

Constitutional review on the basis of the new Fundamental Law of Hungary²

The new Fundamental Law entered into force in Hungary in 2012, and in the same year a new Act on the Constitutional Court (Act no. CLI of the year 2011) also became effective. In my article, I would like to briefly compare the competences of the Constitutional Court of Hungary based on the provisions of both the old and the new basic law.

I would also like to compare the norms affected by constitutional review. I would like to introduce, what are the new instruments for the protection of individual human rights, what are the advantages of the new system of the protection. Finally, I would like to speak about the "real" or "genuine" constitutional complaint as a constitutional remedy. I am focusing on this, i.e. the "real" constitutional complaint, because this is a new form of protection originating in the constitutional changes resulting from the new Fundamental Law of Hungary.

First, let me talk about the historical background. Since the beginning of its operation, the Constitutional Court of Hungary had an excessively wide competence, which basically had two important consequences. The ex post abstract control of the constitutionality of legal norms, i.e. *actio popularis*, provided the constitutional review of the legal provisions with an unlimited scope and purview. The activism of the Hungarian Constitutional Court served as the means to fill in the eventual gaps in constitutional regulation, in line with the fundamental principles of Hungarian constitutional law. *Actio popularis* resulted in an objective barrier to the efficiency of the system of fundamental rights protection, a huge backlog, and an unsustainable system of human rights protection.

In the following, I would like to introduce the 2012 constitutional changes in Hungary, the new approach taken to human rights protection and the new goals established. These new goals could be summarized as the reinforcement of the individual level of the protection, the extension of the constitutional review to the entirety of court decisions and the increasing of the efficiency of the human rights protection. These changes created new tasks in the field of human rights protection.

What were the new tasks concerning these goals? On the one hand, the protection of human rights was extended including all levels of the court system, that said, the new Fundamental Law of Hungary must be applied in all judicial proceedings, and the Constitutional Court was granted the competence to review all judicial decisions on the basis of the New Fundamental Law.

Another question arises then about the constitutional changes that have taken place in Hungary, namely, what was the basic instrument of this change? The basic instrument of the new approach to human rights protection was the introduction of a new form of constitutional complaint on the basis of the German *Urteilsverfassungsbeschwerde*.

Article 27 of the new Act on Constitutional Court (ACC) introduced the "real" or "genuine" constitutional complaint. According to this provision of law persons or

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organisations affected by judicial decisions contrary to the Fundamental law may submit a constitutional complaint to the Constitutional Court if the decision made on the merits of the case or other decision terminating the judicial proceedings violates their rights laid down in the Fundamental Law, and the possibilities for legal remedy have already been exhausted by the petitioners or no such possibilities were available to them.

Let me now compare the main competences of the Hungarian Constitutional Court according to the new and old constitution. According to the former constitution, *ex post* abstract constitutional review was the most important competence of the Constitutional Court. That said, almost seventy percent of all of the activities of the Court dealt with such cases. The second most frequent type was *ex post* concrete constitutional review, making up about thirty percent of the caseload, which could be filed in two different ways: either by "judicial initiative" (petition of the court), or by the so-called "norm control" constitutional complaint.

If we compare these with the main competences of the Hungarian Constitutional Court according to the new Fundamental Law, we can observe that the abstract *ex post* review has a decreasing importance (cca. 5%) while the concrete *ex post* review has increasing importance (cca. 45%). In addition to the old "judicial initiative" and "norm control constitutional complaint" the so-called "direct" constitutional complaint was introduced as a new competence, which can be initiated in the case of violations of fundamental rights through the direct effect or application of a legal provision. In addition to these, the "real" or "genuine" constitutional complaint was also introduced, becoming the most important competence of the Hungarian Constitutional Court. Currently, it takes up cca. 50% of all of the activities of the Court.

Now, what were and are the main objectives of the constitutional review?

If we compare the main objectives of constitutional review based on the competences of the Court laid out in the former Constitution and in the new Fundamental Law, we can see that, according to the former Constitution, the main objectives of constitutional review were the protection of the rule of law and legal certainty, of the constitutionality of legal provisions, the protection of fundamental rights on the level of legislation, and the abstract (general) protection of fundamental rights. This means that the individual level of protection was considered less important.

If we compare the main objectives of constitutional review based on the competences of the Court laid out in the former Constitution and in the new Fundamental Law, we can observe, that according to the new Fundamental Law the level, the efficiency, and the proper toolbox of the protection afforded for individual human rights was increased and expanded through the enlargement of the scope of constitutional complaints, and this way priority was given to the individual protection of fundamental rights.

The new system of constitutional complaints consists of three types. The first is the so-called "norm control" constitutional complaint (maintained from the earlier system), the second is the so-called "direct" complaint, and the third is the "real" or "genuine" complaint. The new Fundamental Law expanded the scope of constitutional complaints, and created a complex new instrument for protecting individual human rights.

What are the advantages of this new system of constitutional complaints? One certainly is the individual constitutional remedy for a violation of fundamental rights by a judicial decision or even without one. Another advantage is the creation of a universal constitutional remedy, which is extended to all three branches of power (executive, legislative, judiciary).

In the case of a violation of fundamental rights through legislation, when an unconstitutional provision is applied by the courts, the "norm control" constitutional complaint can be triggered. When an unconstitutional provision affects an individual directly without a court decision, the "direct" constitutional complaint can be initiated. In the case of a

violation of fundamental rights by a court decision not in harmony with the Fundamental Law, the possibility of filing a “real” or “genuine” constitutional complaint opens up.

Among the advantages of the new system, we have to mention that in the case of a violation of fundamental rights by the executive branch, all decisions of state authorities can be contested in court, so the constitutional review of the executive branch is ensured through ordinary, “non-constitutional” judicial review. This is a form of indirect protection.

The question may arise then, why can the „real” or „genuine” constitutional complaints be considered as a constitutional remedy. One of the reasons for this is that the Constitutional Court has the right to annul the decisions of ordinary courts. According to the new Fundamental Law, the scope of constitutional review is limited to the violation of the fundamental rights of the petitioner. The violation of legal provisions without the injury of the fundamental right (*besonderes Verfassungsrecht*) is beyond the ambit of constitutional review. Violation of the fundamental right must therefore be caused by a court through the *unconstitutional application or interpretation of a constitutional legal provision*.

However, not all violations of fundamental right result in the possibility to trigger a constitutional remedy. Admissibility criteria have been introduced in the new Act on the Constitutional Court from 2012. There is an optional criteria of admissibility in respect of the extension or constitutional significance of the remedy. The subjective criterion of admissibility is that the violation or injury of the fundamental right of the petitioner must be significant, i.e. the violation of the fundamental right must cause significant injury to the applicant.

The objective criterion of admissibility is that in the absence of any subjective criterion the complaint can be admitted on the basis of the constitutional relevance of the case. Constitutional relevance can be established, if the complaint raises constitutional law issues of fundamental importance.

The „real” or „genuine” constitutional complaint functions as a remedy only within a limited scope: only in the case of a *significant* violation of the fundamental rights of the petitioner by the decision of the court complained against. If the violation itself is insignificant, but the *constitutional law issue* arising from the case is *of fundamental importance*, the proceedings of the Court are still triggered.

There seems to have been an important change in the perception of the role of the Constitutional Court regarding the admissibility of complaints. The „real” or „genuine” constitutional complaint can serve as an actual and effective remedy if the discretion of the Constitutional Court tends to be permissive rather than restrictive when assessing the issue of admissibility. The jurisdiction of the Court has been permissive in the recent past, as complaints are generally admitted in cases, which raise constitutional law issues regardless of the relevance of the injury.

Let me summarize my short presentation with two statements. First off, the constitutional changes in Hungary resulted in a new approach to human rights protection focusing on the reinforcement of the individual level and on the efficiency of protection. Second, the new system of constitutional review seems to be able to effectively realise the individual protection of fundamental rights both in the field of ex post concrete norm control and in the constitutional review of court decisions.