CHANGES IN THE COMPETENCES OF THE HUNGARIAN CONSTITUTIONAL COURT

(Professor Péter PACZOLAY, President, Constitutional Court of Hungary)[1]

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 CC 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 CC concerning the preparation of the required legislation.
While these two were abstract procedures, concrete cases came to the CC in two ways. Firstly, ordinary judges can suspend the proceedings and initiate the procedure before the CC when they consider a legal norm applicable in the case as unconstitutional. Secondly, anyone may turn to the CC 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 CC 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 CC 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 CC was not as wide as that of other European constitutional courts that are authorized to review individual decisions of the courts or authorities. This situation as just described has changed with the new legal framework for the CC enacted in 2011, and entered into force on the 1st of January 2012, which we will address below.

The relationship with the ordinary judiciary

The competences and procedures of the Constitutional Court also define its relationship to the ordinary judiciary, especially to the Supreme Court. This has been a sensitive issue in Hungary as well as other states, so it seems worthwhile to briefly reflect on this issue. There are four main interfaces between the two organs.
Firstly, concrete norm control (or otherwise: preliminary ruling procedure) initiated by ordinary judges.[2] Until 2007 the number of these petitions did not exceed 30 initiatives

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annually, but in the two subsequent years their number rose extensively. The rising number of referrals were related to one specific topic, namely illegal parking. Hundreds of cases were submitted to the Constitutional Court by the ordinary judges related to this topic.

The second interface is constitutional review of normative decisions of the Supreme Court, which are issued to secure the unity of judicial statutory interpretation. The normative decisions of the Supreme Court are aimed at securing the uniformity of interpretation, and are not connected to any specific case. This competence of the Constitutional Court – after years of hesitation – was pronounced by the Court itself in 2005 when the Constitutional Court annulled such a normative decision of the Supreme Court, and this was reaffirmed the next year.[3] The cause of the hesitation was the lack of such an explicit competence, and the debated character of the so-called normative decisions. Under the new Act on the Constitutional Court the question is settled as it enlists as a competence of the Constitutional Court.[4]

The third interface is the constitutional complaint. Until this year the Court could give remedy against a judicial decision if the underlying statute was unconstitutional. Actually, if ordinary court decisions violated due process but the underlying statute was constitutional, the Constitutional Court could not review the decisions. Cases for the violation of Article 6 ECHR guarantees went directly to Strasbourg. This "limited" constitutional complaint remains valid even in the new constitution but the so-called "real" constitutional complaint will be introduced.

Finally, certain competences of the Constitutional Court were essentially that of an administrative court, e.g. the review of local government decrees where the standard of the review is not the constitution but the respective statutes. The local government decrees were challenged by regional administrative agencies and the case was, in first and last instance, decided by the Constitutional Court. This competence was established by the Act on Local Governments.[5] The new constitution transfers this competence to the ordinary courts: under Article 25 ordinary courts shall annul the local government decrees that contradict other laws.

In practice, the relation of the CC to the ordinary courts in general, and to the Supreme Court (now re-named as "Kuria") in particular might easily be loaded with tensions. In the Hungarian case, there were two main conflicts: the efforts of the CC to avail itself of the competence to review judicial decisions was until lately successfully rejected by the legislature based on the objections of the Supreme Court. On the other hand, the review of the above-mentioned "normative decisions" deeply offended the Supreme Court, which sharply criticized the CC. Yet the tensions between the two courts in Hungary never led to open conflict; the relation was rather polite.[6] As regards my personal experience, I consequently underline the necessity of cooperation of the two bodies, not only in the interest of the two institutions, but more importantly in the interest of the ultimate beneficiary of the two courts' activities: the individual citizens.

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[2] Art. 38 AC: „Upon noting the unconstitutionality of a law … applicable in the judgement of a case, the judge hearing the case shall suspend the case in the court and submit a petition initiating the proceedings of the Constitutional Court".

[3] Constitutional Court of Hungary, decision 42/2005. (XI.14), and decision 70/2006. (XII.13.) respectively. Available on the homepage of the Constitutional Court: http://www.mkab.hu/index.php?id=decisions.

[4] Act No. 151 of 2011 on the Constitutional Court, Art. 37.

[5] Act LXV of 1990.

[6] See for more on the relationship, *Gábor Halmai*, Who is the Main Protector of Fundamental Rights in Hungary? The Role of the Constitutional Court and the Ordinary Courts, in: Jiri Priban/Pauline Roberts/James Young (eds.), Systems of Justice in Transition, 2003, 50-75.

The 2011 constitutional reform in Hungary

Recent developments in Hungary have illustrated the truism that constitutional justice does not operate in a political vacuum, but has a multifaceted, and sometimes precarious, relationship with politics – in particular if it plays such a prominent role as was the case 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 Basic 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 CC 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 CC. The original plan was to exclude some laws from the constitutional supervision of the CC, 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 CC. 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 CC 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 CC. 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 changes also concerned the composition of the Court and the nomination of judges. As far as the composition of the Court is concerned, the new Constitution increases the number of its members from 11 to 15 and prolongs their term of office from 9 to 12 years. In addition, it transfers the election of its president from the Court to Parliament (by two-thirds majority) and prolongs his/her mandate to the entire duration of the mandate. Changes also concern the nomination of judges, which are elected by the Parliament. One of the first amendments to the constitution changed this nomination process. Previously, the parliamentary Nomination Committee comprised one representative of each parliamentary party who all had the same vote. In contrast, under the new constitutional text the number of representatives is proportionate to the number of seats held by each political party in the Parliament. The motivation behind this constitutional amendment was the long-lasting vacancy of seats due to disagreements on the nomination, which were quickly filled by two new judges after the amendment passed. Many were concerned that the judges would be biased in favour of the ruling party, but shortly after their nomination the two newly elected judges expressed the strongest opinion in favour of the annulment of a symbolic law adopted by the new government, thus giving an example of the “duty of ingratitude”. A new conflict developed when the Parliament established a 98 % punitive tax on “unashamedly high” severance payments paid out of the state budget. The Parliament openly declared its intention to depart from the practice of the CC (which was set forth in 1990 in Decision 903/B/1990) and together with an act adopted a constitutional amendment to make it possible to impose the tax

with retroactive effect starting from January 1, 2010. Regardless of the passing of the constitutional amendment, the CC held that the act on retroactive tax was unconstitutional, violated even the new constitutional provision, therefore annulled it.[7]

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."[8] 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.[9]

[7] On the newly adopted constitution of Hungary see *Kriszta Kovács*/*Gábor Attila Tóth*, Hungary's Constitutional Transformation. European Constitutional Law Review, 7(2) (2011), 183 - 203; *Lóránt Csink*/*Balázs Schanda*/ *András Varga* (eds.), The Basic Law of Hungary - A First Commentary, 2012.

[8] Venice Commission, Opinion on the new Constitution of Hungary, CDL-AD(2011)016, para. 91.

[9] *Ibid*., paras. 93, 97.