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The Position and Activity of the Constitutional Court of Hungary: 2011–2019

Keywords: Constitutional Court, Hungary, 2011–2019

Słowa kluczowe: Sąd Konstytucyjny, Węgry, 2011–2019

Abstract

The Constitutional Court has functioned in Hungary since 1989. Its activity shaped the frame of democratic state of law and influenced the constitutional order in Hungary. In 2011 the National Assembly passed the new Act on the Constitutional Court that replaced a previous one from 1989. The provisions of the Act and the Fundamental Law reduced the role and position of the Court as a separated body in the tripartite power division. The reduction of competences is accompanied by the diminishing of the concluded cases as well.

Streszczenie

Pozycja i działalność Sądu Konstytucyjnego Węgier w latach 2011–2019

Węgierski Sąd Konstytucyjny został ustanowiony w tym kraju w 1989 roku. Jego działalność pozwoliła na ukształtowanie podstaw demokratycznego państwa prawa i porządku konstytucyjnego Węgier. W 2011 roku węgierski parlament przyjął nową ustawę o Sądzie Konstytucyjnym, która zastąpiła pochodzącą z 1989 roku. Przepisy nowej ustawy oraz Fundamentalnego Prawa ograniczyły rolę i pozycję Sądu Konstytucyjnego.

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go jako niezależnego organu władzy mieszczącego się w węgierskim trójpodziale władzy. Ograniczeniu uległ zakres kompetencji, ale i liczba zakończonych spraw rozpatrywanych przez Sąd.

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I.

Generally, the Constitutional Court is a quite new element in the law and political system comparing to the evolutional emergence of legislative, executive and judiciary branches. It appeared as a body to check if constitutional provisions are respected by other law acts. The complicated and not clear allocation of the Courts among tripartite power division lead us to the question if they are judiciary bodies? The Constitutional Court does not belong to judiciary branch, yet has some common features like the decisions are binding, judges must be required from those who have judicial experiences, both Constitutional and other courts of law follow the procedures in their work². The differing specificity of Constitutional courts in the tripartite power division is their main competence to make decisions on conformity of legal acts with the text of Constitution and binding and ultimate character of decisions, possibility of passing own rules and limiting budget³.

The idea to establish the Constitutional Court in Hungary and other Central and Eastern European countries came from the need to implement full democratic values that emerged after the fall of communism. In 1989, among the most important tasks of such courts was purging then existing systems of law from any previous remains and stabilizing new democratic order. The courts were to protect new constitutionalism from any possible deviations⁴. The new courts in Central and Eastern Europe were

² K. Wojtyczek, *Sądownictwo konstytucyjne w Polsce. Wybrane zagadnienia*, Warsaw 2003, pp. 85–93.

³ A. Ludwikowska, *Sądownictwo konstytucyjne w Europie Środkowo-Wschodniej*, Toruń 2002, pp. 40–41, 44.

⁴ K. Wojtyczek, *op.cit.*, pp. 265–267.

built upon the Kelsenian model⁵. It was assumed that such separated body from other institutions would be independent and would guarantee apolitical form of democratic state of law⁶. In 1989, the Hungarian Triangle Table negotiators of the regime shift decided to construct the Constitutional Court on the West German model⁷. After two decades, in 2011, the executive and legislative authorities of Hungary decided to reshape the position of the Constitutional Court.

The article analyzes the legal basis of contemporary Constitutional Court of Hungary in connection to the act that was passed by parliament in 2011 and replaced the previous provisions from 1989. The legal analysis is enriched by empirical data of the outcome of the Constitutional Court activity to show if the quantity of work changed after 2011 or not. The presented analysis reveals the practical dimension of introducing and shaping the position of the Constitutional Court in the last decade after 2011. So, the core aim of the article is to show the changes in the role and position of the Court both in legal and political dimension. Apart from the introduction and summary, the article consists of the analysis of legal and practical functioning of the Constitutional Court in Hungary in 1989–2011, and the analysis of legal basis of Constitutional Court upon the 2011 Act and contemporary practice of this body. The methods used in the research were: analysis, synthesis, institutional approach and comparative method.

The main thesis refers to the statement that position of the Hungarian Constitutional Court was diminished by the executive power after 2011. Regarding the thesis I would like to ask two questions: 1) what kind of competences of the Constitutional Court of Hungary were reduced after 2011 comparing to those from 1989?, 2) how does the activity of the Constitutional Court look like in 2011–2019?

⁵ J. Ferejohn, P. Pasquino, *Constitutional Courts as Deliberative Institutions: Toward an Institutional Theory of Constitutional Justice*, [in:] *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, ed. W. Sadurski, the Hague-London-New York 2002, pp. 30–31.

⁶ D. Rousseau, *Sądowictwo konstytucyjne w Europie*, Warsaw 1999, p. 28.

⁷ K. Kelemen, *The Hungarian Constitutional Court in the New Constitutional Framework*, http://www.academia.edu/1760644/The_Hungarian_Constitutional_Court_in_the_new_constitutional_framework (12.02.2020).

II.

Although the Constitutional Court of democratic Hungary was implemented into law system in 1989, the Hungarian political system of previous communist regime included a kind of constitutional revision authority. The Council of the Constitutional Law was created in 1984 and functioned to 1989. It was an internal parliamentary commission of advisory character, yet as Miroslaw Granat states this body did not fulfill duties of real constitutional courts⁸.

So, the 1989 constitutional amendments to the 1949 Hungarian Constitution introduced the Constitutional Court for the first time in this country on the basis of Austrian and German model⁹. It was done by Art. 32/A included into the fourth chapter of the Constitution¹⁰. During the period of functioning of this Constitution the Art. 32/A was revised twice. The Act XXXII of 1989 on the Constitutional Court was adopted on 19 October 1989. The Constitutional Court had quite a large number of competences to control both legislative and executive bodies, e.g. until 1998 was eligible for making preventive control of not promulgated parliamentary acts. The Hungarian constitutional system introduced *actio popularis* as well. Generally, among the competences of the Constitutional Court were as follows: the conformity of acts with the Constitution and international treaties, possibility of cancellation of unconstitutional provisions and acts, examination of conflicts of competences and responsibility of president, dissolution of local authorities¹¹.

Initially the number of judges of the Constitutional Court was 15, but 11 after 1994. The reduction effected from not well functioning of the composition of 15 members panel which showed first symptom of failure of Austrian

⁸ M. Granat, *Sądowa kontrola konstytucyjności prawa w państwach Europy Środkowej i Wschodniej*, Warsaw 2003, pp. 97–101.

⁹ G. Halamai, *The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court*, [in:] *Constitutional Justice, East and West Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, ed. W. Sadurski, the Hague-London-New York 2002, p. 227.

¹⁰ *The Constitution of Hungary of 1949 with the 1989 amendments*, § 32/A, <https://www.wipo.int/edocs/lexdocs/laws/en/hu/hu047en.pdf> (10.02.2020).

¹¹ *Act LXXIV of 1994 Amending the Constitution of the Republic of Hungary*, § 1, <https://oxcon.oupplaw.com/view/10.1093/law:ocw/cd402.regGroup.1/law-ocw-cd402?prd=OXCON> (5.02.2020).

and German model implemented in Hungary. The term of office for judges was 9 years with the possibility of one re-election. The Hungarian parliament elected judges upon motion of the parliamentary committee. The commission consisted of one representative of each parliamentary party. The Hungarian National Assembly elected each judge by 2/3 majority of votes with the quorum¹².

The first composition of judges of Constitutional Court was accomplished in 1994 reaching number of 15. First 10 judges were elected by the 1990 parliament, while the last 5 by 1994 parliament. Such long time of the election of all judges was due to lack of agreement on the candidates among the members of parliamentary committee responsible for their appointment. This problem became permanent during the application of 1989 Act on Constitutional Court as one parliamentary party was eligible to provide one candidate for a judge. This obstacle was reduced in 2011 when it was amended to the 1989 Act on Constitutional Court that if the parliament is unable to elect a new judge after 90 days of the expiry of a post of a previous judge, this judge is on his/her post till the final election¹³. Upon the 1989 Act on the Hungarian Constitutional Court candidates were qualified from those with law experience of 20 years or being a university professor or doctor of law and being older than 45 years of age. Judges could not match their offices with being members of legislative and executive power, working in business, belonging to political parties. They could work in education, science or artistic fields. The judges had the immunity that could be withdrawn by the plenary decision of the Constitutional Court. The Constitutional Court judges appointed from among themselves the President and the Vice-President of the court for a term of three years. The internal organization of the Court enabled to make decisions in the specific cases on a plenary session, while lower level of cases required chambers of only three judges¹⁴.

¹² W. Brodziński, *System konstytucyjny Węgier*, Warsaw 2003, pp. 65–66; A. Czyż, S. Kubas, *Doświadczenia węgierskiej transformacji ustrojowej – od Jánosá Kádára do Viktora Orbána*, Katowice 2011, pp. 117–119.

¹³ *Act CLI of 2011 on the Constitutional Court*, <http://www.mkab.hu/rules/act-on-the-cc> (3.02.2020).

¹⁴ G. Brunner, *Structure and Proceedings of the Hungarian Constitutional Judiciary*, [in:] *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court*, eds. L. Solym, S.G. Breyer, University of Michigan 2000, pp. 65–102; K. Kelemen, op.cit.

The first President of Hungarian Constitutional Court was László Sólyom (1990–1998) then János Németh (1998–2003), András Holló (2003–2005), Mihály Bihari (2005–2008) and Péter Paczolay (2008–2015) who was the last one elected upon the 1989 Act on Constitutional Court. Especially the L. Solyom's term in office was crucial to stabilize the position of the Constitutional Court as an independent institution. This body took great activity both interpreting the Constitution and shaping the democratic state of law¹⁵.

III.

The structure and proceedings of the contemporary Constitutional Court of Hungary upon the 2011 Act should be analyzed based on the following criteria: 1) appointment and composition of judges of the Constitutional Court; 2) internal organization of the Court; 3) competences of the Constitutional Court.

The first one refers to the way of appointing and the composition of judges. This element can be regarded on four dimensions: the number of judges and time of their cadencies, the state authorities who are eligible for appointing the judges, needed qualifications for becoming a judge, and privileges of judges due to their activity.

After 2011 there are 15 judges elected for 12 years by the 2/3 majority of votes of the National Assembly. Judges cannot be re-elected. The names of candidates are proposed by parliamentary nominating committee which consists of 9–15 representatives of all parliamentary parties. The number of representatives depends on the size of a party in the National Assembly. The judges cannot be members of political parties and involved in any political or economic activity. They cannot take any position or mandate in state or local government administration and run gainful activity except for educational, scientific, editorial, proof-reading, artistic and intellectual one.

The judges are qualified from candidates that have a law degree, are lawyers of outstanding knowledge or have at least twenty years of professional work experience connected with law. They must be not younger than 45 years of age and not older than 70. The judges could not be members of government,

¹⁵ G. Halamai, *op.cit.*, p. 232.

leaders of any political party and leading state officials in the four years prior to the election on the post of judge.

Each judge has an immunity which means he/she is not accountable for his/her activities while exercising legal competences during and after the term of office. Immunity does not include the situation while a judge reveals a state secret. A judge can be taken into custody if he/she is caught in the act, but any criminal or other proceedings may be applied only with the prior consent of the Constitutional Court. The motion for the suspension of immunity shall be submitted to the President of the Constitutional Court by the Prosecutor General. The mandate of a judge is terminated after the expiration of the term of office, death, resignation, due to incompatibility or exclusion, reaching 70 years of age. The exclusion is announced on the plenary meeting of the Constitutional Court if a judge fails to perform his/her duties, was unworthy, committed prosecuted crime, has not participated in the work of the Constitutional Court for one year for reasons imputable to him/her, made a false declaration on important data or facts in his or her declaration of assets¹⁶.

The second element of the analysis of the Constitutional Court is its internal organization. While analyzing this factor, there should be considered such issues as: the way of organizing the functioning of the Court, filling the post of President of the Court and the mode adjudication. Among two models of the organization of work in a Constitutional Court, the Hungarians decided to construct an expanded structure, not a simply one which exists in France¹⁷. The seat of Constitutional Court of Hungary is Budapest. The National Assembly elects the President of the Constitutional Court by two thirds of votes. All administrative tasks of the Court are managed by the Office the Constitutional Court which is directed by the Secretary General.

The principal body of the Court is the plenary session consisting of all its members. The Secretary General takes part in the plenary session *ex officio*. The quorum of the plenary session must be attended by at least two thirds of the members. The decisions are made by open ballot, secret ballot, by a majority of votes and without abstention. The decisions can be made by panels as well. The proposal of referring the case to a panel is made by the President

¹⁶ Act CLI of 2011 on the Constitutional Court, <http://www.mkab.hu/rules/act-on-the-cc> (3.02.2020).

¹⁷ D. Rousseau, *op.cit.*, pp. 48–50.

of the Court who appoints the judges responsible for working over a case. The panel can consist of 5 members or less. The composition of the panels should be changed every three years and the presiding judge should be replaced every year. Panels can be temporary or standing ones.

The third part of the analysis refers to the types of competences of the Constitutional Court. Presenting this problem there should be analyzed: types of subjects who can submit the motion to the Court, the proceedings and the character of decisions.

There are following main competences of the Constitutional Court: 1) review of conformity legal acts with the Fundamental Law¹⁸ and international treaties (ex ante and ex post), 2) examination of judicial initiative for the control of norms in concrete cases, 3) constitutional complaint, 4) examination of conflicts with international treaties, 5) examination of parliamentary resolution related to ordering referendum, 6) opinion on the dissolution of a local representative body operating contrary to the Fundamental Law, 7) opinion on the operation of a religious community contrary to the Fundamental Law, 8) removal of the President of the Republic from office, 9) resolving conflicts of competence, 10) examination of local government decrees, 11) normative decisions and orders, and decisions on the uniform application of the law interpretation of the Fundamental Law¹⁹.

Now let us analyze the competences and types of subjects who can submit the motions. First, the review of conformity of legal acts with the Constitution can be made both ex ante and ex post. In the ex ante cases the National Assembly and the President of the Republic may submit the motion to the Constitutional Court. The subjects entitled to submit the motion to review the conformity of legal acts vary depending on the type of a case. Second, a judge who works on a concrete case is bound to apply a legal provision because he/she perceives it to be contrary to the Constitution, then he/she can submit the motion to the Constitutional Court suspending the judicial proceedings. Third, a person or an organization can put forward a petition to the Court if the application of a legal provision is contrary to the Constitution. Fourth, one quarter of the parliamentary members, the government,

¹⁸ The Fundamental Law is an official name of the Hungarian Constitution.

¹⁹ *Act CLI of 2011 on the Constitutional Court*, <http://www.mkab.hu/rules/act-on-the-cc> (3.02.2020).

the President of the Curia (Hungarian Supreme Court), the Prosecutor General and the Commissioner for Fundamental Rights can request to examine conflicts of legal acts and judicial proceedings with international treaties. The Constitutional Court shall examine these cases *ex officio* as well. Fifth, the Constitutional Court examines parliamentary resolutions ordering or dismissing the ordering the referendum. Sixth, the government can submit the motion of examining if a local representative body or national self-government act according with the Fundamental Law. Seventh, the government and the Court itself can declare a petition to examine the activity of the legal operation of a religious community. Eighth, the parliament submits the motion to remove the President of the Republic from office if he/she violates the Fundamental Law. Ninth, the Constitutional Court can resolve the conflict between state organs and local government organs referring to the interpretation of the Fundamental Law. Tenth, the Constitutional Court examines the conformity of decrees of local government. Eleventh, the National Assembly, the President, the government, the Commissioner of the Fundamental Rights, the Constitutional Court interprets the provisions of the Fundamental Law regarding a concrete case.

The short description of proceedings is following: The motions must be submitted to the Constitutional Court only by the representatives of a case who have a degree in law; The petitions shall contain an explicit request and the reasons for initiating the proceedings; The proceedings of the Constitutional Court are free of charge; The Secretary General examines initially of the motion meets all the needed requirements; The panel of the Constitutional Court decides in the admission of constitutional complaint. During the proceedings, the Court can invite the petitioner to the personal hearing, can invite and expert if the case is connected with the violation of human rights.

The decisions of the Constitutional Court are binding and not appealable to any further investigation. If a judge opposes the final decision of the Court, he/she may declare dissenting opinion. The decision on the lack of conformity of any legal act with the Fundamental Law makes this act invalid. The decisions are published in the State Official Journal²⁰.

²⁰ *Act CLI of 2011 on the Constitutional Court*, <http://www.mkab.hu/rules/act-on-the-cc> (3.02.2020).

IV.

The Constitutional Court of Hungary played a significant role in shaping democratic regime in the first two decades of democratization process. It was a real and independent institution that was a counterweight for the National Assembly during the process of legislation. After 2011, the Court became dependent on executive power (government). The actions taken by Fidesz government aimed at subordinating this organ and make more obedient to the executive power. The first difference between the 1989 Act on Constitutional Court and the 2011 one is the nominating process. After 2011, the composition of the representatives of the nominating parliamentary committee which elects the candidates does not have to reach a consensus. Before 2011, each party had one representative, today the number of representatives depends on the number of deputies a party has in the National Assembly. So, it is possible that all judges are elected by the majority of votes of the ruling party. The 2011 Act on the Constitutional Court extended the term of office of a judge from 9 to 12 years. The President of the Constitutional Court is not elected by judges, but by the National Assembly. The second difference, the Fidesz-KDNP government extended the number of judges from 11 to 15 to get possibility to elect 4 own members just in the beginning of the Viktor Orbán second government term of office. Moreover, the ruling coalition implemented into the Act the limitation of upper age that eligible for the judge to work to 70 years of age which aimed at earlier retirement of the judges elected by previous parliament. The third, today the Court can review the budgeting act of Hungary only if it violates the human rights unless the debt is not over half of gross domestic product. Before, the Court could examine the conformity of a state budget with the Constitution nevertheless of the debt was over 50% of gross domestic product or not. Due to contemporary provisions, the government is less bound by the possibility of the Constitutional Court revision of its financial policy. The fourth, the 2011 Act of Hungarian Constitutional Court abolished the *actio popularis* which let every citizen to initiate the proceedings in the Constitutional Court in the name of public interest²¹. The fifth, after 2010

²¹ I. Halász, R. Grabowski, *Hungarian understanding of the division of powers*, "Przeгляд Prawa Konstytucyjnego" 2016, No. 6, p. 70, 72.

elections and the Fidesz-KDNP changes of the law, the Constitutional Court examined the conformity of legal acts initially with the 1949 Constitution revised in 1989 and then with the 2011 Fundamental Law. The court decided several times the unconstitutionality of the provisions including three amendments to the Fundamental Law (October 29, 2012, December 6, 2012 and January 4, 2013)²². On March 11, 2013, to avoid such resolutions, the National Assembly dominated by Fidesz decided to introduce the fourth amendment to the Fundamental Law. From the perspective of activity and competences of the Constitutional Court, it is worth to analyze the fourth amendment because it drastically limited the position and role of the Constitutional Court of Hungary. The fourth amendments to the Fundamental Law included all provisions that were decided unconstitutional by the Constitutional Court in 2012. The crucial factor of the amendments was that the Constitutional Court can review an amendment to the Fundamental Law on procedural grounds only and cannot do that on the substantive grounds. Moreover, the fourth amendment stated that the Court cannot refer to all its decisions made before January 1, 2012²³.

V.

From 1 January 2012 to 30 September 2019 the Hungarian Constitutional Court examined 516,7 concluded cases every year on average. The largest number of cases was in 2012 (1237) which was connected with the fact of introduction of the Fundamental Law and petitions on the conformity of other acts with the new Constitution. Among the types of cases of the Constitutional court the constitutional complaints present as the most numerous (389,3 every year on average). The next places are taken by: judicial initiative for norm controlling in concrete cases (64,3), examination of the conform-

²² *The Orange Files. The Amendments to the Fundamental Law*, <https://theorangefiles.hu/amendments-to-the-fundamental-law> (17.02.2020).

²³ N. Chronowski, M. Varju, P. Bárd, G. Sulyok, *Hungary: Constitutional (R)evolution or Regression?*, [in:] *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, eds. A. Albi, S. Bardutzky, the Hague 2019, pp. 1439–1443, <https://link.springer.com/content/pdf/bfm%3A978-94-6265-273-6%2F1.pdf> (17.02.2020).

ity of legal acts with Fundamental Law (10,7) and then preliminary examination, examination of conflict with international treaties and interpretation of Fundamental Law (1).

Comparing the activity of the Constitutional Court of Hungary after 2011 one can see the diminishing number of the examined cases. The average of concluded cases in 1990–1999 was 1362, and in 2000–2011 1300²⁴.

Chart 1. Number of completed and closed cases by Constitutional Court of Hungary: 2012–2019

Type of a case	2012	2013	2014	2015	2016	2017	2018	2019 (from 1.01 to 30.09)	Average No. of cases by year: 2012–2018
Preliminary examination	0	1	1	1	2	1	1	0	1
Conformity of legal acts with Fundamental Law	15	17	14	6	3	8	4	8	10,7
Judicial initiative for norm controlling in concrete cases	101	69	53	69	58	57	43	18	64,3
Constitutional complaints	752	277	357	288	284	380	387	224	389,3
Examination of conflict with international treaties	0	0	0	0	2	2	3	0	1
Interpretation of Fundamental Law	2	1	1	0	1	1	1	1	1
Other	367	2	1	0	5	0	0	0	1,1
Together	1237	367	426	364	335	449	439	251	516,7

Source: author's own calculations based on the Hungarian Constitutional Court Proceedings from 2012 to 2019, Alkotmánybíróság, <https://hunconcourt.hu/ugyforgalmi-es-statisztikai-adatok> (11.02.1020).

²⁴ The Constitutional Court of Hungary, Alkotmánybíróság, <https://hunconcourt.hu/ugyforgalmi-es-statisztikai-adatok> (11.02.1020).

VI.

The Montesquieu's principle of the tripartition of power is an immanent element of democratic state of law. This principle means that the legislative, executive and judiciary authorities are separated and should not overshadow their own competences. The Constitutional Court as an institution which examines the quality of legislative and executive acts should be independent.

Hungarian Fidesz won the 2010 elections with the overwhelming majority. It helped the party to recreate the law and political situation in the country. The taken actions led to the limitation of the achievements of the liberal democratic order that had been developing after 1989. In 2011 the National Assembly passed the Act on Constitutional Court of Hungary that replaced the previous one from 1989. In reference to the main thesis of the article it was verified that the 2011 Act, the Fundamental Law and further amendments reduced the role and position of the Court in Hungary comparing to the 1989 Act.

Answering the first question about the competences of the Constitutional Court of Hungary that were reduced after 2011 it should be stated that the Court became more dependent on the political party dominating in the parliament (the candidates for judges are nominated by a parliamentary committee while the number of deputies depends on the number of seats of parliamentary parties, the President is elected by the National Assembly). In the name of current and immediate situation, in 2011 the Act on Constitutional Court extended the number of judges from 11 to 15 what let Fidesz to elect 4 own judges. The same act reduced the upper age of activity of judges to 70 that enabled Fidesz to get rid of other judges and replace them by those loyal to V. Orban. The *actio popularis* was excluded from the possible examination by the Constitutional Court which limited the activity of civil society. In 2012 Fidesz amended the Fundamental Law which reduced the reviews of the Constitutional Court only to substantive grounds and implemented provision that the Court cannot refer to its decision made before 2012. This cut the continuity of the Court established in 1989.

The second additional question referred to the activity of the Constitutional Court after 2011. The analysis of cases concluded by the Constitutional Court of Hungary after 2011 shows that the number of cases diminished

comparing to the cases from 1990–2011. Between 2012 and 2019 (30 September) the average of concluded cases was 516,7 while in 1990–1999 it was 1362 and in 2000–2011–1300.

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