitutional Court is the question of the day. The Ministry of Justice has published the draft of the amendment of the Constitution (hereinafter Constamend1) and the draft of the new Act on the Constitutional Court (hereinafter ConstCourt bill1) in its

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home page[1] and in an altered and revised form they soon appeared in the home page of the Parliament too.[2] (Hereinafter the revised version will be referred to as Constamend2 and ConstCourt bill2.) These drafts may obviously be revised before adoption. In this respect the declarations of certain public figures; ministers, the President of the Supreme Court and Constitutional Court justices will help to understand this issue more properly.

The present study will examine the question from two angles. On the one hand, from the point of view if upon the present regulation the Constitutional Court is entitled to review the constitutionality of the directives of the Supreme Court on unifying the case law, on the other hand from the aspect if the future regulation should coercively involve this possibility.

I. The possibility for the examination on the ground of the prevailing legal situation

In the Hungarian constitutional system according to the Constitution, the highest judicial forum is the Supreme Court (Article 47, Paragraph 1) and the highest organ safeguarding the Constitution is the Constitutional Court. Nevertheless, the Constitutional Court does not form part of the regular judicial forum-system and there is no subordinating or superordinating relation between the two organs. The Hungarian legal system, as opposed to the German solution, does not make the possibility to review the constitutionality of the judicial decisions by the Constitutional Court. Making use of the authority of the Constitutional Court, which is named constitutional complaint in Hungary, the *unconstitutional law* forming the ground of a concrete case may be contested before the Constitutional Court and if it turns out right, the procedure may be restarted in a legal environment compatible with the fundamental law.

The Constitutional Court thus is not entitled to examine single judicial decisions. It is doubtful, however if the directives of normative character unifying the case law, handed down by the Supreme Court may be the subject of a constitutional control, and whether it was necessary and proper to involve them in the new draft. The question arises because the directives on unifying the case law are of normative character, but neither the Constitution nor the Act on the Constitutional Court provide an *expressis verbis* statement on the possibility of a Constitutional Court review. The question of a review is due to the normativity of the directives on unifying the case law.

[1] www.im.hu
[2] www.mkogy.hu

1. A few characteristics of directives on unifying the case law

a) Pursuant to Article 47, Paragraph 2 of the Constitution the Supreme Court shall assure the uniformity of the administration of justice by the courts[3] and its resolutions concerning uniformity shall be binding on all the courts.[4] The role of the directives on unifying the case law is to ensure the uniformity of the judicature. In the course of judicial discretion it may happen that given legal principles are construed in different ways, consequently in cases of similar character, decisions of different content may be passed. The uniformity of law enforcement should be ensured in order to eliminate this problem. For the sake of the course, the Supreme Court[5] pass directives on unifying the case law[6] and

[3] This provision of the Constitution does not preclude that an act would amplify the ways of task fulfilment of the Supreme Court—beside directives on unifying the case law—for the sake of the fulfilment of this constitutional duty. It was done by the Act on the Judicial System when provided on the publication of court decisions of principle. On the ground of the provisions of the Act on the Judicial System, it can be stated the regulation of the publication of court decisions of principle wanted to entitle all the judges and courts to contribute to the improvement of legal legislation. 12/2001 (14.05) Const. Court resolution, ABH 2001. 163, 173.

[4] Due to this provision of the Constitution, the force of directives on unifying the case law necessarily has an effect on litigants through the application of law, by transmitting the ruling based on the obligatory interpretation of law. This general force of directives on unifying the case law ensuing from Article 47, paragraph 2 of the Constitution, which is binding on the courts, may be effective after it has been passed. Cases involved in the acts of procedure may be different if the directives on unifying the case law (may) directly allude to the basic case(s) as well. 12/2001 (14. 05) Const. Court resolution, ABH 2001. 163, 173.

[5] Article 33 of the Act on the Judicial System regulates the role of colleges in the procedure of the Paragraph 1 analyses the practice of the courts and forms an opinion in contested questions of law enforcement, so as to provide a uniform litigation practice. According to the Constitutional Court this provision does not infringe legal security, because in this case the problem is not if the colleges of the Supreme Court or county courts decide in certain professional matters definitively and with a binding force. The rule concerning college opinion in questions of law enforcement involved in the Act on the Judicial System merely a provision that promotes the ruling upon a disputed question of law. The other rules of the Act on the Judicial System, which provide proposal making and initiative right to college leaders for the launching of a unity of law procedure, also corroborate this fact. It may happen—according to the wording of the act "if necessary"—, when the uniformity of law enforcement requires more than a college opinion. 12/2001 (14. 05) Const. Court resolution, ABH 2001. 163, 174.

[6] According to the view of the Constitutional Court, the Act on the Judicial System lays emphasis on the uniform judgement of questions of principle and for this sake within

proclaim judicial decisions of principle.[7] The directives on unifying the case law must be published in the Official Journal of the Republic of Hungary. According to the Constitutional Court, this provision has fulfilled the requirement relevant from the point of view of legal security, namely the cognizability and predictable application of the directives on unifying the case law, since the persons and institutions concerned may get knowledge of the decision of the Supreme Court in a proper way.[8] Thus, a directive on unifying the case law is a normative decision of the Supreme Court released in a procedure regulated by an act, which is binding on all the courts so the content involved in a directive on unifying the case law has a binding force upon all the subjects taking part in the judicial procedure. As a consequence of this, the specification of the directives on unifying the case law among the normative provisions is debated even in the special literature. Related to this the following remarks must be made.

b) The system of sources of law in the Republic of Hungary is regulated partly in the Constitution and partly in Act 11 of 1987 on Legislation. The system of sources of law is divided into two parts by the Act. On the one hand, it distinguishes provisions entailing rights and duties upon subjects, on the other hand specifies other legal means of the so-called state administration, like decisions and directives. The latter have no binding force on subjects, their function *generally* is to provide the uniform direction within the given

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the court organisation system regulates the "mechanism", through which court decisions deciding questions of principle may get to higher judicial forums, finally to the Supreme Court. Thus, the procedure concerning decisions of principle is regulated in the Act on the Judicial System. If the court decision of principle is submitted to the Supreme Court, the duties and rights of the Supreme Court, laid down in the Constitution are to be followed: namely: the uniformity of the law enforcement of the courts. If the Supreme Court require to form an opinion of principle expressed in a court ruling widely known in the litigation practice, the decision may be published. In this way, judicial practice may be properly oriented. The Act on the Judicial System does not refer to the observance of court rulings, and does not contain provisions like the Constitution does in relation to the directives on unifying the case. According to the Constitutional Court, a directive on unifying the case may be initiated if the reverse practice has developed due to the neglect of a court ruling previously published by the courts. Nevertheless, the directives on unifying the case law as a consequence of this, have a binding force on the courts. Thus the possibility that court rulings of principle may be published, will not bring about legal insecurity, because, contrasted with unity of law resolutions, it is not compulsory. 12/2001. (14. 05) Const. Court resolution, ABH 2001. 163, 173–174.

[7] Petrétei, J.: *Magyar alkotmányjog II. Államszervezet.* [Hungarian Constitutional Law II, State Organisation]. Budapest–Pécs, 2000. 213.

[8] 12/2001 (14. 05) Const. Court resolution, ABH 2001. 163, 169.

organisation. The directives of the Supreme Court on unifying the case law are mentioned neither among the laws, nor among the other legal means of state administration.

c) By virtue of Article 32/A of the Constitution the Constitutional Court shall review the constitutionality of laws and attend to the duties assigned to its competence by law. On this ground does Act 32 of 1989 on the Constitutional Court relegate the subsequent constitutional review of other legal means of state administration within the competence of this body.[9]

d) There may arise the question, however if the Constitutional Court is entitled to review, besides laws and statutes and other legal means of state administration, other acts of normative character, not relegated within its authority, for instance directives on unifying the case law. In order to find the answer it is worth examining the major characteristics of relevant directives. First of all, it must be stated that besides unifying the case law directives, certain decisions of the court may also have a normative content. In a certain sphere, for instance the formally binding force of judicial precedents has been recognised. Namely pursuant to Article 29 on the Act on the Judicial System,[10] a division of the Supreme Court in legal matters may reach a divergent ruling from that of another division of the Supreme Court, if the unifying the case law directive passed in the unifying procedure on its initiation provides that.[11] Nevertheless the primary aim of the above mentioned provision of the Act on the Judicial System is not to express the normative character but to safeguard legal security by providing the uniformity of litigation within the supreme forum of jurisdiction. Normative character refers here just to the relation among the unifying the case law divisions of the Supreme Court, and its purpose is to eliminate their different interpretation of law. Because of this, it has no direct effect on the litigation of the lower courts. They are effected exclusively by a directives on unifying the case law passed in the procedure referred to above, which—due to its abstract character—has a binding force on all the courts, thus,

[9] Cf. with 27/1995 (15. 05) Const. Court resolution. ABH (the collection of the resolutions of the Constitutional Court) 1995. 129, 135.

[10] Act 66 of 1997.

[11] Rácz, A.: Alapvető jogok és jogforrások [Fundamental rights and sources of law]. In: *Emlékkönyv Ádám Antal egyetemi tanár születésének 70. évfordulójára* [Book published in honour of Professor Antal, Ádám on the occasion of the 70th anniversary of his birth] (ed.: Petrétei, J.). Pécs, 2000. 187. In relation to this it is worth mentioning that binding force related to the courts can be regarded only as temporary since it will exist until the directive on unifying the case law is passed in the subject. After that, precedents will lose their—very narrow-ranging—binding force.

concerning the subjects in the judicial process it has an effect of *de facto* provision.

e) As concerns unifying the case law, in 1976 a member of the Constitutional Court *István Kukorelli,* expounded his still pertinent opinion related to normative acts—*directives, decisions of principle—of that tim*e, which cannot be passed at present, however the existing ones cannot be neglected either.[12] According to this, general norms, which are launched by the governing organs within a given organizational system upon the right of hierarchy, may be regarded as controlling norms. The major function of these norms is to ensure the uniform and concerted operation of different organs within the given organization. "Governing norms join provisions bearing a general binding force, interpret and explain their content but they should not primarily regulate social relations."[13] The practice of the Supreme Court puts directives on unifying the case law closer to controlling norms. The approach, according to which the directives on unifying the case law of the Supreme Court form a separate group of legal directives, is similar to this. Namely, these norms of law interpretation—as opposed to other directives—pursuant to the provision of the Constitution are binding also formally on the courts.[14]

f) Nevertheless, according to other opinions directives on unifying the case law not even in their effect bear provisional characteristics. Pursuant to this view, directives on unifying the case law is a constitutional institution of law, which joins the exclusive jurisdictional authority of the courts and upon the authorization of the Constitution falls within the power of the Supreme Court. This is the highest level judicial interpretation of law, bearing the aim to ensure the constitutional obligation connected to the principle of legal

[12] According to the statement of the Constitutional Court the survival of directives, decisions of principle and divisional opinions will not infringe legal security until a unifying the case law of different content is created. In order to provide the uniform litigation practice, compared to the previous rather complicated means of professional administration, directives on unifying the case law denote a new "quality", by no means. Article 2, Paragraph 1 of the Constitution does not prove necessity to review unjustified en masse previous directives, decisions of principle and divisional opinions limited to deadlines. The issue of directives, decisions of principle and college opinions had adequate constitutional and statutory basis (Act 46 of 1972, Article 46 and 499, passing them—just like in the case of unity of law resolution—falls within the authority of the Supreme Court. 12/2001 (14. 05) Const. Court resolution. ABH 2001. 163, 175.

[13] Kukorelli, I.: A Legfelsőbb Bíróság normaalkotó tevékenységéről [On the norm creating activity of the Supreme Court]. *Jogtudományi Közlöny*, 1976/11. 658.

[14] Rácz: *op. cit.,* 187.

security.[15] According to the representative of this viewpoint, interpretation can never get to the field of law enforcement by chance. At this point, it must be noted that *it is true as a requirement, but as a possibility, it cannot be excluded*.

Since there is quite a large number of similar, colliding views, it is worth examining the place of the directives on unifying the case law in the system of normative acts, and through this, the possibility for a Constitutional Court review.

2. On the Constitutional Court review of the directives on unifying the case

a) The normative character as the preliminary condition for the Constitutional Court control

The institution of the Constitutional Court, as a basic rule, was intended to review normative acts.[16] Article 46, Paragraph 2 of the Act on the Judicial System has taken the individual decisions expressively off the review of the Constitutional Court, since they are not decisions of a normative content. The Constitutional Court has rejected the constitutional review of individual parliamentary decisions several occasions on the ground that they are single acts without a normative binding force, thus pursuant to the Act on the Judicial System, their review falls off the authority of the Constitutional Court.[17] A few other exceptions, which however fall within the regulation sphere of special acts, were also made. The exceptions are as follows.

Pursuant to the Act on the Electoral System on matters of a national referendum or popular initiative, a complaint can be submitted to the Constitutional Court. In cases like that, the Court obviously acts upon single decisions.[18]

The competence of the Constitutional Court safeguarding the self-governments and autonomy of institutions of higher education also form an exception. On the ground of the Act on Higher Education, provisions and *single* decisions

[15] Szabó, Gy.: A bírói precedensjog kezdetei Magyarországon [The origins of judicial precedent law in Hungary]. In: *Ötödik Magyar Jogászgyűlés* [The Fifth Hungarian Jurist Assembly]. Budapest, 2000. 52.

[16] Individual, concrete court rulings can be regarded neither as norms, nor as legal sources, thus the review of their constitutionality does not fall under the powers of the Constitutional Court. However, no genuine constitutional examination of Constitutional Court acts of normative effect has been performed yet.

[17] Cf. e.g. with 52/1993 (07.10) Const. Court resolution ABH 1993. 407, 408) and 15/1999 (03. 06) Const. Court resolution ABH 1999. 407, 401).

[18] Act C of 1997, Article 130, Paragraph 1.

infringing the self-government and autonomy of higher educations can be challenged before the Constitutional Court.[19]

In the case of the dissolution of a local self-government, the Constitutional Court may express its opinion on the unconstitutional operation of the body, thus it will take measures definitely in a single case.[20]

Participation in the impeachment procedure against the President of the Republic may also be regarded as a single case.[21]

To sum up, the Constitutional Court generally exercises a norm control, but within a well-defined sphere, it may also undertake the constitutional review of acts of a normative character, and a Constitutional Court procedure in other single matters.

In the Hungarian law, within the acts of normative character there are also specified *judicial decisions*, since there are some provisions to express the normative character of certain court rulings.[22] Nevertheless, single court decisions—rulings and injunctions—show up with a binding force mainly in the relations between the parties. The directives on unifying the case law referred to above are undoubtedly bear a normative character: their normativity arises from Article 47, Paragraph 2 of the Constitution. According to this, "the Supreme Court shall assure the uniformity of the administration of justice by the courts and its directives on unifying the case law shall be binding for all the courts".

b) Constitutional Court procedure against provisions of normative character

ba) By virtue of Article 32/A of the Constitution, the Constitutional Court shall review the constitutionality of laws and attend to the duties assigned to its jurisdiction by law. On the ground of laws and under Article 1 of the Constitution, the different legal means of state administration are also under a subsequent Constitutional Court norm control. Directives on unifying the case law however formally do not belong to any categories and no other provision refers these acts under the procedure of the Constitutional Court. Notwithstanding, directives on unifying the case law are obviously of a normative

[19] Act 80 of 1993, Article 65, Paragraph 2. The bill on the Constitutional Court intends to take this authority off the Constitutional Court.

[20] Article 19, Paragraph 3, section 1 of the Constitution. The Act on the Constitutional. Court would refer the act of dissolution within the authority of the Constitutional Court.

[21] Article 31/A, Paragraph 6 of the Constitution.

[22] Pursuant to Article 7 of the Act 66 of 1997 on the Judicial System of the courts, court rulings have a general binding force, even if in a case the court verifies its *sphere of authority* or the *lack of its authority*. Nevertheless, it must be stated that in the latter case it is a question of procedure and not of a content obligation.

character, they are binding directly on the courts but indirectly they have a binding force on all the subjects who are concerned by the court procedure.[23]

Related to the problems scrutinised, it must be emphasized even if the Constitutional Court is the supreme organ safeguarding the Constitution, still it has no overall right for review, and a right to nullify acts. There is not a single provision to state that the Constitutional Court has a right of review concerning all the acts bearing a normative content. The fact that every provision and other legal means of state administration are under Constitutional Court control does not mean that all the norms should fall under the control, since provision as a notion is not the synonym of provision of a normative content. It does not mean however that the organs that issue provisions of normative content could neglect constitutional aspects drafted by the Constitutional Court.[24] Because of this, it is an important requirement that directives on unifying the case law should meet the Constitution and this appropriateness can be provided exclusively by the Constitutional Court.

bb) A frequent argument against the Constitutional Court review of directives on unifying the case law is that directives on unifying the case law expound only the content of decisions, consequently they cannot create a new normative content so their review is not justified. Notwithstanding, expounding and making the norm content concrete denotes that *one potential* meaning of the norm is made compulsory. As a consequence of this, directives on unifying the case law—by selecting one of the several interpretations and regarding it as a norm—make the legislators' wish more precise and unambiguous and in this way it will appear for the subjects as a new binding interpretation, *quasi* a new norm.[25] It can be regarded as that, because the original norm bears several

[23] In this respect, it is interesting that under Article 32, Paragraph 6 of the Act on the Judicial System "directives on unifying the case law, if the law makes no exception, has no binding force on the parties". On this ground it can be stated that within a certain sphere the law may extend the force of directives on unifying the case law to the parties. Thus at this time these directives can be directly binding on the parties too. According to the Constitutional Court, whether this provision corresponds to the Constitution must be examined upon the concrete regulation case by case. Cf. with 12/2001 (14. 05) Const. Court resolution. ABH 2001. 163, 172.

[24] Sólyom, L.: To the Tenth Anniversary of Constitutional Review. In: *A megtalált Alkotmány? A magyar alapjogi bíráskodás első kilenc éve* [The Constitution found? The First Nine Years of Hungarian Constitutional Review on Fundamental Rights] (ed.: Halmai, G.). Budapest, 2000. 25.

[25] The norm-character in itself is established by taking one of the several interpretations and recognising that as exemplary. This, however means the narrowing of the potential narrowing of the norm, thus it can be regarded as the creation of a new norm.

potential meanings and content, the application of which—with one exception—is excluded by a directive on unifying the case law. This exclusion, besides the exposure of the content, leads to the restriction of the norm content. Thus, the argument mentioned above is not suitable for the denial of the Constitutional Court review of directives on unifying the case law. On the other hand, the *Constitutional Court*—in accordance with its constant practice—judges acts *according to their content and not to their names*. In this way has the judicial body examined circular letters, ordinances etc.,[26] which do not belong either to laws, not to other means of state administration, but according to their content they act in that way. In an analogue way, thus directives on unifying the case law may also fall within this sphere of examination, since they appear as new norms.[27]

bc) Directives on unifying the case law reveal the content of provisions and provide compulsory interpretation on the content of laws. If the Constitutional Court is entitled to the constitutional review of laws, they must be entitled to the review of an unconstitutional interpretation as well.[28] A decree however rarely becomes independent, administered law: in most of the cases, the legislators' activity is also required. Provided that the norm reviewed by the Constitutional Court is the subject of a directive on unifying the case law as well, the directive on unifying the case law, together with the norm must be referred within the examination sphere of the Constitutional Court. The position taken by the Constitutional Court in this respect is that the former and present compulsory directives of the Supreme Court are regarded as norms.[29]

[26] Cf. e.g. with 60/1992 (17. 11.) Const. Court resolution. ABH 1992. 275, 277.

[27] Kukorelli, István in relation to this speaks expressively about the "legislative practice" of the Supreme Court. Kukorelli: *op. cit.,* 659.

[28] "It cannot be neglected that the Constitutional Court should judge and nullify the directive or principle of a decision of the Supreme Court which supplements the ambiguous law enforcement with an unconstitutional law interpretation…, since from the fact that the Constitutional Court is entitled to judge the constitutionality of an act, it follows that it is empowered to judge the authentic interpretation of the act too." Ádám, A.: A jogszabályok alkotmánybírósági ellenőrzéséről [On the constitutional Court control of provisions]. *Jogtudományi Közlöny*, 1992/12. 528. Sólyom, László states "like in the more the less, in the right of annulment of a provision, the exclusion of certain unconstitutional applications is also included." Sólyom: *op. cit.,* 32.

[29] Holló, A.: A bírói precedensjog kezdetei Magyarországon [The origins of judicial precedent law in Hungary]. In: *Ötödik Magyar Jogászgyűlés. op. cit.,* 44.

c) Further arguments on the Constitutional Court control of directives on unifying the case law

ca) The Constitutional Court—as I have already referred to—has taken measures in acts which according to their names could not belong to the procedure of the Constitutional Court, but in their content their effect is equivalent to acts falling under the review of the Constitutional Court. At the beginning of its operation the Court faced the fact that the central administrative organs issued their acts of normative content not under the name specified in the Act on legislation, such as e.g.: injunction, but under different names like circular letter or information.[30] Organs of lower level applied these provisions of normative content during their procedure, thus they had a binding force on the subjects. These circular letters and ordinances *did not have a provisional ground*, but due to the right of injunction etc. of the superior organ, *in their effect* were equal to the directives on unifying the case law.[31] Their force—apparently—covered well-defined groups of well-defined organs, but in an indirect way, they made an effect on all the subjects who had any contact with the organization system. *In a formal way*, merely on the ground of their name the Constitutional Court could not have reviewed these acts, but it expounded that these provisions of normative content actually qualified as acts named in the Act on legislation, thus according to their content they were regarded as that and the procedure was applied. An analogue argumentation may be applied upon directives on unifying the case law too: on the ground of their names—formally—their Constitutional Court review is made impossible, but due to their content, because of their character and concerning other constitutional principles and fundamental law provisions referred to above, they can also undergo a norm control. It must be added that the acts mentioned did not bear a provisional base (merely because of this fact, promulgating them was unlawful and unconstitutional), but directives on unifying the case law have a constitutional basis too. These acts, due to the force of the Constitution bind subjects in an indirect way and they are enforceable. Notwithstanding, the force of a directive on unifying the case law indirectly extends on the parties by all means, since the courts are obliged to apply them.[32] The requirement concerning

[30] Cf. with 60/1992 (17. 11.) Const. Court resolution.

[31] This equal character naturally appears within a different organization.

[32] By virtue of Article 32 of the Act on the Judicial System "directives on unifying the case law, if no exception is made by the law, have no binding force on the subjects". Regardless that this provision does not harmonize completely with Article 47 of the Constitution, because that makes directives on unifying the case law obligatory for the courts, this regulation seems to be senseless.

the review of directives on unifying the case law thus seems to be well grounded.

cb) The Constitutional Court expounded that Article 32/A of the Constitution gives rise only to the authority of a subsequent norm control, but this authority is "forcible and comprehensive".[33] The historical interpretation of the constitutional rule makes clear that according to the intent of the legislation all decrees and other legal means of state administration, *without exception*, should fall under a Constitutional Court control.

cc) Beyond this, since the courts constitute the third branch of power in the system of the separation of powers, it is unjustified to exclude acts which are promulgated within the judicial system and which make – either directly or indirectly – a normative effect on the subjects, from under the control of the Constitutional Court. Whilst the normative acts of the other two branches of power – the legislative and the executive power – fall under this control, what is more, form the essence of the activity of the Constitutional Court. László *Sólyom,* states if "the monopoly of the Constitutional Court to interpret the Constitution has a positive legal basis, it can be an effective aid to justify the relationship among the courts. *In lack of an express provision this provision may be deduced from the duty of the Constitutional Court*."[34]

d) Further viewpoints and proposals for solution, published in the special literature

da) According to a clear-cut opinion, since all the courts are bound to apply the directives on unifying the case law of the Supreme Court, directives on unifying the case law indirectly bear a binding force and character on all the participants of the judicial procedure. Directives on unifying the case law thus have a normative force, they act as norms: a directive on unifying the case law is an abstract judicial decision with a normative force providing principles, which should be followed by judges in subsequent cases.[35] Thus, directives on unifying the case law, concerning the way of their application and consequences obviously bear similarities with legal norms.[36] The difference between directives on unifying the case law and legal norms is in the regulating subject, in the

[33] 4/1997 (22. 01) Const. Court resolution. ABH 1997. 41, 49.

[34] Sólyom: *op. cit.,* 26 8 (italics mine—P. T.).

[35] Gadó, G.: Az alkotmányjogi panasszal és a jogegységi határozattal összefüggő szabályozási kérdések [Questions of regulation related to constitutional complaint and directives on unifying the case law]. *Magyar Jog,* 2000/9. 540.

[36] *Ibid*.

matter regulated and in the manner, the rule is recognised. The effectiveness of the created norm and in connection with this, the relation of the norm with the Constitution, there is no difference.[37] Pursuant to this opinion, when facing unconstitutional directives on unifying the case law the Constitutional Court can choose from two possibilities. The first one is to undertake a review in the form of a subsequent norm control—if this right is not denied—, the second one is to nullify the legal norm[38] upon the concept of "living law". However, the latter version could prevail if the so-called "genuine" constitutional complaint was involved in the Hungarian legal system. "In lack of this, the constitutional control of directives on unifying the case law cannot be neglected."[39] Unlike the author, I regard the nullification of directives on unifying the case law and not that of basic provisions as expedient and justified.

db) The present president of the Constitutional Court holds an opposite view. According to his opinion the Constitutional Court review in relation to directives on unifying the case law should be confided to the verification of the constitutional requirement. If the Supreme Court neglected the constitutional requirement in the process of carrying a directive on unifying the case law,[40] the Constitutional Court review of live law could be realized. The author states[41] "a constitutional requirement thus will not institutionalise in the primary scope for action of the Constitutional Court, namely in legislation, but it functions as the aiming of law enforcement." Starting from the constitutional position of the Constitutional Court, it can be verified the Constitutional Court is authorized to classify constitutionality, to state the conformity to the Constitution and to provide the official interpretation of the Constitution. Consequently, the interpretation, given in a directive on unifying the case law by the Supreme Court, if it is different from the interpretation of the Constitutional

[37] Gadó: *op. cit.,* 51. According to Gadó there is no real difference between directives on unifying the case law and legal norms concerning the relation between the norm and the Constitution.

[38] Naturally, it is an unconstitutional interpretation of law, distorted by "living law".

[39] Gadó: *op. cit*., 541. The author states that the creation of the statutory conditions of an abstract norm control towards directives on unifying the case law requires a consequent regulation.

[40] In this case, it is obviously the drafting of a new directive on unifying the case law or the amendment of an old one, because the Supreme Court could not consider the subsequent Constitutional Court direction in the process of reaching directive on unifying the case law.

[41] Holló, A.: Az alapvető jogok védelme [The protection of fundamental rights]. In: *A magyar alkotmányosság ezer éve* [Thousand years of Hungarian constitutionality]. Scientific conference (ed.: Mikolasek, S.). Esztergom, 1999. 16.

Court is not a competent interpretation.[42] According to his view, there should be developed "a procedure of the Constitutional Court and that of the Supreme Court built on each other in all the directives on unifying the case law in which the interpretation of the given thesis of the Constitution can be regarded as a genuine preliminary question. The procedure on a directive on unifying the case law – on the standard of the legal solution referred to above – should be suspended until the Constitutional Court's interpretation of the "preliminary question" of the given provision of the Constitution, initiated by the President of the Supreme Court. In such a "complex" procedure, the Constitutional Court and the Supreme Court would express their own constitutional position. Otherwise, the constitutionality of a directive on unifying the case law may be the subject of a Constitutional Court review."[43] It is worth mentioning here that the previous deputy-president also stated that the constitutional review of the directives on unifying the case law should fall within the competence of the Constitutional Court.[44]

dc) According to the previous Minister of Justice the Constitutional Court's review of directives on unifying the case law may be justified, because they bear a normative function. Since the competence would be introduced in the Constitution, the problem of constitutionality could not occur either. She thinks the competence would not transform the hierarchy of jurisdiction, because it is a concrete matter of the Constitutional Court, thus the Court had no competence to review decisions in concrete cases. The minister outlined two variants of legal consequence. In this way, the Constitutional Court should either nullify the unconstitutional directive on unifying the case law or verify the unconstitutionality and ask the Supreme Court "for remedy". In her opinion, in that case nobody would influence the Supreme Court. It is important to state that because the review is of constitutional respect and does not extend on concrete matters, it would be irrelevant in the first case too. Consequently, the place of the Supreme Court in the hierarchy of the judicial system would remain intact.

dd) Nevertheless, even well-known constitutional lawyers think that according to the regulation in force, the Constitutional Court is not entitled to review these acts, and had it been allowed by the amendment, the result would

[42] *Ibid.*

[43] *Ibid.*

[44] Lábady, T.: A helyét kereső alkotmánybíráskodás [Constitutional jurisdiction seeking its place]. *Világosság*, 1993/1. 38.

be the amplification of the sphere of norms reviewed.[45] In connection with the introduction of the institution they expounded that because of the *ex nunc* nullification, that would not infringe legal security. At the same time, they found it constitutionally perilous that while legal sources are involved in the Act on Legislation, there is no reference to directives on unifying the case law, although in their content they may be regarded as legal norm. In their opinion, in this case review would over-extend the law.

de) The ex-deputy president of the Supreme Court also argued against the Constitutional Court review of directives on unifying the case law. He stated "Pursuant to Article 38, Paragraph 1 of the Act on the Constitutional Court, the interpretative activity of the Court extends on the constitutional review of an applicable law and during this procedure they take a stand on the fact if the law may have an interpretation to ensure the compliance with the Constitution. Due to the creation of directives on unifying the case law, the legislator exclusively entrusted to the Supreme Court with the power at the highest-level of constitutional review of judicial interpretation. That is why pursuant to the Constitution in force, the Constitutional Court is not entitled to give a constitutional review of directives on unifying the case law."[46]

The viewpoint of the author, however at several points is not properly grounded. Firstly, under Article 38 of the Act on the Constitutional Court judges may really examine the constitutionality of a law, but Article 38 provides that the review of constitutionality of law falls within the authority of the Constitutional Court. Pursuant to Article 38, Paragraph 1 of the Act on the Constitutional Court, "the judge—besides the suspension of the judicial procedure—shall initiate the procedure of the Constitutional Court if in the case before him he has to apply a law or any other legal means of state administration in his judgement, the unconstitutionality of which he perceives." Secondly, the provision of the Act on the Constitutional Court cited above does not refer to directives on unifying the case law but to laws *providing the ground* of judicial decisions. Thirdly, the fact that a judge may have a constitutional review of laws during the procedure *does not entail* that the creation of the institution of directives on unifying the case law entrusted to secure the constitutionality of judicial law interpretation *exclusively* on the Supreme Court. Notwithstanding, there is no logical relation between these two statements. The aim of the creation of directives on unifying the case law was not to provide constitutionality, but to guarantee the uniformity of judicial

[45] Interview with Albert Takács, and Ibolya Dávid. Radio Kossuth, Program 'sixteen hours'. 09. September 2000.

[46] Szabó: *op. cit.,* 52.

interpretation of legal norms. Above this, it is worth mentioning our concern is not to secure the constitutionality by directives on unifying the case law but to secure the constitutionality of directives on unifying the case law and there is a sharp difference between these two. Fourthly, by virtue of Article 38 of the Act on the Constitutional Court constitutional review can not be exclusive, because if the judge does not turn to the Constitutional Court, any of the parties may do so within sixty days after the decision enters into force. Namely, pursuant to Article 48 of the Act on the Constitutional Court, "Anyone whose rights safeguarded in the Constitution are infringed, may lodge a constitutional complaint to the Constitutional Court, if his grievance is due to the application of an unconstitutional law and has exhausted all his resource of remedy or no other remedy is provided for him. The constitutional complaint may be lodged in, in writing, within sixty days after the delivery of the effective decision." If the constitutional complaint is well grounded, the court must provide remedy for the individual. I think these counter-arguments can refute the view-points above, thus even the statement that the Constitutional Court is not entitled to review the constitutionality of a directive on unifying the case law carries no conviction.

df) The deputy president of the supreme judicial body expressed his opinion in connection with the amendment of regulation too. According to this, the examination of the constitutional requirement decisive in the application of the norm, would be performed within the framework of a norm control, thus it was unreasonable and inappropriate to provide an independent sphere of authority for the Constitutional Court for the constitutional review of directives on unifying the case law. Thus even if the constitutional requirements were specified in a different way, the Constitutional Court could not decide on directives on unifying the case law (could not repeal or amend them).[47] Concerning the proposal however it may be criticised that the Constitutional Court *will not examine but specify* the constitutional requirement: the examination may cover just facts involved in the constitutional requirements, in a subsequent Constitutional Court procedure. On the other hand, from the citation it follows that the author does not consider the directives on unifying the case law as norms, since he makes a distinction between the review of directives on unifying the case law and norm control, which in my opinion is logically unjustified.

Finally, some conclusions may be drawn from the previous decisions of the Constitutional Court on the interpretation of its competence, on the ground of

[47] Szabó: *op. cit*., 53

which directives on unifying the case law may be involved into the sphere of examination too.

3. Some decisions of the Constitutional Court concerning the interpretation of its competence

It is worthy to scrutinize here the decisions of the Constitutional Court in which the body exercised its competence ambiguously recorded in law, in a concrete way. The existence of such cases however may prove in itself that *a Constitutional Court's procedure does not need to have an expressis verbis provisional ground if the procedural competence may be deduced from other provisions or legal principles*. Since the Constitutional Court's right for the review of directives on unifying the case law is not obligatorily specified by law, that must be deduced, provided it is possible, from different constitutional or other provisions. The supporting arguments are the following:

a) The Constitutional Court held[48] that the constitutionality of an international treaty may be reviewed not only pursuant to Article 1 a) of the Act on the Constitutional Court, within a preliminary norm-control procedure, but also by virtue of Article 1 b) of the Act on the Constitutional Court within a subsequent norm-control procedure. In the codification work of the Act on the Constitutional Court and the Constitution, there is not a single data to prove that legislators wanted to evade from below the norm control any kind of acts—for instance the act promulgating international treaties. The potential conditions that—with special regard to the circumstances of constitutionalisation and to the drafting of the Act on the Constitutional Court—this case of subsequent norm control was not considered separately that time, will not have any effect on the right of the Constitutional Court to *concretise its sphere of authority by interpretation of legal norms*. The decision of the Constitutional Court construing the authority of its own have a general binding force, just like any other of its decisions. In this interpretation the Constitutional Court is guided partly by the wish *to fulfil its specific duty*, partly by the example of other constitutional courts and in this way it follows the solutions required by the development necessary for the administration of the Constitutional Court. The definition of "constitutional requirements" for instance has rendered the solution of "constitution-conform interpretation" which is generally applied constitutional courts all over the world—but it *frequently bears a separate statutory ground*—introduced into Hungarian law and adjusted it to the standpoint expounded on the competence to interpret legal norms. In accordance

[48] Const. Court resolution 1997, 41, 49.

with its previous decisions on the interpretation of competence, the Constitutional Court *besides completely performing* the constitutional authority concerning a subsequent norm control takes also the foreign examples of the constitutional review of international treaties into account. Finally, the Constitutional Court refers to the fact that the review of the constitutionality of international treaties remains within the framework of its constitutional duty: subsequent norm control and does not allude to the sphere of authority and duty of other branches of power.[49]

The Constitutional Court thus through the interpretation of competence, by the correlation of constitutional provisions and through the application of different—historical, logical etc.—interpretation methods stated and corroborated the existence of an authority not declared *expressis verbis* in a provision, but which may be deduced from the text of the law. The Court descriptively showed that not even in the subsequent norm-control procedure did they apply the right of annulment provided by law, but the constitution conform interpretation of the Constitution, a method which conforms to the protection of the Constitution and the principle of constitutionality which however bears no statutory ground. Thus through the interpretation and analysis of the principles and provisions of the Constitution certain issues of authority may be deduced, which otherwise are not named definitely among the provisions.

b) The Constitutional Court applied the method of extensive or restrictive interpretation several times and in connection with its different competences. These decisions construing the sphere of authority well demonstrate that the Court fulfil their authority by taking the principle of the separation of powers into account, in accordance with their constitutional status.[50] According to the Constitutional Court, in the process of the interpretation of their authority "the principle of the separation of powers should be taken into account to a greater extent, since that is the most important organizational and operational principle of the Hungarian state organisation".[51] The Court thus exercises its authority by considering its constitutional legal status, by respecting the principle of the separation of powers not merely through the mechanic application of express provisions but by taking all the relevant legal principles and values,[52] arising from the Constitution into consideration. The same can be referred to the acts

[49] Const. Court resolution 1997, 41, 49.

[50] E.g. 16/1991 (20. 04) and 31/1990 (18.12) Const. Court resolutions.

[51] Const. Court resolution 1990, 136, 137.

[52] In connection with constitutional values see Ádám, A.: *Alkotmányi értékek és alkotmánybíráskodás* [Constitutional values and constitutional jurisdiction]. Budapest, 1998. 25–83.

reviewed: in the course of the constitutional review the Court takes other provisions, principles and values into account. In relation to the directives on unifying the case law—by having regard for the content involved in the Constitutional Court decisions referred to above—it can be verified that in the process of a potential constitutional review the principle of the separation of powers is not infringed. As a consequence of the constitutional review of directives on unifying the case law, *the Constitutional Court will not become a part of the judicial system, will not rise above the Supreme Court*, because it is entitled to review the normative acts of the Supreme Court exclusively from a constitutional point of view, and cannot be in favour of the fact if their content is right or wrong, well-grounded or unfounded. The Constitutional Court is not entitled to verify that the standpoint of the Supreme Court taken up in a directive on unifying the case law is legally improper, misinterpreted, or mistaken concerning civil, criminal, administrative etc. law. The Constitutional Court may take a stand exclusively in question of constitutionality but in those, they may *definitely* take a stand.

c) On the ground of the fact sorted out above, it can be seen that the Constitutional Court may exercise the review of the directives on unifying the case law of the Supreme Court in lack of an *expressis verbis* constitutional or statutory authorisation as well. This right would be excluded only by an express prohibition of the Constitution or an act. Because of this, the Supreme Court (the intention of which is that the Constitutional Court could not proceed against their normative acts), in order to realise their intention, should "persuade" the Parliament to exempt directives on unifying the case law from below the Constitutional Court control with an express statutory prohibition. *It is important, if the Supreme Court does not wish to provide the possibility for the review, it is not enough to attain or urge that the Parliament should leave the issue unregulated. At this time, however it will be transferred to the competence of the Constitutional Court* and that body will decide in the question what sort of possibility exists against directives on unifying the case law, related to a concrete matter. *In lack of an unambiguous constitutional or statutory prohibition*, if only the regulating element concerning the review is "made to be omitted" from the act, the Constitutional Court may—without an express provisional ground, just by taking other principles, derivable from the Constitution and by providing the highest level safeguard of the Constitution, fulfil the review and in a given case, the annulment of a directive on unifying the case law. The Constitutional Court however, has undertaken a similar activity. Because of this, even if the new text of the Constitution or the new Act on the Constitutional Court did not express the possibility of a Constitu-

tional Court review of directives in unifying the case law, it would not definitely restrict the activity of the Constitutional Court in such matters.

4. The concrete Constitutional Court review of directives on unifying the case law, the correlation between living law and constitutional requirements

a) Provided that the Constitutional Court review in relation to directives on unifying the case law is recognised, in the case of unconstitutionality the Court can choose from two solutions. One of them is to annul the directive on unifying the case law bearing an unconstitutional interpretation.[53] The other is to apply their statements concerning the correlation between the interpretation of "living law" and constitution conform interpretation.[54] Accordingly, the constitutional protest (constitutional complain) related to judicial law enforcement may call forth a two-step Constitutional Court procedure. If the judicial practice applies the given provision in an unconstitutional way, the Constitutional Court will express the constitutional content of the provision in a decision. Provided that the judicial practice neglects the decision of the Constitutional Court, and because of this the law will enter into force as the result of unconstitutional law enforcement, the Constitutional Court will annul the given law on the ground of the principle of "living law".[55] Referring all this to directives on unifying the case law, the Court first would verify a constitutional requirement, and if the Supreme Court, and other courts later on did not recognise this requirement, the Constitutional Court would annul the given directive on unifying the case law on the principle of "living law". It is important to realise

[53] Pursuant to Article 40 of the Act on the Constitutional Court, if the Constitutional Court verifies the unconstitutionality of a law or of any other legal means of state administration, they will annul the law or any other legal means of state administration totally or partly.

[54] 1/1993 (13. 09)—internal opinion—on the Constitutional Court practice to be followed in the process of the constitutional review of judicial law enforcement.

[55] The principle of "living law" in the practice of the Hungarian Constitutional Court denotes in the process of the constitutional review of laws that the body reviews not exclusively the text of the law but if necessary, its meaning used in uniform law enforcement. If from among the potential interpretations of the law only one is applied by the legal practice and this interpretation is unconstitutional, the Constitutional Court will verify the unconstitutionality of the norm, or depending on the case, will specify the "constitutional requirements" important for the application of the norm. Nevertheless, the review of "living law" is quite frequent, since because of an individual character it may be significant in constitutional complains, but even in that case it is not regular.

that in this case not the given law but the directive on unifying the case law should be annulled. The reason for this is that the annulment of the directive on unifying the case law—even if the *ex nunc* annulment is taken as a base—would result in the—probably only partial—"fall off" of an act from the legal system. It may happen, however that a directive on unifying the case law is the result of the interpretation of a number of laws. Because of this, in some cases, it would lead to difficulties and in other cases; it would be impossible to decide which of the laws construed should be annulled to restore constitutionality. On the other hand, if the Constitutional Court reached the same result through the annulment of several acts instead of nullifying just one, legal security would also be affected. It is also expedient to refer to the separate opinion of Géza, Kilényi justice of the Constitutional Court, related to the theory of "living law". He states "if the legal practice by the unconstitutional interpretation come up against law, the organs exercising law enforcement must be enforced to undertake the constitutional interpretation and application of the act (or other provision) by the use of the appropriate legal means. It is not the legislator who should be punished because of the unconstitutional law enforcement of legislative organs, which means the Constitutional Court annuls the law, which upon a correct constitutional interpretation would not be unconstitutional".[56] In my opinion, this argument is very acceptable in the respect that not the fundamental rule (provisions) but the unity of law decision drafting the unconstitutional interpretation should be annulled. Unconstitutionality thus, besides complying with the requirements arising from constitutionality may be redressed in a single way: by the annulment of the unconstitutional directive on unifying the case law.

b) In relation to the examination of living law it must be seen "the Constitutional Court reviews the norm content, appearing in the permanent judicial practice, namely handles court interpretations as a fact and judges the constitutionality of a norm existing in practice. By the review of living law the Constitutional Court undeniably supervises the constitutionality of judicial practice, however not in a concrete case but in a general form having *consolidated into a norm*: Constitutional Court control refers not to the concrete litigation but to the norm creating activity of the judicial power. Judge made law, which has prevailed invincibly and uniformly for a long time, is a legal form just like the *decisions of the Supreme Court, which specify uniform law enforcement with an obligatory force*. The Constitutional Court review of these provisions leaves the independence of judicial litigation intact. May unconstitutionality arise, the Constitutional Court will nullify the norm or specify the potential

[56] Cf. with 57/1991 (08. 11) Const. Court resolution. ABH 1991. 272, 287.

constitutional applications of the norm, but will not deal with court rulings."[57] Constitutional requirement is also a norm: the Constitutional Court "in the tenor specifies it with the generality of a norm"[58] The possibility for the constitutional review of "living law" corroborates the requirement that directives on unifying the case law should be, by all means, placed under the review of the Constitutional Court.

c) Since the potential consequences of Constitutional Court decisions arise concerning the planned new regulation as well, these and the significantly dissenting ideas of legal literature will be discussed together with the new concept on regulation.

II. New ideas about the Constitutional Court, which concern directives on unifying the case law

1. The pertinent sections of the previous regulation concerning the Constitutional Court

The review of the regulation concerning the Constitutional Court has been in process for quite a long time. In favour of the amendment, the Ministry of Justice have prepared a number of bills already in 2000 and attached a "Proposition" to the conception to give grounds for the necessity of an amendment. In the Proposition, there is a summary of the arguments for and against the notions concerning the new regulation, and the necessity of the modification and the certain professional and political opinions connected to the ideas are accounted for in detail. Different viewpoints are contrasted in relation to the Constitutional Court review of directives on unifying the case law and the advantages and risks concealed behind the ideas are also demonstrated. By virtue of the persuasive argumentation of the Proposition, it is not justified that while the normative decisions of the other two branches of power fall under a Constitutional Court control, there is no such possibility concerning directives on unifying the case law. Nevertheless, the Proposition sorts out arguments—which, in my opinion do not seem to be persuasive—against the review as well.

a) According to one of the arguments, in this way the Constitutional Court may have a review of judicial law enforcement. Pursuant to the proposal "the

[57] Sólyom: *op. cit.,* 30.

[58] Sólyom: *op. cit.,* 45. Notwithstanding Sólyom also refers to the legitimating force of express legal regulation: "If the constitution conform interpretation gains an express constitutional ground, the courts will probably follow this".

alternative means against the courts may be grounded by the special character of this branch of power." The judicial branch of power is of a special character; decisions are not influenced by politics thus, there is no definite reason for a legal and professional sifting of the decisions (norms).

b) Pursuant to the other counter argument, the above authority would not comply with Article 47, Paragraph 2 of the Constitution, because it states; the uniform law enforcement of the courts is provided by the Supreme Court. Beyond this, the normative content of directives on unifying the case law is not equivalent to a law; since it will not verify a new legal content: just expound that of the law. Not even their binding force is equal, because directives on unifying the case law oblige the courts only. The Proposition, reflecting the political standpoint of the government finally states: "The professional arguments underline the variant that the Constitutional Court should not be entitled to the review of directives on unifying the case law."[59]

These counter arguments, I think have not been deliberate enough or they are not relevant to settle the issue. As to the first counter argument, it is not persuasive that the review of the normative acts of the legislative and executive power is justified because their decisions are effected by politics, thus their professional sifting is justified however, that of the courts, in lack of a political character, is not justified. Constitutional Court control is not simply a "professional sifting", but a special sphere of that: constitutional control. In questions of constitutionality, however there is no difference between directives on unifying the case law and the normative acts of the other two branches of power. It is no doubt that the Parliament and the majority of ministries, alike the Supreme Court, have expert advisory panels to justify and enforce constitutionality. Notwithstanding, uniform constitutionality may be ensured only if all the acts of normative character, which are based on law fall under the control of the Constitutional Court.

The second counter argument was not well grounded either. Securing the unity of law enforcement is not equal to the control of the constitutionality of the norm providing "security". The uniformity of law enforcement, totally independently from the Constitutional Court control, would be exercised by the Supreme Court further on, because the Constitutional Court would not exercise a control on criminal-, civil-, and administrative law interpretation, different from that involved in directives on unifying the case law, but would have an exclusive constitutional control.

[59] Proposition 6.

2. The amendment of the Constitution intended in 2003

In connection with the subsequent norm control, the Constamend2, as a significant amplification and important progress, would also provide the constitutional foundation to the constitutional review of directives on unifying the case law.[60] In the Constamend2, the review of conflict with international treaties would also have constructed a separate section and the scope of norms reviewed would have been amplified—among others—with directives on unifying the case law. It must be mentioned that the proposal made by the Minister of Justice of the previous Government involved the same solution, so there is an apparent political consensus in this respect. Notwithstanding, there is a significant difference between the drafts as regards that the first Constitutional amendment would have authorized the Constitutional Court to annul directives on unifying the case law conflicting with the Constitution, in the second draft there is no reference to a possibility on the annulment of directives on unifying the case law. The reason for this is that the revised version would refer the obligation to withdraw directives on unifying the case law declared unconstitutional, within the authority of the Supreme Court.

3. Notions related to the drafts of the new Act on the Constitutional Court

a) General rules

aa) The original draft of the Act on the Constitutional Court would have provided the possibility for the suspension of the application of a directive on unifying the case law and it would have been *referred under the authority of the full session. The revised draft however would not provide this possibility*. The reason for the annulment is the withdrawal concerning directives on unifying the case law, which would make the proposal null and void.

ab) As regards directives on unifying the case law, provided that a proposal related to such an act of the Supreme Court would be presented to the body, they were obliged to pass it to the President of the Supreme Court for an opinion.[61] Pursuant to the Act on the Constitutional Court2, the decision *on the unconstitutionality of a directive on unifying the case law* should be published in the Official Journal too. Its basis is Article 38, Paragraphs 1, and 2 of the

[60] Because of the considerable resistance of the Supreme Court, however the success of recognition is doubtful.

[61] Act on the Const. Court2, Article 29, Paragraph 1.

new draft, according to which the Constitutional Court must publish their decisions, besides their own official gazette, in the Official Journal as well.

ac) The Act on the Constitutional Court2 *would not let* the Constitutional Court apply a temporary provision in connection with a directive on unifying the case law.

b) Conceptions related to certain procedures

ba) *In relation to the review of conflict with an international treaty, the following conceptions have appeared*

baa) The scope of reviewable norms would be extended on other legal means of self-governmental administration and directives on unifying the case law, which would lead to the mild differentiation of the procedure.

Pursuant to Article 43, Paragraph 2 of the Act on the Constitutional Court, if the Constitutional Court verifies that a directive on unifying the case law conflicts with an international treaty, the Supreme Court will withdraw the decision within thirty days from the promulgation of the decision (namely the decision of the Constitutional Court). Concerning a directive on unifying the case law, there is no need to examine the level of legal source, because this act is not a law, thus its position could not be interpreted in relation to provisional hierarchy. However, it is doubtful why the Act on the Constitutional Court2 makes it impossible for the Supreme Court to amend the directive on unifying the case law conflicting with an international treaty and why the draft immediately operates with withdrawal. This latter possibility should also be provided for the supreme judicial body.

The Constitutional Court was not given the possibility to provide a constitution conform interpretation concerning the directives on unifying the case law of the Supreme Court.

bab) Since a directive on unifying the case law *can never occupy* a higher level than a law promulgating an international treaty, thus it does not require any regulation, so related to this the Act on the Constitutional Court2 does not involve any specification.

bb) *In connection with the subsequent review of unconstitutionality*— although the Constamend2 would permit the review of directives on unifying the case law, the ConstCourt bill2 would not provide the *pro futuro* annulment in relation to directives on unifying the case law. It has a base of principle and practice as well: *on the one hand*, the creation of a directive on unifying the case law would probably take less time than the amendment of another norm

or the creation of a new regulation. O*n the other hand*—and this is the more important reason—if a directive on unifying the case law is nullified, it will not give rise to a lack of regulation, because for the organs of law enforcement the relevant provisions still exist, however in their regard a wider scope of freedom will appear. In addition to that, the requirements of principle, involved in the nullified directive on unifying the case law—if due to the character of the annulment it is not excluded—may be applied and taken into account concerning the decision of the Constitutional Court, together with the decision and the constitutional content.

bc) Above this, by virtue of Article 50, Paragraph 2 of the ConstCourt bill2, provided that the provisions of the bill are realised, the Constitutional Court could order the review of the criminal procedure determined on the ground of an unconstitutional law or directive on unifying the case law.

bd) Besides this, the Constitutional Court could act in the concrete norm control procedure initiated by the judge, even against the directive on unifying the case law not in effect any longer. The same would be competent in the procedure of a constitutional complain. If the Constitutional Court acting within this latter authority would verify the unconstitutionality of a directive on unifying the case law referred to by the constitutional complain, the Supreme Court would be obliged to withdraw the unconstitutional directive on unifying the case law within thirty days after its promulgation.

be) In connection with the *constitutional complain* the major elements of the present solution would survive in the ConstCourt bill2. The draft, on the ground of the infringement of rights included in the Constitution will provide the possibility for those, whose grievance is the consequence of the application of an unconstitutional normative act—*among them directives on unifying the case law*—and the infringement of rights may be the subject of the Constitutional Court's review, if he has exhausted all the other possibilities for remedy or there are no other possibility for remedy.

bf) *If the unconstitutionality is the result of the omission of legislative obligation, directives on unifying the case law should not be taken into account.* The reason for this is partly that the effective acts and bills—count (would count) only an omission embodied in the omission of the drafting of a law by the *legislative organ*, under the effect of the action. The involvement of directives on unifying the case law in this sphere would recognise the legislative character of the Supreme Court *expressis verbis*, to which the legislators do not at present show any reluctance. On the other hand, since the already existing acts can be interpreted without the existence of a directive on unifying the case law, actually there is no omission related to them: the purpose and substance of

the creation of a directive on unifying the case law however, is not to draft a new provision but to clear up the meaning of a provision.

III. Further potential solutions

Since in the special literature there are several potential solutions concerning the review of directives on unifying the case law in the following, I will shortly introduce the variant not adapted in the drafts. The reason for this is that the regulation concerning the Constitutional Court is before acceptance, thus a proposal (or part of a proposal), which is not included in the draft may be reflected in the subsequent versions or in the final text of the law. The solutions not having inserted are different from the variants involved in the draft concerning some legal consequences proposed for the unconstitutionality of a directive on unifying the case law.

a) According to the related proposal, the Constitutional Court would be entitled to verify the unconstitutionality but the possibility of annulment—alike in the ConstCourt bill2—would not be included among the means of the Court. Thus, unconstitutionality could be eliminated in the way that the Constitutional Court would withdraw the unconstitutional directive on unifying the case law within a definite time after the promulgation of the decision. It means that the Constitutional Court would retain its right of review but the actual authority of annulment would be referred to the Supreme Court. The present President of the Constitutional Court András *Holló* for instance has expounded "according to the standpoint of the Constitutional Court as a result of the constitutional review of a directive on unifying the case law, the Constitutional Court would reach a so called "verifying decision", namely would just verify that the directive on unifying the case law is unconstitutional but its legal consequence, the annulment of the directive on unifying the case law would remain within the authority of the Supreme Court."[62] Notwithstanding I do not think that the Supreme Court, based on the opinion of the Constitutional Court will be inclined to nullify the act of their own, because even in the issue of Constitutional Court review they show a sharply negative attitude. President *Holló* himself had a solution for the verification of the unconstitutionality of directives on unifying the case law. According to his opinion "if the Constitutional Court, instead of the annulment of the provision interpreted by a directive on unifying the case law, will specify the constitutional requirements competent in the application of the law, this specification—

[62] Holló: *op. cit.,* 45.

since the Constitutional Court decision has a general binding force—is normative on the Supreme Court. The Supreme Court must harmonize directives on unifying the case law with the aspects specified under the constitutional requirements. As long as it has been fulfilled, the directive on unifying the case law cannot be applied."[63] However, it is doubtful if in this case until the "harmonization" it is to be adhered to the decision of lower level courts, the Constitutional Court or the Supreme Court. It is to be feared that to the latter: notwithstanding, court rulings, through the forum system of remedy can get before the Supreme Court quite easily, where the will of this organ will be enforced.

b) In relation to this solution it must be mentioned that concerning its substance it would not make any difference as if the Constitutional Court annulled the directive on unifying the case law, but it would bear a number of factors of uncertainty.

ba) Partly, even if the standpoint seemingly seeks a compromise between the Constitutional Court and the Supreme Court, there are also some risks concealed in the proposal. Beyond the aspects of prestige, it is all the same if a directive on unifying the case law regarded as unconstitutional is nullified by the Supreme Court and not the Constitutional Court. The only argument for may be that in this case, the Supreme Court's amending potential will prevail, but this *will remain under the pro futuro annulment possibility as well—which is however, intended not to be provided*. A complicated and detailed regulation is required in the matter if the Supreme Court—by standing against the opinion of the Constitutional Court—would not annul a directive on unifying the case law. At this time, it may be problematic to provide the mode of the solution. One variation could be that in this case—within an appointed time—the Constitutional Court would be obliged to proceed in an obligatory way and practised the authority of annulment. The other proposal covers that the directive on unifying the case law, by virtue of the law, should become invalid within definite time. In my opinion, neither of the solutions deviates in their effect from the annulment coeval with the verification of unconstitutionality exercised by the Constitutional Court, but they would cause a significant waste of time and result in legal insecurity.

bb) Notwithstanding, Géza *Kilényi,* former Justice at the Constitutional Court, states "indirect repeal is different from direct repeal not mainly concerning its sense but rather in the array of the procedure. The decision in this case is also made by the Constitutional Court but at this time, the body does it in a covert way and the legislative organ is forced to fulfil the task. The indirect repeal is

[63] Holló: *op. cit.,* 45.

more polite than the direct repeal but undoubtedly much more circumstantial as well."[64] I think putting the proposal into a statutory form could not be accepted by the Supreme Court either, and above this, if realised it would actually be equal to annulment, thus the application of a circumstantial and complicated regulation would not be obedient in the creation of the new act.

c) The method of the so-called constitution-conform constitution interpretation generally applied by the Constitutional Court may be connected to the issue of annulment.[65] According to the practice of the Constitutional Court it briefly means—although "living law", namely the "permanent and uniform" content appearing in the legislative practice must also be taken into account during the constitutional review of the norm—, and the annulment of a law should be avoided, if possible. Pursuant to the principle followed by the Constitutional Court, effective law should be preserved. Consequently the Constitutional Court will not necessarily annul the given provision, but if among its interpretative possibilities there is a variant of interpretation which conforms to the Constitution, the Court will specify the so called "constitutional requirements" competent in the application of the norm. Because of this, if there is a possibility to provide the prevalence of constitutionality by leaving the norm text unchanged, the requirements that should be applied or taken into account to make a law constitutional are specified in the clause of the decision. Obviously, if the legislative practice will not conform to this, the only way open for the Constitutional Court is to nullify the law.

d) Notwithstanding, in my opinion the method to specify constitutional requirements related to a directive on unifying the case law could be applied in no way. In that case, namely the Constitutional Court actually may not decide about a constitutional issue, but about a problem belonging to another branch of power, thus would take over the role of the Supreme Court. The reason for this is that the directive on unifying the case law has made one sense of the law bearing several interpretations obligatory for the courts. If by specifying the constitutional requirement, it were narrowed down further on, it would either make the directive on unifying the case law devoid of content, or result in an interpretation regarded as incorrect by the Supreme Court. Concerning the principle of the separation of powers however, it would be inadmissible. The Constitutional Court may keep directives on unifying the case law within

[64] Kilényi, G.: Az alkotmányosság védelmének szervezeti garanciái a különböző országokban [The organisational guarantees of the protection of constitutionality in different countries]. *Magyar Jog*, 1989/7–8. 608.

[65] Cf. with 38/1993 (11. 06) resolution. ABH 1993. 256, 266–267.

constitutional limits if a constitutional requirement, related to the law that forms the basis of the directive on unifying the case law is specified.

IV. Summary

In my view the Constitutional Court review of directives on unifying the case law may be administered on the ground of the effective legal background. Notwithstanding, a satisfying legal solution will require the uniformity of positive law regulation. Since besides the point of view of prestige, there is no reason why the Constitutional Court should not review—obviously *exclusively on the ground of constitutional respects*—the directives on unifying the case law of the Supreme Court, for the sake of the protection of the fundamental law, this competence should be provided for the Constitutional Court with the possibility of annulment.

Any different regulation would lead to the total disturbance of constitutional jurisdiction, which cannot be supported in a constitutional state. However, it is a healthy sign that in a recent decision of the Constitutional Court on the subject of a proposal initiating the constitutional review of a directive on unifying the case law, a decree of annulment was delivered because the person in question withdrew his proposal.[66] Since a decree of annulment must be preceded by a genuine examination—because submissions not falling within the authority of the body are refused—in that case the genuine constitutional control of directives on unifying the case law in all probability has been in progress. Provided that an appropriate proposal is presented, the Constitutional Court will hopefully pass a resolution concerning the constitutionality of a directive on unifying the case law.

[66] 213/B/1999 Const, Court decree. ABK 2003 September, 638, 639.