Constitutional adjudication in the system of separation of powers. American impacts in Hungary

Ajudicación constitucional en el sistema de la separación de poderes. Impactos americanos en Hungría

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Summary
Throughout the world one can find two basic models of constitutional adjudication: the American and the Kelsenian ones. At first sight one could easily differentiate them with the mere fact that in the American model there is no separate constitutional court; constitutional adjudication is incorporated into the judicial system.

The essay argues that the differentiation is more complicated. The base of distinction is not the existence of a constitutional court. The essay chooses a functional approach and analyses if the activity of constitutional adjudication is closer to the judicial branch or it is "negative legislation" as Kelsen originally thought. Such an approach requires the analysis of separation of powers and the competences of constitutional courts; especially the abstract law review and individual complaint.

Hungary's new constitution changed the role of the constitutional court. The essay concludes that due to the changes the Hungarian system of constitution adjudication made a great step towards the American model from the Kelsenian one.

Keywords
Separation of Powers / Constitutional Adjudication / Kelsen / Hungary / Individual Complaint.

Resumen
Alrededor del mundo se pueden encontrar dos modelos básicos de adjudicación constitucional: el americano y el kelseniano. A primera vista se podría diferenciar fácilmente el uno del otro por el mero hecho de que en el modelo americano no hay una corte constitucional separada. La adjudicación constitucional está, así, incorporada en el propio sistema jurídico.

Este trabajo propone que dicha diferenciación es más complicada de lo que parece y que el fundamento de distinción no es la existencia de una corte constitucional. Al seguir un enfoque funcional este trabajo busca, en cambio, analizar si la actividad de adjudicación constitucional es más cercana al poder judicial o bien es una "legislación negativa", tal como pensaba Kelsen. Este enfoque se articula en un análisis de la separación de poderes y competencias de las cortes constitucionales, especialmente a partir de dos nociones: la revisión abstracta del derecho y el reclamo individual.

La nueva constitución de Hungría cambió el papel de la corte constitucional. Este trabajo concluye que debido a estas modificaciones el sistema de adjudicación constitucional húngaro tomó un giro desde el modelo kelseniano hacia aquel americano.

Palabras clave
Separación de poderes / Adjudicación constitucional / Kelsen / Hungría / Reclamo individual.

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Separation of powers is one of the most basic principles democratic states are based on. Everyone finds it obvious that legislative, executive and judicial branches have to be divided and checks and balances have to be established. Still, there is no common standpoint what exactly separation of powers means. In order to place constitutional adjudication, the meaning of separation of powers has to be clarified first.

Why to separate powers? There are several arguments saying that state powers should not, or cannot be separated. There are great differences among the ideas of Rousseau, Marxist scholars and some modern, democratic theorists denying separation of powers but their common base is that the people's representative body, the parliament has no equal opponent, therefore, there can be no balance among the branches. On the other hand, mainstream ideology finds it necessary to establish checks and balances in the legal system. Even though they do not have a common base, three different tendencies can be identified.

The most apparent feature of *complex separation* is that it looks beyond the classic branches of powers. It examines not only legislative, executive and judicial branches but also identifies other actors of power (media, economic enterprises, NGO-s etc.). Complex separation concludes that checks and balances are in transition and they are the ideas of 18th and 19th century nation-states. By the late 50s separation of power became more complex. Due to globalisation and supranational activities the public power of the state is practically restricted on the one hand[1]; and state power is also restricted internally because of independent media and NGOs[2]. According to this concept, in practice they prove to be greater balances over the government's policy than any national judicial power.

Secondly, *parliamentarist separation* roots in the fact that the government has majority in the parliament in parliamentary states, as a result of which government and parliament have a common political base. Legislative and executive branches are united, forming a political branch that is balanced by a neutral branch, consisting of organs like the judiciary, the constitutional court, the ombudsman and the president. This theory observes the balances between the political and the neutral branches.

Finally, the tendency of *modernised Montesquieu* is based on the classic separation and intends to apply it to contemporary systems. The focus is not the political nature of organs but their functions and it examines if functions of an organ have a legislative, executive or judicial character. The present essay examines the functions of constitutional adjudication within these frames.

1. Theoretical base of constitutional adjudication

Two questions are ever so prevalent both in legal literature and in public life: to what extent may constitutional jurisdiction limit the operation of popular representation, and *vice versa*, do parliaments have the possibility to restrict constitutional jurisdiction? In other words the question is whether the state is observant of the individuals' personal freedom (i.e. whether human rights are ensured) and on the other hand, wherein lies the people's sovereignty in the course of the practice of state power?

The basic dilemma seems to be that constitutional jurisdiction is a counter-majoritarian function, as in this case a non-democratic (i.e. non-representative) body overrules the decision of the parliament —a body possessing direct legitimacy— (Dorsen et al., 2003, pp. 108-109). Therefore it is necessary to examine how judicial review complies with the principles of democracy and also to search for the theoretical basis of the phenomenon where a judicial organ

[1] For more details see Muir Watt (2006, p. 441-446) and Dorsen et al. (2003 pp. 47 and following)

[2] In Hungarian legal literature the idea originates in István Bibó (1982, pp. 556-558).

steps up against the majority with reference to the protection of constitutional democracy.

The simple answer that the legitimacy of the Constitutional Court derives from the national constitution itself is insufficient. Particular legitimacy depends on many other circumstances, such as the election of the Constitutional Court, the order of nomination, the legal rank of the Act on the Constitutional Court (Ádam, 1996, p. 393). This approach focuses on the issue of social legitimacy and highlights the importance of the efficiency of constitutional jurisdiction and the result of its jurisprudence. Furthermore, it also inquires how constitutional adjudication meets social requirements. In other words: people's sovereignty emphasizes the "will" of the people, while the theory of the basic statute focuses on the restriction of the people's representation (McCloskey, 1995, p. 40).

Bruce Ackerman approaches the question from a different point of view. In his research related to constitutional politics, he distinguishes between monist and dualist theories. A possible monist standpoint insists on parliamentary supremacy, according to which the operation of the democratic body (popular representation) cannot be restricted in any way. The other monist view stresses the protection of basic rights instead of democratic principles asserting the priority of constitutional control. Last but not least, dualist democratic theory —the view Ackerman accepts— implies that the freedom of the parliament is rather broad. Nevertheless, this theory states that temporary majority does not suffice for changing basic principles; it also needs support from a wide range of people[3].

As a matter of fact, the monist theory of parliamentary supremacy stresses political control rather than legal control. The reason why the monist theory of parliamentary sovereignty is so popular in post-communist states seems to be that this principle formed part of socialist doctrine for 40 years, although in reality, it never prevailed. It might be difficult for national parliaments to adhere to the new situation, in which there is no one single source of power, but a harmonized construction of different centres of power (Sólyom, 2007, p. 427).

The monist theory of the primacy of constitutional control reckons that basic rights are naturally given and declares primacy of legal (constitutional) control over political (people's) control. According to the radical view of this theory, basic rights derive neither from the constitution nor from the people but from abstract principles. On the other hand, dualist democratic theory holds that the constitution —including also basic human rights— is the basis of social organization. Constitutional jurisdiction, in their view, is the enforcement of the constitution implying social principles and values over the present majority's will. Consequently, constitutional jurisdiction still protects majority; yet not the short-term will of the people but the long-term majority.

In sum, how can one define the relationship between constitutional jurisdiction and legislative power? The answer depends on how one defines the position of the Constitutional Court in the system of the separation of powers. To this end, the functions of the Constitutional Court have to be considered: according to their nature are they closer to the functions of the legislative branch or rather to that of the judiciary? The content of constitutional jurisdiction —including the definition of the sphere of authorities— depends on the position of the Constitutional Court in the system of the separation of powers. Having regard to all the above, this essay examines the models of constitutional jurisdiction in order to find the answer how the reconstructed Hungarian Constitutional Court's competence fits in the state organisation, with particular concern to how it relates to the decentralised American model.

[3] Bruce Ackerman's thoughts summarized by Paczolay (1995, p. 19).

2. The correspondence between the model and the content of constitutional jurisdiction

When introducing the models of constitutional jurisdiction legal literature usually compares the American and the Kelsenian model. The typical difference between the models is that the American model deals with individual complaints, while the Kelsenian model uses abstract law review. European constitutional courts are rooted in the Kelsenian theory mainly; notwithstanding the fact that in several European countries constitutional courts apply the review of particular cases as a general rule. The hypothesis of the essay is that the individual and abstract character of judicial review basically defines the place of constitutional jurisdiction in the system of the separation of powers.

As a definition of abstract law review, one may say that it is the kind of constitutional jurisdiction where the examination of the law takes place irrespective to the particular case. By contrast, in the case of individual complaints, the constitutional question emerges in the framework of a judicial procedure (Dorsen et al., 2003, p. 114). Another important distinction may be that decisions rendered on the basis of individual complaints affect the judgements in particular cases, unlike in the case of the abstract review of the law[4].

3. The nature of American constitutional jurisdiction

Regarding its function, the decentralized model of constitutional jurisdiction is not separated from ordinary jurisdiction. As a result, there is no separate constitutional procedure in the United States of America (Dorsen et al., 2003, p. 114), much rather, a constitutional question is *incidenter* in ordinary judicial court procedure (Paczolay, 2010, p. 222). In the famous *Marbury v. Madison* case (1803) establishing judicial review in the United States, chief justice John Marshall argued that the presence of a written constitution and an independent judiciary logically implied the Supreme Court's power of judicial review; the court, faced with an incompatibility between the Constitution and ordinary law, had no choice but to apply the higher law and to neglect the law of a lower status (Lijphart, 1999, p. 223). In theory, adjudication has three steps. Firstly, the statement of facts, including the presentation of evidence. Secondly, revealing the relevant statute (legal norm) and lastly, the application of the "revealed" statute to the case. This latter step includes a decision on the constitutionality of the relevant statute. In the decentralized model these three steps are all exercised by the ordinary court with no review from outside the judicial system. In conclusion, the decision of a court upon the constitutionality a statute applicable to a particular case is not overruled by either the legislative bodies or a constitutional court, but by another court through the system of legal remedy.

Analysing the model in practice leads to the following conclusions:

a) The review focuses on the *application* of the law and not on the law itself.
b) The same law may be applied to some cases, while it is not applicable in some other cases (differentiated constitutional jurisdiction);
c) The law remains a part of the legal system even though applying it in particular cases would be unconstitutional;

In consequence, it can be stated that the core of American constitutional jurisdiction is the particular legal protection of rights with the aim of protecting individuals' basic rights.

This may be explained by the fact that American constitutional jurisdiction based on the concept of natural law. One of the —historical— reasons of this resides in the constitution of the United States of America, which was born in the ages of enlightenment and was influenced by natural law and the principle of statutes of nature. The faith in common-sense and universal

[4] An exception to the rule is the retrospective annulment of the law; its legal effect is like a norm that never existed.

natural law prepossessed the reasoning of American Supreme Court judges (Paczolay, 2010, p. 226). The Supreme Court is incapable of fully resolving these structural conflicts. As the Court presides over a large institutional system and lacks the capacity to review more than a fraction of cases submitted to it, its role is necessarily restricted to the declaration of general principles of law and episodic, ad hoc interventions in the system (Posner and Vermeule, 2011, p. 30.). The grassroots of natural law also substantiate the statement that the aim of the American individual complaint is to protect individual rights.

4. The Kelsenian model of constitutional jurisdiction

In Europe, there was a long-standing impediment to the emergence of constitutional jurisdiction, namely that "while in the United States the constitution is sacred, in Europe the statute is" (Favoreu, 1995, p. 57). In the beginning, it was the monist theory of parliamentary sovereignty that prevailed in Europe. People's representation emerged in rejection of absolutism and for safeguarding democracy. At the end of the 18th century democratic movements aimed at abolishing all obstacles restricting the parliament. Such obstacles were considered to be the remains of absolutism and therefore deemed to be antidemocratic. Until the 20th century there was no room for a court to challenge the decisions of the parliament.

The Kelsenian model of constitutional jurisdiction "emerged as a result of the weakening of positive law and the supremacy of legislative power, and consequently, from the recognition that constitutional statutes and especially basic rights form an obstacle to the actions and decision making power of the state" (Paczolay, 1995, p. 13). This model is called the centralized system of judicial review. It was proposed by the famous Austrian jurist Hans Kelsen and first instituted in Austria in 1920 (Lijphart, 1999, pp. 224-225).

Kelsen's central thesis is that "the legal system is not a coordinated system of statutes on the same level, but it is a hierarchy of statutes on a different level" (Kelsen, 1967, p. 221). Elsewhere he points out that "the legal system is a whole of general and individual laws, which connect to each other with taking into account the principle that the law itself is regulating its own initiation" (Kelsen, 1946, p. 132).

Contrary to those theories that restrict the hierarchy of law to normative acts, it is worth noting that both general and individual laws fit in the system created by Kelsen.

For the operation of a legal system a basic norm (*Grundnorm*) is needed, which defines the remaining legal statutes, especially the order of legislation. Contentwise, Kelsen identifies this basic norm as similar to the constitution (p. 124). By contrast, in the formal sense the constitution is a solemn document that may only be amended by way of a special procedure. The basic norm is an unquestionable starting point in the legal system. This is the point from which other statutes validity derives and *vice versa*, other statutes' validity is supplied by this basic norm.

Laws are not all directly based on the basic norm. The laws legitimised by the basic norm ensure the validity of further general and particular legal norms. To give a practical example: if the parliament legislates upon authorization of the constitution, the ensuing statute ensures the validity of the implementation of the entire regulation on the one hand, while also ensuring a judicial decision's validity (if the appropriate statute is applied by the court) on the other. In this case, the common feature of the implementation of the regulation and the judicial decision is that both comply with the legal system through the corresponding legal provision. As such, they are both based on the statute itself. In case neither the regulation nor the judicial decision was in accordance with the statute, the system would "throw out such a law" through the system of constitutional jurisdiction or legal remedy.

Now, what conclusions may be drawn from this example? Firstly, there is a hierarchy among the legal norms. The law, which ensures the validity of another is the "higher" norm. A law is valid in case and to the extent it is in compliance with the "higher" norm. Thus, this latter norm is the reason for the validity of the norm placed on a "lower" level (Kelsen, 1967, p. 221).

The next consequence is, due to the hierarchical order, that the law constitutes a single system. The unity of the legal system is guaranteed by fact that making "lower" level law is defined by higher norms, the existence of these "higher" level laws is also defined by higher norms with the chain finally ending in the basic norm: the supreme origin of validity (Kelsen, 1946, p. 132). Therefore, if every law originates its validity from the same norm and finally, all of them may be traced back to the basic norm as an *origo*, one can say: the legal system has a linear structure. This fact renders the entire legal system —assuming that the basic norm is complete and consistent according to Kelsen— complete and consistent both in a rational sense as well as contentwise. Therefore, in case the question of validity of a law appears, the answer for this can be easily given by examining whether the norm fits the legal system, with other words if it is in accordance with the "higher" norm, and finally, with the basic norm (Kelsen, 1967, p. 209).

The third consequence is that there is no such norm that would ensure the validity of the basic norm; its validity cannot be originated from a different, even higher norm (Kelsen, 1946, p. 195). The legitimacy of the basic norm (constitution) is not the necessary consequence of a defined procedure, nor a defined content. The constitution's normative power is more preferably connected to its *ability* to influence the definition and regulation of the real circumstances of life (p. 165). This also means that in the legal system, the basic norm's validity is theoretically unquestionable (1967, pp. 196-197). Any system of law is only able to operate if it has an axiomatic starting point.

Finally, the fourth statement needs more explanation: the validity of a legal norm does not depend on its content but on the way of its legislation (pp. 198). This does not mean that the content of norm is of no interest, it simply means that Kelsen does not consider the hierarchy of law to be based on natural law. In Kelsen's system, the law of "higher" level defines the law of a "lower" level: its creator, the structure of legislation and its content. The "lower" level law must only comply with the previous one, because that is the law possessing a higher position in the hierarchy, and not because the "higher" norm is right. The system is free of axiological evaluation —it is legal hierarchy and not the right content of the norm that the structure is built upon—. In Kelsen's system the role of constitutional jurisdiction is that the elements of the legal system should not be separated from the norm their validity is originated from. As such, the function of constitutional jurisdiction is nothing else but the safeguard for the basic norm's integrity.

Most European legal systems introduced their constitutional courts based on the theory of Kelsen[5]. In such a model "the constitution is the absolute standard and source of the law's validity, which can primarily be defined in a positive way, with the neutrality of natural law and political interpretation". The gradual and hierarchical construction of the law and its completeness is a normative requirement (Sólyom, 2007, p. 443).

The aim of Kelsen's model is to validate the integrity of the legal system and the constitution in the scope of abstract legal review. According to some authors this model's aim and result

[5] Paczolay, remarks that "the followers of the model where the constitutional jurisdiction has a substantive body, honours Kelsen, the 'father' of constitutional jurisdiction. This significant theory remained an episode in Kelsen's oeuvre. After his dispute with Carl Schmitt he did not continue the interpretation of this problem" (2010, pp. 222).

is identical with that of the American individual complaint (Dorsen et al., 2003, p. 115). However, there are significant differences:

a). The review focuses on the law and not on the real life relations created by the law.
b). It is of no significance that the application of the law is not unconstitutional in certain cases.
c). The unconstitutional law is annulled; it is not only inapplicable but also null and void.

The primary goal of the model is not the particular legal protection of (basic) rights, but the protection of the integrity of the constitution. The model implements basic rights incorporated in the constitution through abstract law review.

Therefore, as regards their function there is a marked difference between the American model of individual complaint and the Austrian model's abstract law review.

5. American impacts: individual complaint in the forefront in Hungary

In the field of state organization the most relevant alteration was the change in the functioning of the Constitutional Court. Before 1 January 2012 the most significant competence of the Constitutional Court was the abstract law review; anyone could challenge any piece of legislation without referring to any interest (*actio popularis*). In course of the preliminary discussions on political transition in 1989 three basic principles of the operation of the Constitutional Court were adopted. Firstly, that the review of the Constitutional Court concerns statutes as well. Secondly, that the Constitutional Court annuls unconstitutional statutes. Lastly, that anyone can initiate the procedure —abstract law review— of the Constitutional Court (HCC, Decision 4/1997).

Under the effect of the previous constitution the abstract law review was the main competence and individual complaints were the exceptions. There were two types of individual complaints: the judicial initiation and the constitutional complaint. In the former procedure, judges proceeding in an individual case could initiate the review of the constitutionality of relevant statutes. Constitutional complaints could be launched by those whose basic rights were injured as a result of the application of an unconstitutional statute. It is worth mentioning that the submission of constitutional complaints was only allowed if all other legal remedies were unsuccessful or unavailable. When the Basic Law came into force the relationship between the main function and the exception changed. Constitutional jurisdiction was reoriented to consider constitutional complaints and its scope of application was broadened as well. Simultaneously, the relevance of abstract law review was reduced. The *actio popularis* was abolished —according to Article 24 of the Basic Law posterior law review can only be initiated by the Government, one-fourth of the Members of Parliament, the President of the Curia, the Supreme Prosecutor or the Commissioner for Fundamental Rights—. Having regard to all the above we are seeking the answers for the following questions:

a). Does the broadening of the scope of individual complaints involve that abstract law review becomes less significant?
b). How does the individual or abstract nature of law review affect the position of the Constitutional Court in the system of the separation of powers?

6. The relationship between abstract law review and individual complaint

In the above, we pointed out that individual law review is rooted in the natural law approach and its primary function is to protect substantive fundamental rights. Abstract law review is, according to Kelsen's original concept, based in positive law and emphasises the integrity of the constitution. Individual law review serves the implementation of individual interest, while

abstract law review serves the common interest (Gárdos-Orosz, 2012, p. 306). In the case of abstract law review, the petitioner does not turn to the Constitutional Court in his or her individual interest, since abstract law review *per definitionem* lacks an individual case. *Pro forma*, the petition serves the abstract common good, i.e. that the law remains coherent and its parts are in accordance with the constitution[6]. The petitioner of abstract law review acts in the interest of constitutional democracy (p. 307).

In practice there is no state where the two institutions (individual complaint and *actio popularis*) operate in parallel; they cannot be "equally" strong competences. One reason might be that the comprehensive individual complaint and *actio popularis* would mean overwork; there would be notable structural and functional converts, what would block the disposal of the cases in reasonable time (p. 306). However, the simultaneous use of individual and abstract law review does not only have technical obstacles. The function, approach and instruments of the two institutions are also so very different that they involve practicing functions that belong to different branches of power. The rationale of the separation of powers is often watered down to the rationale of checks and balances and the general dispersal of power in a constitutional system (Waldron, 2013, p. 433). We conclude that constitutional courts cannot adjudicate abstract law review and individual complaints in an equally powerful way; one of these must always be the general rule and the other the exception.

According to Kelsen's concept, the constitutional court is the negative legislator (Kelsen, 1928, pp. 197-257) safeguarding the integrity of the constitution and repealing laws incompatible with the constitution. According to this concept the creation and the annulment of a norm are not essentially different; they are just two sides of the same action. On the other hand, the Constitutional Court, when dealing with individual cases, is much rather a real court than a negative legislator. Comparative research reveals that it is typically the state institutions which may initiate posterior abstract law review and in Hungarian scholarly literature (Dorsen, 2003, p. 115) already in 1996 there were calls for the termination of the *actio popularis* and the reinforcement of the competence related to individual complaints (Ádam, 1996, p. 394). Similarly, Péter Paczolay (president of the Constitutional Court) considers the *actio popularis* to be the alternative of the constitutional complaint, moreover he states that "the renunciation of the *acio popularis* will not be a serious price for a real constitutional complaint". He argues that abstract law review is a political competence, contrary to the adjudication of individual complaints (Paczolay, 2012, p. 67).

Having regard to all the above, the termination of *actio popularis* is not a step back in the level of the protection of fundamental rights, but much rather a necessity brought about by the different role of the Constitutional Court. We do not say that either abstract law or adjudicating individual complaints are a better way for protecting constitutionality, but we do confirm that they cannot be simultaneously strong competences of a constitutional court.

The constitutional complaint has become the Constitutional Court's characteristic competence since the Basic Law entered into force. Earlier the judicial initiation —when the judge finds the measure relevant to his case to be unconstitutional, and initiates its review— and the constitutional complaint were exceptional in the Constitutional Court's jurisdiction. This changed as of January 2012.

The Act on the Constitutional Court (ACC) distinguishes between three kinds of constitutional complaints:

[6] Without reference to this, the circumstance that the initiator of abstract law review can have personal interest to the submission and consideration of the motion cannot be constitutionally valued.

a). The so-called "old" constitutional complaint (referring to the fact that this kind of complaint already existed before 2012), in which the party to a judicial procedure can launch a petition if an unconstitutional law was applied in his or her case;
b). The "real" constitutional complaint (referring to the fact that this kind of complaint is the closest to the individual complaint of the American model), when the complainant finds that the court applied a law unconstitutionally in his or her case; furthermore
c). The direct constitutional complaint, when the application of an unconstitutional law directly influences the human rights of the person concerned, without a judicial decision (in this respect direct complaints are not linked to individual cases) (Paczolay, 2012, p. 361).

Since direct complaints lack the individual character, they seem to be nothing less than abstract law review. When deciding a direct complaint, the Constitutional Court does not decide on the applicability of the law in the particular case; instead, it only declares whether the law is constitutional or not.

On the other hand, both the "old" and the "real" complaints focus on the individual case. Concerning the "old" complaint, the ACC stipulates: "a person or organisation affected by a concrete case may submit a constitutional complaint to the Constitutional Court if, due to the application of a legal regulation contrary to the Basic Law in their judicial proceedings violate his or her fundamental right". As for "real" complaints it states: "persons or organisations affected by judicial decisions contrary to the Basic Law may submit a constitutional complaint to the Constitutional Court if the decision made regarding the merits of the case or other decision terminating the judicial proceedings violates their rights laid down in the Basic Law".

The great difference between the complaints is that the "old" complaint is a remedy for unconstitutional laws and the "real" complaint is a remedy for unconstitutional jurisdiction. In this latter case it is not the piece of legislation that infringes human rights, but much rather the *way it was applied* by the courts.

Consequently, the Constitutional Court is entitled to review not only the activity of the legislator but also the jurisprudence of the courts (Csink, Schanda and Varga, 2012, p. 164)[7].

In case of the "old" complaint, there necessarily exists an unconstitutional statute that infringed the complainant's human rights in a particular case. Therefore, the Constitutional Court's decision shall have a dual nature: for one it decides upon the constitutionality of the statute and, secondly, it decides whether the individual's rights were infringed. These two functions do not necessarily lead to the same conclusion; human rights may be infringed by applying a formally constitutional statute and conversely, the application of an unconstitutional statute does not necessarily lead to the violation of human rights in the particular case.

The situation is entirely different in the case of a "real" complaint. As it was mentioned above, in case of a real complaint the Constitutional Court determines whether the *application* of the statute is constitutional. Consequently, the constitutionality of the statute itself is not at question, it is the judicial decision that is in focus. Whenever the Constitutional Court decides on a "real" complaint it overrules the substantive judicial decision of the ordinary court and not the Act of the Parliament. Therefore, this competence makes the Constitutional Court part of the judicial branch, rather than it being a negative legislator.

[7] Similar to this, when the Court of the European Union states the national law's conflict with the European Union's law, because in this case the Court also makes a decision about the application of the law and not about the decision of the national court.

7. The role of the Ombudsman in posterior (abstract) law review

As it was mentioned earlier, the *actio popularis* terminated when the Basic Law entered into force. The typical competence of the Constitutional Court became the review of individual complaints instead of the abstract review of norms.

As a result of this change, the Ombudsman's competence to turn to the Constitutional Court for posterior law review has gained enormous significance. The experience of the first 18 months (from January 2012 until June 2013) shows that the Constitutional Court performs this competence upon the petition of the Commissioner for Fundamental Rights. Therefore, a large number of individuals, organs and social groups turn to the Commissioner to turn to the Constitutional Court and challenge the law they find unconstitutional. In the framework of this competence the Commissioner answers all submissions and either he launches a petition or states his reasons for not doing so.

Since the beginning of 2012 the Commissioner examined all complaints, whether they were submitted by individuals, civil organizations or even political entities. However, it is not the amount of petitions but the quality of the argumentation by way of which society may help yield constitutional corrections as a result of Constitutional Court proceedings. For this purpose it is not the unconstrained use of direct ex post review of norms that would be necessary, since comprehensive processing may not be expected from the jurist elite organisation doing the Constitutional Court proceedings, but an organization is needed with a suitable screening function, experienced in handling civil complaints, with the appropriate level of constitutional law expertise, such as the ombudsman.

The legal basis of the Ombudsman's competence to launch a petition is stipulated in the Basic Law itself. The detailed regulations may be found in the Ombudsman Act and the Act on the Constitutional Court. Besides, the Ombudsman stipulated the most basic aspects of such an inquiry and pointed out that the Commissioner pays close attention to the situation of the most vulnerable groups.

The Commissioner's right to launch a petition has a subsidiary nature. If someone has already turned to the Constitutional Court with an individual complaint then the Commissioner's petition for abstract review would be futile. The Commissioner practices his right to turn to the Court mainly in cases where the conditions of the individual implementation of a right are amiss.

From the very beginning the Ombudsman regarded the possibility of turning to the Court as a competence and not as a measure. The Commissioner answers all submissions stating that a piece of legislation is unconstitutional. Therefore *actio popularis* has not vanished; there exists an institution that answers all constitutional matters, yet it is not the Constitutional Court any longer but the Ombudsman.

8. Conclusion

Among the competences of the Constitutional Court ex ante review is connected to the legislative power (it may be initiated by the Parliament or the President). In this case the Constitutional Court is part of legislature and its decision influences the effective existence of the law. Legislation is obviously the function of the legislative power.

The competence of ex post review also belongs to the legislative power. In these cases the Constitutional Court decides upon the constitutionality of statues in an abstract way, without examining the individual case. This function, except for some special cases, does not differ from the annulment of the law. Moreover, it is safe to say that a statute can be overruled by the legislative power's political decision (amendment) or by the Constitutional

Court's constitutionally based decision (annulment). Although political and legal decisions fundamentally affect the nature of the function, regarding its result, we may conclude that in such cases these functions belong to the legislative power.

The situation is different regarding the "old" and the "real" constitutional complaints. In both cases the decision of the Constitutional Court influences decision rendered by the regular court in the individual case. However, at the case of "real" complaints the Constitutional Court focuses on the application of the statute in the individual cases, which is a competence that belongs to judiciary. The fact that the constitutional complaint became the main competence of the Constitutional Court means that the Constitutional Court is decisively operating with functions that pertain to the judicial power.

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