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CONSTITUTIONAL JUSTICE: FUNCTIONS AND RELATIONSHIP WITH THE OTHER PUBLIC AUTHORITIES

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The Constitutional Court of Hungary*

I. THE CONSTITUTIONAL COURT'S RELATIONSHIP TO PARLIAMENT AND GOVERNMENT

- 1. The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?**

1.1 Procedure for appointment

The Constitutional Court shall consist of eleven members who all are elected by the Parliament. After considering the opinion of its Legal, Administrative and Justice Committee, the Parliament elects the members with a two-thirds majority vote.

The nomination is made by the Nominating Committee, which consists of members of the parliamentary fractions of each political party represented in the Parliament. The number of the members of the Nominating Committee shall be between 9 and 15, determined by the size of the respective parliamentary fractions. [§32/A subsection (4) of the Constitution, inserted by Amendment of 5 July, 2010, and §6 of the Act on the Constitutional Court.] Prior to this modification no reference was made to proportionality, the Nominating Committee consisted of one member of each parliamentary fraction.

The members of the Constitutional Court are elected for a nine-year term, and they may be re-elected once.

In order to avoid the direct influence of the political parties on the nomination procedure the Act on the Constitutional Court (hereinafter referred to as: CC Act) prohibits for the members of the Constitutional Court to pursue political activities or to make political statements, and only those can be elected, who had not filled leading political or governmental positions four years prior to their election.

1.2. Termination of the membership

Once elected the members of the Constitutional Court cannot be revoked by the Parliament. The membership terminates exclusively upon the following grounds:

- a) reaching the age of 70 years;
- b) expiry of the term of office;
- c) decease;
- d) by resignation;
- e) the establishment of a conflict of interest;
- f) by release;
- g) by expulsion.

The grounds listed in items a)-d) are established and published by the President of the Constitutional Court. In case of items e), f) and g), the plenary session of the Constitutional Court passes a decision. [§15 subsection (1) of the CC Act]

2. To what extent is the Constitutional Court financially autonomous – in the setting up and administration of its own expenditure budget?

The Constitutional Court determines its own budget, which shall be submitted for approval to the Parliament as a part of the state budget. [§2 of CC Act]

3. Is it customary or possible that Parliament amends the Law on the Organization and Functioning of the Constitutional Court, yet without any consultation with the Court itself?

The detailed regulations on the organization and procedure of the Constitutional Court are set forth by the Rules of Procedure of the Constitutional Court, and it shall be approved in a statute by the Parliament upon the recommendation of the Constitutional Court. [§29 of CC Act] A majority of two-thirds of the votes of the Members of Parliament present is required to pass the statute on the organization and operation of the Constitutional Court. [§32/A subsection (6) of the Constitution]

The Standing Rules of the Parliament gives the possibility to the President of the Constitutional Court to attend and speak in the parliamentary session. [§45 subsection (1) of the Standing Rules of the Parliament]

4. Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/ Standing Orders of Parliament and, respectively, Government?

4.1. Ex ante review powers

The competence of the Constitutional Court includes the preventive norm control of Standing Rules of the Parliament [§1 item a) of the CC Act]. The Parliament may send its rules of procedure, before adopting them, to the Constitutional Court for the examination of conformity with the Constitution, indicating the provision(s) thought to be of concern. If the Constitutional Court establishes the unconstitutionality of a provision thought to be of concern in the rules of procedure, the Parliament shall eliminate such unconstitutionality. [§34 subsections (1), (2)]

4.2. Ex post review powers

The competence for ex post facto review of legislative acts and sub-legislative legal norms comprises the review of the Standing Rules of the Parliament and Government Regulations. [§1 item b) of the CC Act]. The proceedings for ex post facto review can be initiated by anyone. [§21 subsection (2) of CC Act]

5. Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.

The Act on the Constitutional Court uses a terminology that declines partially from the Constitution; while the Constitution mentions only laws [§32/A subsection (1) of the Constitution] it is the Act on the Constitutional Court which assigns the task of posterior constitutional review of other legal means of state administration, too. [§1 item b) of CC Act]

5.1. Laws

5.1.1. Exception from constitutional review based on the subject-matter of the law

There is a proposal that would amend §32/A subsection (2) of the Constitution. (The final vote on this proposal is expected to be on November 16, 2010.) Under §32/A subsection (2) currently in force "the Constitutional Court shall annul the statutes and other legal norms that it finds to be unconstitutional". After the amendment it would read as follows: "The Constitutional Court shall annul the statutes and other legal norms that it finds to be unconstitutional. The Constitutional Court shall annul the statues on the State Budget and its implementation, on central taxes, stamp and customs duties, contributions, as well as on the content of the statues concerning uniform requirements on local taxes only if the content of these statutes violates 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 the Hungarian citizenship under Article 69 of the Constitution."

5. 2. The other legal means of state administration

The Constitutional Court has had a unified examination practice concerning the other legal means of state administration; the examination has depended on whether the act in question had normative content.

In the early phase of the Constitutional Court's jurisprudence it was declared that the other legal means of state administration will not be determined by their name, but by their content (Decision 60/1992.).¹

In majority of the cases the Constitutional Court decided whether the examined decision made by the Parliament is a normative or a concrete decision on the basis of examination of the aims of the decision, the specifications and duration of rules of behaviour contained in the decision (summarizing: Decision 50/2003²).

1 The Act on Legislation made distinction between the general and compulsory acts (laws) extended to everybody and the internal norms issued by particular authorities of state power. These latter norms are binding on the issuing and its subordinated organs, while cannot become compulsory and cannot give rights to or impose obligations on "outsiders".

2 The English translation of Decision 50/2003 is available at http://www.mkab.hu/admin/data/file/711_50_2003.pdf

There are some norms, which belong to the scope of other legal means of state administration by their names, but not by their content (at first: Ruling 52/1993). The Constitutional Court established for such cases the lack of competency, as the act to be taken under examination had no normative character, and refused the petition.

There are also other norms, which cannot be considered upon their issue or upon their name as other legal means of state administration, nevertheless they are similar upon their content (Decision 16/2001, Decision 23/2007). The Constitutional Court refuses the petition in such cases, but the annulment of the examined norm is stated in the heading and it is highlighted that they cannot generate therefore any rights and obligations and no legal consequence can be related to them.

On the other hand, a diverging practice has been followed regarding the possibility of examination of laws without normative content. The common element of all the decisions is that the Constitutional Court has taken the Act on the Constitutional Court as initial point. It was changed by the Decision 42/2005³, which stated that: “The Constitutional Court has been considering the competence of the abstract posterior review as a competence, which covers all norms (provisions with normative content), originated (and protected by) from the Constitution”. Consequently, the Constitutional Court reviewed the constitutionality of a uniformity decision (binding upon lower courts) by the Supreme Court.

By this principle every normative act is a law, and conversely: a law is a normative act. In this approach the competence of the Constitutional Court is not necessarily extended to the examination of the statutory provisions, if their normativity cannot be established (Decision 703/B/2003).

The concept of law has been approached by the Decision 124/2008 from a different way again. It has set that the “Constitution determines itself, which state authority and in what form can issue laws.” In the sense of this decision a law is which may be issued upon the Constitution as such.

5.3. Categories of acts according to the competence of the Constitutional Court

5.3.1. Ex ante review

of

- (1) enacted but yet not promulgated statutes;
- (2) Standing Rules of the Parliament;
- (3) not yet adopted international treaties.

5.3.2. Ex post facto review

of

- (1) legislative acts;
- (2) sub-legislative legal norms, such as ministerial decrees, local governmental decrees.

³ The English translation of Decision 42/2005 is available at http://www.mkab.hu/admin/data/file/704_42_2005.pdf

It could be (1) an abstract norm control and (2) concrete norm control.

(The concrete norm control is initiated by a judge who finds that a legal norm or administrative provision to be applied is unconstitutional must stay the proceeding and obtain a decision on the matter from the Constitutional Court.)

5.3.3. Review of unconstitutional omission of legislation.

If the legislature has omitted to comply with its legislative duty, deriving from a legal rule, and has thus given rise to unconstitutionality, then the Constitutional Court shall appoint a term within which the organ committing the omission must meet its duty.

5.3.4. Review of the conformity of legislative acts with international treaties.

5.3.5. Constitutional complaint

A complaint can be brought by any person who claims that his or her fundamental rights have been injured through the application of an unconstitutional legal norm. The subject of the constitutional review is not the decision that embodies the direct violation of the fundamental right but the legal norm on which it is based.

- 6. a) Parliament and Government, as the case may be, will proceed without delay to amending the law (or another act declared unconstitutional) in order to bring such into accord with the Constitution, following the constitutional court's decision. If so, what is the term established in that sense? Is there also any special procedure? If not, specify alternatives. Give examples.**

6.1. Ex ante review

If the subject for ex ante constitutional review was a law, which has been promulgated but has not yet entered into force, the President of the Republic may not promulgate the statute before the Parliament eliminates such unconstitutionality. [§35 subsection (2) of CC Act]

6.2. Ex post facto review

If the Constitutional Court establishes the unconstitutionality of a law or any other legal means of state administration, it annuls in whole or in part that law or other legal mean of state administration. [§40 of CC Act] No additional procedure is required, the annulled law or other legal mean of state administration shall not be applied from the day of publication in the official journal.[§43 subsection (1) of CC Act]

However, the Act on the Constitutional Court renders possible that the Constitutional Court may set a different time for an unconstitutional law to become ineffective or for its applicability in a particular case, if this is justified by the interest in legal certainty or a particularly important interest of the entity initiating the proceedings. [§43 subsection (4)]

6.3. Unconstitutional omission of the legislative

If the Constitutional Court establishes ex officio or upon anyone's petition that a legislative organ failed to fulfil its legislative tasks issuing from its lawful authority, thereby bringing about unconstitutionality, it instructs the organ which committed the omission, setting a deadline, to fulfil its task. The Act on the Constitutional Court does not contain sanction, it only prescribes in §49 subsection (2) that the organ which committed the omission shall fulfil the task by deadline.

6.4.

It is the duty of the legislation to harmonize the legal system and draw the consequences of the annulment of any legal norm. For this procedure there is no deadline set forth in the law.

6. b) Parliament can invalidate the constitutional court's decision: specify conditions.

The decisions of the Constitutional Court are binding on everyone [§27 subsection (2) of CC Act], therefore the Parliament cannot invalidate the constitutional court's decision without running into the risk of a subsequent constitutional review of the new legislative solution.

7. Are there any institutionalized cooperation mechanisms between the Constitutional Court and other bodies? If so, what is the nature of these contacts / what functions and powers shall be exerted on both sides?

The Constitutional Court is in cooperation with the judiciary (especially with administrative judicial colleges) and with the Ombudsperson; the members and legal advisors of the Constitutional Court participate regularly in workshops and conferences.

The preparatory committee on the Constitution has recently asked the opinion of the Constitutional Court on the principles of its regulation in the Constitution. The Constitutional Court answered to the invitation, it drew, however, the attention to its decision from 1991 with the following citation: "The Constitutional Court is not an adviser to Parliament but the judge of the result of Parliament's legislative work". [Decision 16/1991, http://www.mkab.hu/admin/data/file/739_16_1991.pdf].

II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT

1. What are the characteristic traits of the contents of organic litigations (legal disputes of a constitutional nature between public authorities)?

The Constitution does not list organic litigations among the competences of the Constitutional Court, it is the Act on the Constitutional Court which contains provisions about the elimination of conflicts of competence between state organs, local governments and other state organs, or between local governments [§1 item f) and §50 of CC Act].

Notwithstanding its possibility, the Constitutional Court did not use its competence for the resolution of legal disputes of a constitutional nature, but decided such issues by interpreting the provisions of the Constitution. Interpretative decisions settled the competences of the President of the Republic, for example in Decision 48/1991⁴ in which the petitioners sought an advisory opinion on the interpretation of the Constitution in relation to the position of the President of the Republic vis-à-vis the armed forces.

2. Specify whether the Constitutional Court is competent to resolve such litigation.

The Constitutional Court may resolve conflicts in competence among state organs and local governments. Seldom did the Constitutional Court perform this competence as it is not a typical constitutional one. Lately the Constitutional Court received no petition upon this provision of the Act on the Constitutional Court.

In 2005 a new Act on the General Rules of the Administrative Procedure⁵ was adopted, according to which the competence for the resolution of organic litigations belongs to the Metropolitan Court of Budapest.

Despite repeated attempts for repealing §1 item f) and §50 of the Act on the Constitutional Court (which requires two-third of the votes of the MPs) the aforementioned provisions remained in the CC Act, causing contradiction in the legal system.

3. Which public authorities may be involved in such disputes?

- State organs other than courts;
- Local governments.

⁴ See <http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1991-s-002?fn=document-frameset.htm&f=templates§3.0>

⁵ Act CXL of 2004

- 4. Legal acts, facts or actions which may give rise to such litigations: do they relate only to disputes on competence, or do they also involve cases when a public authority challenges the constitutionality of an act issued by another public authority? Whether your constitutional court has adjudicated upon such disputes; please give examples.**

The Constitutional Court has adjudicated upon only in few disputes, altogether in 31 cases (between 1990 and 2005). Decision 154/F/2005 for example concerned the double protection of the garden of the Castle of Eszterházy in Fertőd. As a historical monument, the garden was under the auspices of the National Trust, which wanted to reconstruct it in baroque style, while the authorities of the Nature Conservation did not allow cutting the trees.

- 5. Who is entitled to submit proceedings before the Constitutional Court for the adjudication of such disputes?**

Before 2005, the following entities had a right to initiate proceedings before the Constitutional Court:

- State organs other than courts;
- Local governments

(Superior authorities were not entitled to initiate proceedings.).

- 6. What procedure is applicable for the adjudication of such dispute?**

There is no special procedure for the adjudication of such disputes.

- 7. What choices are there open for the Constitutional Court in making its decision (judgment). Examples.**

Before 2005, the Constitutional Court

- determined which organ has competence in the dispute and appoints the organ obligated to proceed; or
- dismissed the petition in the absence of a conflict.

Examples where the case was decided by resolving the conflict:

Decision 444/F/1992AB (ABH 1992, 743);

Decision 645/F/1996AB (ABH 1996, 771).

Examples where the case was dismissed in the absence of a conflict:

Resolution 581/B/1994AB (ABH 1994, 956);

Decision 6/B/1994AB (ABH 1995, 848);

Decision 737/F/1995AB (ABH 1996, 706).

8. Ways and means for implementing the Constitutional Court's decision: actions taken by the public authorities concerned afterwards. Examples.

Before 2005, no implementation procedure was necessary, because the Constitutional Court determined in its decision which organ had competence in the dispute and appointed the organ obligated to proceed.

III. ENFORCEMENT OF CONSTITUTIONAL COURT'S DECISIONS

1. The Constitutional Court's decisions are:
 - a) final;
 - b) subject to appeal; if so, please specify which legal entities/subjects are entitled to lodge appeal, the deadlines and procedure;
 - c) binding erga omnes;
 - d) binding *inter partes litigantes*.

2. As from publication of the decision in the Official Gazette/Journal, the legal text declared unconstitutional shall be:
 - a) repealed;
 - b) suspended until when the act/text declared unconstitutional has been accorded with the provisions of the Constitution;
 - c) suspended until when the legislature has invalidated the decision rendered by the Constitutional Court;
 - d) other instances.

3. Once the Constitutional Court has passed a judgment of unconstitutionality, in what way is it binding for the referring court of law and for other courts?

The decisions of the Constitutional Court are binding on everyone – without any condition and time limit. In case of concrete review of constitutionality, the annulled provisions may not be applicable if the Constitutional Court disposes so in the given case.

The Constitutional Court orders the review of the criminal proceedings concluded with a non-appealable verdict based on an unconstitutional law or other legal mean of state administration if the convict has not been exempted from all adverse consequences and the nullity of the provision applied in the proceedings would result in the reduction or waiver of the measure or in the exemption from or limitation of liability.

4. Is it customary that the legislature fulfills, within specified deadlines, the constitutional obligation to eliminate any unconstitutional aspects as may have been found- as a result of *a posteriori* and/or *a priori* review?

4.1. The legislature always fulfils its constitutional obligation to eliminate the unconstitutionality as a result of a posterior review.

The Act on the Constitutional Court establishes this obligation for the different organs, although does not contain sanction:

- the President of the Republic may not promulgate the statute before the Parliament eliminates such unconstitutionality. [§35 subsection (2) of the CC Act]
- the international treaty may not be confirmed before the organ or person concluding the international treaty eliminates such unconstitutionality. [§36 subsection (2) of the CC Act]

- the Parliament shall eliminate unconstitutionality from its Rules of Procedure. [§34 subsection (2) of the CC Act]

4.2. It is customary that the legislature fulfils its obligation in case of constitutional omission, although the number of failing to do so has increased. During its twenty-years existence, the Constitutional Court has called the legislature to fulfil its obligation in 103 cases, out of which in 18 cases the legislature has not yet fulfilled its obligation.

5. What happens if the legislature has failed to eliminate unconstitutional flaws within the deadline set by the Constitution and/or legislation? Give examples.

There is no sanction determined in the Constitution, nor in other laws. In case of constitutional omission, the cases are published by the Constitutional Court, and they can be found at the website of the Parliament, too.

6. Is legislature allowed to pass again, through another normative act, the same legislative solution which has been declared unconstitutional? Also state the arguments.

The decisions of the Constitutional Court are binding on everyone – without any condition and time limit. It means that under the same conditions (e.g. without amending the Constitution) it is not allowed to pass again a law with a content already declared unconstitutional.

Examples, however, show that instead of eliminating the unconstitutional aspects of a law the legislature decides to amend the Constitution, due to the fact that Hungary has flexible constitution, and it is relatively easy to modify any provisions thereof with two-thirds of the votes of the MPs.

See Decision 3/1990 and subsequently the Amendment of the Constitution of October 7, 1994 which inserted the condition of staying in the territory of Hungary during the elections for the right to vote.

In Decision 103/2010 the Constitutional Court ruled the 98 % tax levied on public service severance pay over HUF 2 million unconstitutional and annulled it. After the decision the parliamentary majority initiated an amendment to the Constitution that would curb the Constitutional Court's jurisdiction. The final vote on this proposal is expected to be on November 16, 2010.

7. Does the Constitutional Court have a possibility to commission other state agencies with the enforcement of its decisions and/or to stipulate the manner in which they are enforced in a specific case?

The Constitutional Court does not have means (except for the publicity) for influencing the enforcement of its decisions.