CHANGES IN THE COMPETENCES OF THE HUNGARIAN CONSTITUTIONAL COURT

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Competencies between 1990 and 2011

The introduction of judicial review in the 1989 Act on the Constitutional Court followed the European model with a mixture of competences taken from various examples of other constitutional courts. Among the proceedings, the one that became most prominent during the transition period was the posterior constitutional review of legislation initiated by individuals (*actio popularis*). Anyone could submit such requests without need to show personal injury, which led to a great number of cases. Another specificity of Hungarian constitutional justice was the procedure for legislative omission: the Court could proceed *ex officio* in cases when the legislative organ created an unconstitutional situation by omitting to carry out its legislative duty. In the case of declaration of such omission, the legislative body must perform the order of the Court concerning the preparation of the required legislation.

While these two were abstract procedures, concrete cases came to the Constitutional Court in two ways. Firstly, ordinary judges can suspend the proceedings and initiate the procedure before the Constitutional Court when they consider a legal norm applicable in the case as unconstitutional. Secondly, anyone may turn to the Constitutional Court with a constitutional complaint after having unsuccessfully tried all other means to gain legal remedy, when they consider their rights have been violated by the application of an unconstitutional legal provision. Such constitutional complaints also represent posterior norm control, since the Constitutional Court only reviews the constitutionality of the statutes applied by ordinary courts and not the question of whether the given decision of a court or an administrative authority has violated a constitutional right of the claimant. The Constitutional Court can provide as the sole remedy to such injuries the prohibition of further application of the statute found to be unconstitutional in the case of the claimant. Owing to these limitations, the claims related to constitutional rights made up only a mere 2% of the total number of claims. As regards claims related to constitutional rights, the power of the Constitutional Court was not as wide as that of other European constitutional courts that are authorized to review

[1] Presented at the International Symposium on the occasion of the 20th anniversary of the Constitutional Court of Slovakia, 9 April 2013

individual decisions of the courts or authorities. This situation as just described has changed with the new legal framework for the Constitutional Court enacted in 2011, and entered into force on the 1st of January 2012, which we will address below.

The 2011 constitutional reform in Hungary

After 20 years, the transition process and constitutionalism in Hungary have reached an important point of change, embodied in the new Constitution (called Fundamental Law) enacted in 2011 and entered into force on 1 January 2012. The reforms have been controversial, and much of this has concerned the changes to constitutional justice. It may thus be apt to make a few remarks on these reforms and on the political implications of and reactions to constitutional justice in transition, thus situating the events in the age-old debate on the relationship between law and politics.

After 20 years of experience, dramatic and radical changes in the competences of the Constitutional Court have been made in 2010 and during the drafting of the new constitution in 2011. After the 2010 elections, the new two-thirds parliamentary majority, which is large enough to amend the constitution, announced a proposal to limit the subject matter jurisdiction of the Constitutional Court. The original plan was to exclude some laws from the constitutional supervision of the Constitutional Court, such as budgetary, pension and tax laws in general. One month later, the Parliament adopted the constitutional amendment on the limitation of the competences of the Constitutional Court. According to the new wording, budgetary and tax laws are only subject to constitutional review if the petition refers exclusively to the violation of the right to life and human dignity, the right to the protection of personal data, the right to freedom of thought, conscience and religion or the right connected to Hungarian citizenship. Hence, the Hungarian Constitutional Court had to suffer limitations of its powers for the first time during its 20-year existence. The new constitution unfortunately upheld this limitation, and otherwise radically changed the organization and the competences of the Constitutional Court. Furthermore, the new system brought important changes regarding the types of procedures before the Constitutional Court. On the one hand, the old *actio popularis* was abolished. On the other hand, the reform introduced a procedure for an individual constitutional complaint against individual acts of public authority.

The reactions to the reforms were mixed. In its opinion on the new Hungarian Constitution, the Venice Commission of the Council of Europe acknowledged that „since 1990, the Constitutional Court has played a vital role in the Hungarian system of checks and balances. Moreover, the Venice Commission is pleased to note that the Court has gained international recognition through its case

law."[2] In the Venice Commission's view, the above-mentioned changes in the composition and mode of election of the CC must also be assessed in conjunction with the competences of the Court. On the one hand, the Venice Commission noted with satisfaction that the individual constitutional complaint has been introduced into the constitutional review system. It welcomed the introduction of the "real" constitutional complaint that makes possible the review of the decisions of the ordinary judiciary. On the other hand, in the light of the 2010 curtailment of the Court's powers which were confirmed by the new Constitution, the Commission is concerned that a number of provisions of the new Constitution may undermine further the authority of the CC as a guarantor of constitutionality of the Hungarian legal order.[3]

Experiences with the new competencies

However, the Constitutional Court adapted its procedures to the new set of competencies.

As regards the **preventive norm control**, the President of the Republic submitted one law adopted by the parliament to the Constitutional Court instead of signing it. This was the law on electoral process, and the Court declared a number of its provisions unconstitutional.[4]

As regards **repressive norm control**, after that the actio popularis was abolished, the laws are quite exclusively challenged by the ombudsman who in 2012 sent 24 requests to the Court (an additional request was submitted by the Government).

On its Plenary Session of 28 December 2012, the Constitutional Court has declared that the Hungarian Parliament exceeded its legislative authority, when enacted such regulations into the "Transitional Provisions of the Fundamental Law" that did not have transitional character.[5] The Hungarian Parliament shall comply with the procedural requirements also when acting as constitution-maker, because the regulations that violate these requirements are invalid. Therefore the Constitutional Court annulled the concerned regulations due to formal deficiencies. The Constitutional Court, regarding its consistent practice, did not examine the constitutionality of the content of the Fundamental Law and the Transitional Provisions.

The Commissioner for Fundamental Rights initiated the review of conformity with the Fundamental Law of certain provisions of the Transitional Provisions related to the Fundamental Law of Hungary.

[2] Venice Commission, Opinion on the new Constitution of Hungary, CDL-AD(2011)016, para. 91.
[3] *Ibid*., paras. 93, 97.
[4] Decision 1/2013. (I. 7.) AB
[5] Decision 45/2012. (XII. 29.) AB

The Constitutional Court has declared that Point 3 of Closing Provisions of the Fundamental Law authorises the Hungarian Parliament to adopt transitional regulations related to the Fundamental Law in order to ensure the transition from the old regulation into the new one. Nevertheless, more than two-thirds of the provisions do not have transitional character; these provisions contain long-term and general regulations.

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It is a constitutional requirement to comply with the procedural rules of legislation declared in the Fundamental Law, thus the Constitutional Court, according to its practice, examines the compliance of these formal rules. In case the Parliament exceeds its legislative authority, it is such a serious violation of the procedural rules that results the declaration of the invalidity under public law and the nullification of concerned regulations, even if the legislative body acted as a constitution-making power.

The Constitutional Court did not examine the content of the Fundamental Law and of the Transitional Provisions; only the violation of the formal rules of legislation by the Parliament has been declared.

Those regulations of the Transitional Provisions have not been annulled that complied with the requirements of the rule of law laid down in the Fundamental Law. In order to protect the Fundamental Law, the Constitutional Court has declared requirements regarding the amendment and the supplemental proceedings. The Fundamental Law of Hungary is a unified legal document, thus every single amendment and supplement must be the part of the Fundamental Law either substantively and structurally.

On 4 January provisions of the Act on Election Procedure based on the petition of the President of Hungary was declared unconstitutional, stating that the provision under which all voters were obliged to register unjustifiably restricted the right to vote.[6]

On 15 February for the first time a judicial decision was found contrary to the Fundamental Law as violating the right to peaceful assembly.[7]

On 21 February provisions of the Criminal Code regarding the prohibition of the use of the symbols of the totalitarian regimes were abolished.[8]

On 26 February the Constitutional Court has declared contrary to the Fundamental Law those provisions of the Act on Churches which resulted in the losing of the former status as churches of the petitioners. Taking the character of legal remedy of the constitutional complaints into consideration, the Constitutional Court has ordered retroactive annulment of the unconstitutional

[6] Decision 1/2013. (I. 7.) AB
[7] Decision 3/2013. (II. 14.) AB
[8] Decision 4/2013. (II. 21.) AB

provisions and has excluded their application. Therefore, the decision of the Parliament on the refusal of the acknowledgement as a church and the unconstitutional provisions of the Act on Churches shall not have any legal effect. The churches specified in the annex of the Decision of the Parliament which submitted petitions to the Constitutional Court, did not lose their status as churches and their transformation from Church to association could not be enforced.[9]

In the enlarged competences of **constitutional complaint** there is definitely more interest for the "exceptional" type when Constitutional Court proceedings may also be initiated by exception if

a) due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision, and

b) there is no procedure for legal remedy designed to repair the violation of rights, or the petitioner has already exhausted the possibilities for remedy.

This competence is basically a version of abstract review and this might explain that petitioners use it more frequently as the "real" constitutional complaint strictly linked to a concrete judicial case.

The new procedures in figures

According to the statistical figures found on the website of the Constitutional Court, as much as 800 new petitions arrived to the Constitutional Court last year, and together with more than 400 cases in pending status at the beginning of 2012, there were more than 1200 cases to be completed. However, most of the cases had been closed during the year, and there were 270 pending cases at the end of the year.

Prior to putting into force the new Act on the Constitutional Court on 1 January 2012, there had been more than 1600 pending cases, but three quarters of them was terminated due to the changes in the Court's scope of competence. The reason is that from 2012 onwards, it is not possible any more for anyone to turn to the Court for the posterior constitutional review of any legal regulation; it can only be done in one's own case, because of the injury of rights, in the form of a constitutional complaint. 224 of the terminated cases were renewed by the petitioners as constitutional complaints on the basis of being affected personally.

836 new procedures were started last year, including 728 constitutional complaints, 65 initiatives by ordinary judges, and 25 petitions for posterior norm control (of which 24 were filed by the ombudsman and 1 by the government). Most of the new cases were related to economic, property and procedural questions, with a relatively low proportion of petitions concerning criminal law.

[9] Decision 6/2013. (III. 1.) AB

Taking into account 413 cases from the previous year and 836 cases that arrived in 2012, last year there were altogether 1249 cases to be ruled upon by the Constitutional Court's 15 members. (Excluding some 2500 petitions of similar contents filed by law enforcement officials and firemen related to changing the rules on preferential early retirement.)

Last year the Constitutional Court finished 1239 cases. 525 of the cases were closed in the course of the preparatory procedure by the secretary general, and 80 of them were finished with a single judge ruling, as these petitions failed to meet the fundamental formal and substantial criteria.

With regard to constitutional complaints, it is a new element that the Constitutional Court first judges upon accepting the petition, and the examination of the merits of the accepted petitions starts afterwards. There were more than 300 rejected petitions.

In the year 2012 the Constitutional Court closed 165 cases with a resolution on the merits of the case. This included 2 interpretations of the Fundamental Law and 29 cases of establishing the contradiction with the Fundamental Law of legal regulations or parts thereof, and their annulment. Until now the Constitutional Court has not annulled any judicial decision.

At the end of the year 2012 there were 270 pending cases at the Constitutional Court, including 193 constitutional complaints, 50 judicial initiatives and 22 petitions aimed at posterior norm control.

The detailed statistical figures and the short descriptions of the cases in process can be found on the website of the Constitutional Court.

Fundamental Law amendments

The original intent beyond the adoption of the new Fundamental Law in 2011 was to have a solid, firm and long-standing constitution. However, the newly adopted text has been amended already four times during the period slightly more than one year. The Fourth Amendment, entered into force on the 1st of April, is at minimum controversial. First, partly it responds to the requirements laid down by the Constitutional Court, introducing to the text of the constitution those provisions that should be there (because they are not of provisional character).

Other very questionable provisions overrule a number of the above mentioned decisions of the CC by elevating the unconstitutional provisions to the level of the constitution. Finally, the third part of the amendments simply maneuver the Court in a impossible situation by reducing the deadline of ending the cases on the initiative of ordinary judges within 30 days, or by the provision according to which former decisions of the Court lose their validity but not their effect.

Conclusions

The Constitutional Court is the principal organ for the protection of the Fundamental Law. Its tasks are to protect the fundamental rights and to exercise constitutional control on the legislation and on the application of law. The Constitutional Court performs its tasks even if the government has two-thirds majority. However, this is a relevant circumstance regarding the efficient operation, because the two-thirds majority might amend the Fundamental Law or narrow the competences of the Court. Nevertheless, the Constitutional Court has to enforce the constitutionality through its decisions.

In connection with its latest decisions the Court has been accused of politicizing, it has to be underlined that although it is obvious that several decisions have political consequences, it does not mean that the decisions are based on political aspects. Up till now every decision of the Court has been based on legal arguments. It is not surprising that the decisions of the Constitutional Court are usually assessed and commented by public figures according to their own political interests. Nevertheless, in a democratic State governed by the rule of law there is no place for unfounded accusations and for the questioning of the competences of the Court.