The constitutional environment of the introduction of the constitutional complaint to the Hungarian constitutional system

di Fruzsina Gárdos-Orosz

Abstract: Il contesto costituzionale dell'introduzione del *constitutional complaint* nel sistema costituzionale ungherese – The new constitution of Hungary, named 'Fundamental Law', entered into force on 1 January 2012 replacing the former Constitution. The governmental forces gaining a two-thirds constituent majority at the 2010 elections envisaged a new role for the constitutional court. According to the official reasoning, the aim of the transformation was to give more emphasis on the subjective protection of fundamental rights in the individual cases and on the other hand abolish the possibility of *actio popularis*, which meant that anyone could turn to the Constitutional Court without any particular interest in order to ask for the annulment of a piece of legislation deemed unconstitutional. Concerns were however significant that the constituent majority will reconsider the central role of the institution in maintaining the rule of law in Hungary. While the constitutional principle of the separation of powers was being respected, the only branch with which the desired level of cooperation was not reached was the judiciary. Several researches have shown that the judicial practice rarely reflected the constitutional arguments. The details of the envisaged complete transformation of the constitutional adjudication unfolded in the course of the drafting of the constitution. Article 24 of the Fundamental Law therefore stated that on the basis of a constitutional complaint, the conformity with the Fundamental Law of the rules of law applied in a particular case, or the judicial decision itself will be reviewed. Such introduction of the German type constitutional complaint was a significant change completing the constitutional turn by transforming the constitutional control of the Government legislative majority to the constitutional control of the judiciary.

Keywords: Constitutional court; Constitutional complaint; Hungarian constitutional change; Constitutional adjudication in Hungary; judicial power.

1. Introduction

The aim of this paper is to desdribe the circumstances of the introduction of the German type constitutional complaint in Hungary. I argue that the reorganisation of the competencies of the Hungarian Constitutional Court in 2011 was focused on the restriction of the a posteriori norm controll review. The introduction of the German type constitutional complaint was rahter a side benefit of the constitution-making and legislative procedure that aimed to cover the loss in the general competence of the Constitutional Court. Although there has been very strong claims in the literature for the introduction of the German

type constitutional complaint, the direct individual recourse to constitutional justice, finnally the sudden introducion of it was instrumental. When talking about the institutional transformation and the competences of the Constitutional Court of Hungary we must always take into consideration the environment of the legal change that made it possible that the constitution making power introduced the constitutional complaint. I would like to show that an institutional or procedural solution might appear very different in the different legal systems, what is more that introduction of such an institution or procedure might be evaluated very differently depending on its political and constitutional environment. I argued some years ago in my phd dissertation that the consitutional complaint is a necessary element fo complete the system of rights protection.[1] I hve experiened today that the present solution introduced by the Fundamental Law of 2011 in Hungary is rather a substitute for the abstract norm control, something that covers the deficiencies of the effective constitutional protection against legislative and government acts, against unconstitutional law.

2. The bases of the discussion

The new constitution of Hungary, named 'Fundamental Law', entered into force on 1 January 2012 replacing the former Constitution[2]. Following the democratic change of regime in 1989-1990, Hungary already had a Constitutional Court from 1990; however, the governmental forces gaining a two-thirds constituent majority at the 2010 elections envisaged a new role for the constitutional institution.[3] The regulation pertaining to the new Constitutional Court has been adopted in several steps, the first ones of which took place as early as in 2010. Not long after its constituent sitting, the Parliament adopted the "5 July 2010 amendment to the Constitution", which modified Section 32/A (4) of the Constitution so that (before their election by the two-thirds majority of the Members of the National Assembly) the Judges of the Constitutional Court were no longer appointed by a parliamentary committee calling for an agreement between the opposition and the governing parties but by a committee reflecting the proportional headcount of the respective parliamentary groups.

The parliamentary majority, also having the "constituent majority", which means an absolute two thirds majority, empowered to adopt and amend the

[1] Fruzsina Gárdos-Orosz, *Alkotmányos polgári jog? Az alapvető jogok alkalmazása a horizontális jogviszsonyokban*, Budapest, 2011.

[2] The Act XX of 1949 on the Constitution of the Republic of Hungary was created in 1989 by a general amendment of the socialist constitution and by further amendments during the democratic transition.

[3] This paper is based on two of my former studies about the constitutional courts: Z. Szente & F. Gárdos-Orosz, *New challenges to constitutional adjudication in Europe*, London & New York, 2018, pp. 89-111; chapter title: 'Judicial deference or political loyalty? The Hungarian Constitutional Court's role in tackling crisis situations' and F. Gárdos-Orosz, *The transformation of the Hungarian Constitutional Court, in* G. F. Ferrari and P. Paczolay (Eds), *Constitutional issues and Challenges in Hungary and in Italy*, Budapest, forthcoming.

constitution in Hungary, also decided in 2010 to decrease the influence of the Constitutional Court by way of limiting its competences. The Constitution was amended so that the Constitutional Court would not examine the contents of the laws relating to central finances which are of substantial importance in terms of governance.[4](The restriction persists in Article 37 (4)-(5) of the Fundamental Law[5], and – with a few distinctive exceptions[6] – the Constitutional Court has actually refused such proposals with reference to a lack of competence.

According to another amendment, the "National Assembly [...] shall elect the President of the Constitutional Court from among the members of the Constitutional Court by 31 July 2011, by a two-thirds majority of the Members of the National Assembly".[7] Earlier, the body itself elected its President from among its members, for three years. According to the new rules, the National Assembly also elects the President from among the Judges of the Constitutional Court by a two-thirds majority, moreover, the President is appointed until the end of his or her mandate, which may last for up to 12 years. The President's position has been traditionally strong, as, for example, the President has a casting vote in the event of a tie, and it is also the President who assigns the cases i.e. selects their respective rapporteurs. The rapporteur Judge has a particular influence on the result of the case and the final contents of the decision. Among the President's wide scope of tasks, it is also worth highlighting that it is the President who sets the agenda, i.e. determines when each case is discussed by the body. This also has a strategic importance.[8]

With the entry into force of the Fundamental Law, the number of the Judges of the Constitutional Court rose to 15 from 11, by adding the new

[4] Act CXIX of 2010 on the Amendment to the Constitution was promulgated in vol. 177/2010 of the Official Gazette (Magyar Közlöny). For a detailed analysis of the restriction see Miklós Bánkuti et al.: "Opinion on Hungary's New Constitutional Order" lapa.princeton.edu/hosteddocs/hungary/Amicus_Cardinal_Laws_final.pdf.

[5]"As long as the level of state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its competence pursuant to points b) to e) of paragraph (2) of Article 24, review the Acts on the central budget, on the implementation of the budget, on central taxes, on duties and on contributions, on customs duties, and on the central conditions for local taxes for conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or in connection with the rights related to Hungarian citizenship, and it may only annul these Acts for the violation of these rights. The Constitutional Court shall have the right to annul without restriction Acts governing the above matters if the procedural requirements laid down in the Fundamental Law for the making and publication of such Acts have not been observed." This limitation persists until the condition as per Article 37 (4) is met, that is, the level of state debt decreases to less than half of the Gross Domestic Product. According to current financial-economic analyses, this condition will hardly be met in the near future.

[6] Decision no. 184/2010 (X. 28.) and no. 37/2011. (V. 10.) of the CC on the unconstitutionality of the introduction of a special retroactive 98% tax.

7 Section 5 of Act LXI of 2011 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary required for the adoption of certain transitional provisions related to the Fundamental Law

[8] For the competences of the President of the Constitutional Court please consult Section 17 (1) of the Act on the CC.

members elected by the two-thirds majority of the National Assembly[9] to the body (also due to a modification of the procedure of the Judges' appointment). At the same time, the mandate of the Judges of the Constitutional Court rose to twelve years from nine, and the possibility of their re-election was abolished.[10]

The position of the Judges of the Constitutional Court elected by the constitutional majority was definitively strengthened by an amendment to Act CVI of 2011 on the Constitutional Court ("Act on the CC", a cardinal act pursuant to the Fundamental Law) whereby the provision according to which the mandate of the Judges of the Constitutional Court expires at the age of 70, was deleted from the text.[11] Consequently, if, for example, a person is elected a Judge of the Constitutional Court at the age of 68, his or her mandate expires at the age of 80. By 2017, no Judge elected before 2010 remained in the body.

After the rapid drafting of the constitution in 2010-2011, the Fundamental Law chose complex and, in certain respects, atypical solutions, which were subsequently further shaped in accordance with the will of the two-thirds constituent (constitution-amending) majority by way of the fourth amendment to the Fundamental Law and the amendments of the Act on the CC, which latter were adopted rather rapidly[12], in reply to current governmental challenges.

3. The transformation of the Hungarian Constitutional Court since 2010

In the period after 1990, and in the years following the change of regime in particular, the Constitutional Court – maybe in a way worthy of criticism – assumed a significant role in forming the order of public and civil law in Hungary. Maybe that is why the constituent (constitution-amending) majority did not choose to carry out a complete reform in 2010 and on. The Constitutional Court has remained as a constitutional institution[13], it has kept its significant competences, and the concept that it is the Constitutional Court that has the final say on the contents of the Fundamental Law and the

[9] The Fidesz-KDNP coalition gained an absolute two-thirds majority in the National Assembly in both 2010 and 2014, obtaining the power to act as a constituent assembly pursuant to the Constitution. Article S (2) of the Fundamental Law also provides that for the amendment of the Fundamental Law, the votes of two-thirds of the Members of the National Assembly shall be sufficient.

[10] In Section 15 (3) of the new Act on the CC, the legislator has also stipulated that the 12-year mandate of the Judge of the Constitutional Court in office shall be extended if the new Judge is not successfully elected by the relevant deadline. This provision, however, conflicted with Article 24 (8) of the Fundamental Law, and was repealed by Section 42 (3) of Act CCVII of 2013.

[11] This provision was repealed by Section 42 (1) of Act CCVII of 2013, which entered into force as of 11/12/2013.

[12] By the end of 2014, 55 provisions of the Act on the CC were amended by altogether 6 Acts: Act CCI of 2011, Act CXXXI of 2013, Act CXXXIII of 2013, Act CCVII of 2013, Act CCXXIII of 2013 and Act CCXXXVIII of 2013.

[13] Gabor Attila Toth: Folytatja-e az Alkotmánybíróság? "Will the Constitutional Court Continue?" In Gábor Attila Tóth: *Eletfogytig szabadlab. Alkotmányjogi karcolatok. (At Large for a Lifetime. Sketches of Constitutional Law.)* (Budapest: Élet és Irodalom (Life and Literature) 2011) 26.

constitutionality of laws, has also survived. The structurally separate Constitutional Court has the power to annul laws. Given the two-thirds constituent majority, however, neither the constituent majority, nor the newly elected Judges of the Constitutional Court themselves had a reason to believe that they had the real autonomous power to interpret the Fundamental Law, as in 2010-2013, the constituent (constitution-amending) majority overrode the Constitutional Court's decisions in many cases by amending the Fundamental Law.[14] Although the relationship of the governmental majority and the Constitutional Court has sometimes been tense in other countries as well[15], the Hungarian situation is special because before 2010, the Constitutional Court enjoyed general and stable legitimacy. While the constitutional principle of the division of powers was being respected, the only branch with which the desired level of cooperation was not reached was the judiciary. Several researches have shown that the judicial practice rarely reflected the constitutional arguments or the Constitutional Court's decisions.[16]

The details of the envisaged complete transformation of the Constitutional Court's competences unfolded in the course of the drafting of the constitution. Pursuant to Article 24 of the Fundamental Law, the Constitutional Court shall be the principal organ for the protection of the Fundamental Law. The Constitutional Court shall examine adopted but not yet published Acts for conformity with the Fundamental Law. It shall review immediately but no later than within ninety days any piece of legislation applied in a particular case for conformity with the Fundamental Law at the proposal of any judge. It shall review, on the basis of a constitutional complaint, the conformity with the Fundamental Law of the rules of law applied in a particular case and of a judicial decision. It shall review any piece of legislation for conformity with the Fundamental Law at the proposal of the Government, one-fourth of the Members of the National Assembly, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights. In addition, the Constitutional Court shall examine whether rules of law are in conflict with international treaties, and whether the Fundamental Law and its amendments have been adopted constitutionally in terms of compliance with procedural rules. The Fundamental Law itself allows the Constitutional Court to exercise further

[14] For the analysis of the amendments to the Constitution before 2012 see e.g. István Stumpf, "Rule of Law, Division of powers, constitutionalism". *Acta Juridica Hungarica* 2014/4. 299-317. Nóra Chronowski calls the result "limited constitutional jurisdiction". Nóra Chronowski: Az alkotmánybíráskodás sarkalatos átalakítása (Fundamental Transformation of Constitutional Jurisdiction). MTA Law Working Paper 2014/8. 4.

[15] A much cited example consists of the initial hardships of political acceptance of the German constitutional court – Kálmán Pócza: "Politika és Alkotmánybíróság: a Bundesverfassungsgericht létrejötte (Politics and the Constitutional Court: the Establishment of the Bundesverfassungsgericht)", *Külügyi Szemle* (Foreign Affairs magazine), 2014/1, 111-131

[16] In summary and overviewing the relevant basic researches: Fruzsina Gárdos-Orosz: *Alkotmányos polgári jog? Az alapvető jogok alkalmazása a magánjogi jogvitákban (Constitutional Civil Law? Application of Fundamental Rights in Civil Law Disputes)* (Budapest-Pécs: Dialog-Campus 2011).

functions and competences as laid down in a cardinal Act.

Pursuant to Section 13 (5)-(6) of the cardinal Act CLI of 2011 on the Constitutional Court, in addition to the procedures of abstract posterior norm control, specific posterior norm control, preliminary norm control and constitutional complaint procedures, the competences of the Constitutional Court also include the abstract interpretation of the Fundamental Law, the preliminary and posterior examination of laws for compliance with international treaties, the posterior constitutional examination of local government ordinances, normative decisions and orders, and decisions on the uniform application of the law, the examination of conflicts of competence between state organs, removal of the President of the Republic from office, giving opinion on the operation of a religious community contrary to the fundamental law, examination of the decision of the National Assembly concerning the acknowledgment of organisation performing religious activity, examination of a parliamentary resolution related to ordering a referendum, and giving opinion if a municipal council operates contrary to the Fundamental Law[17].

Before 2012, the review of the decisions of the National Election Commission (Országos Választási Bizottság) and the examination of the unlawfulness of local government ordinances brought a higher caseload for the Constitutional Court. Therefore, the legislator transferred these decisions bearing the characteristics of administrative judicature to the municipal committee of the Curia, which had been established partially for this particular purpose. Due to reasons of scale, in the course of the further analysis, the other competences specified in the cardinal Act will not be addressed, including the abstract interpretation of the constitution, or the preliminary and posterior examination of the conflict of laws with international treaties, as these procedures, being insignificant in number, do not significantly contribute to the nature and characteristics of Hungarian constitutional judicature.[18] Nevertheless, it is worth noting here that in a European comparison the scope of the Constitutional Court's functions and competences can be considered extremely complex.

Given the new rules regarding competence, the composition of cases has changed completely. The procedure of abstract posterior norm control which could be initiated by anyone *(actio popularis)* and which had made up the majority of cases earlier, has been abolished. Consequently, the scope of those entitled to initiate abstract norm control has been radically narrowed. In addition, by today, a new package of constitutional complaints, also allowing for the review of judicial decisions, is available for those violated in their rights enshrined in the Fundamental Law, even if they wish to challenge the norm underlying the judicial decision. If, on the other hand, the constitutionality of the norm needs to be reviewed because the application or entry into force of the law leads to a direct violation of fundamental rights, the aggrieved person also has the

[17] Section 35 (5)
[18] www.mkab.hu/statisztika

opportunity to submit a constitutional complaint.[19]

It can be established that the new regulation clearly modified the rules of interaction between the constitutional institutions and the Constitutional Court. While earlier the connection could be considered intensive between the executive and the legislature, that is, the legislator and the Constitutional Court, under the current regulation, it is rather the connection between the ordinary courts and the Constitutional Court that is getting continuously stronger.

As the result of the transformation, as from 2015 the majority of norm control cases has been pursued in the area of judicial initiations; in a few cases, the constitutional complaints as per Section 26 (1) of the Act on the CC (also known before 2012) or the constitutional complaints as per Section 26 (2) of the Act on the CC (which can also be initiated if judicial procedures are not available) generate the cases of substantial norm control.[20] The majority of cases, however, is made up of constitutional complaints as per Section 27 (German type constitutional complaint) of the Act on the CC, in the framework of which the Constitutional Court examines the procedure and, ultimately, the decision of the ordinary court. In addition to a few annulments and prohibitions of application of a certain piece of unconstitutional law, the legal consequences expressed in the operational ruling part of the Constitutional Court's decisions include constitutional requirements in an increasing number of the cases, declare the constitutional interpretation of the affected law with an *erga omnes* effect, decidedly aimed to orient the judicial practice.

In spite of all declarations[21] to the contrary – albeit made in general, and not as regards this phenomenon in particular – the Constitutional Court has become an appellate body in terms of the constitutionality of the application of law. Conducting the procedure – and therefore making decisions – in line with the Fundamental Law is a constitutional responsibility of all ordinary courts. Accordingly, in the framework of the procedure as per Section 27 of the Fundamental Law, the Constitutional Court examines something that should be expected from ordinary courts in a constitutional democracy. It examines as an appellate body whether the judge acting in the case has made its decision in harmony with the Fundamental Law. Of course, the Constitutional Court's decisions have increased significance also in that they go beyond the specific cases and shape the judicial practice and, ultimately, the legislation and the application of the law in general (objective protection of the constitutional order). Due to their position among the sources of law, the Constitutional Court's decisions are shaping the legal order with an *erga omnes* effect even through the individual cases. The special procedural law applied by the Constitutional Court also proves that the law-forming function of the Constitutional Court is between the functions of legislation and judicature. The

[19] The detailed rules and experiences regarding the old and new competences will be addressed in the next part.
[20] The new complaint procedure is presented in the next part.
[21] e.g. Decision no. 3037/2014 (III. 13.) of the CC.

concept according to which the Constitutional Court is a so-called "negative legislator" has already become widely known earlier, however, in light of its new competences it is also to be acknowledged that, in the particular cases, the Constitutional Court is ultimately the 'lawful judge' of the parties.[22] In constitutional complaint procedures, the Constitutional Court acts as an appellate judge in terms of the constitutional aspects of the particular litigation case. The scope of review in terms of constitutionality, however, is limited in the individual cases[23].

Before 2012, based on the rules of *actio popularis*, the posterior abstract norm control procedure that could be initiated by anyone, everyone (without having to prove their interests and without the need for a previous court proceeding) could file a submission with the Constitutional Court. Of course – as it is also apparent from the text of the submissions – the majority of the individual petitions was also based on individual interests, or violations of rights or interests, but the procedural order did not require the preliminary enforcement of rights in the way it has since 2012. It was simple to have direct recourse to the Constitutional Court. As the Fundamental Law decided to terminate the institution of *actio popularis*, after January 2012, the persons and organisations intending to take action in order to protect the constitutional order but who are not directly affected by a specific case can inform the Constitutional Court of their constitutional position only in the form of *amicus curiae* i.e. in connection with a specific pending case, but they have no right to submit a petition.

The change has rather been a shift from control over legislation to control over the application of law in the current system. Before 2012, the Hungarian constitutional legal literature had often pointed out that it would be important to introduce the constitutional complaint as known in German law.[24] In contrast, after 2012, the literature has often stressed that it would be important to exercise actual and efficient constitutional legal control over the legislature and

[22] The fact that the Constitutional Court does not decide on the litigation case, does not invalidate this suggestion. According to Chapter XXIV of Act III of 1952 on the Code of Civil Procedure, for example, the decision of the CC shall be followed by a repeated judicial proceeding, except if the Curia or the party concerned deems it unnecessary. In many cases, the ordinary judicial appellate forum cannot decide on the dispute either, but it can only e.g. order the court of first instance to conduct a new procedure.

[23] E.g. in a constitutional complaint, the only valid ground for reference can be the violation of a right enshrined by the Fundamental Law (Order no. 3252/2012. (IX. 28.) of the CC); an issue regarding the application of the law having an "exclusively civil law nature" cannot have substantial importance in terms of constitutional law (Order no. 3072/2012. (VII. 26.) of the CC); The Constitutional Court may not revise the ordinary court decision that was made on the basis of case-by-case assessment: the Constitutional Court is not entitled to "review the judicial assessment pertaining to the results of the evidentiary procedure" (Order no. 3237/2012. (IX. 28.) of the CC); The Constitutional Court has no competence to review the direction of the judicial decision or the judicial assessment of evidence, nor has it competence to adjudicate how the ordinary courts assessed the various facts, in other words, it may not fully review the totality of the judicial proceeding (Order no. 3359/2012. (XII. 5.) of the CC).

[24] The relevant literature is summarised in: Gárdos-Orosz (fn. 14).

the changes to the constitution.[25] The two directions of constitutional protection are not alternative but supplementary to each other; both ensure the realisation of the constitutional ideal of a self-restraining power.

At the birth of the new Constitutional Court, the perception of the body of its own role is manifested in the declaration issued on 28 October 2010 regarding the above-mentioned envisaged self-restraining amendment to the Constitution. "The Constitutional Court of the Republic of Hungary is a major institution and a guarantee of the democratic rule of law, the main duty of which is to protect constitutionality and the citizens' fundamental rights. (...) With regard to posterior norm control, there are two basic requirements on constitutional judicature. On the one hand, constitutional control should cover all acts of law, regardless of the regulated subject matter, on the other hand, the Constitutional Court should be given the power to annul any act of law deemed unconstitutional." The declaration stresses that the functions and responsibilities of constitutional judicature are permanent by nature. Contrary to that, the attitude of the Constitutional Court in 2019 is more of an adaptation to the changing circumstances, aptly described by the following thoughts expressed by Barnabás Lenkovics, then President of the Constitutional Court, in an interview: "Constitutional judicature is not independent of time and space, either. We need to keep up with the changing circumstances. The same benchmarks elaborated and applied by the Constitutional Court against the legislator under stable or at least seemingly stable circumstances cannot be applied unchanged under substantially different historical circumstances. This would result in lifting some benchmarks to the state of dogma, paralyse legislation, governance, and even the operation of the rule of law, which would make crisis management impossible. This is the reason behind the transformation of the content and set of criteria of fundamental rights in the Fundamental Law, as well as the significant changes made to the competences of the Constitutional Court, the shift towards the protection of the individual's fundamental rights."[26]

4. From actio popularis to constitutional complaint

As general a rule, the procedure of the Hungarian Constitutional Court can be initiated by a petition.[27]Thus, the petitioner's role and responsibility is crucial to what is examined by the Constitutional Court in Hungary. Therefore, in the following, besides presenting the substance of the output of the constitutional

[25] Fruzsina Gárdos-Orosz, Zoltán Szente: Alkotmánybíráskodás (Constitutional adjudication) 2010-2015, Hvg-Orac, Budapest 2015.

[26]Interview with Barnabás Lenkovics in the online journal Jogi Fórum. www.jogiforum.hu/interju/122. As opposed to this view, see: László Sólyom: "Ezen a lejtőn nehéz lesz megállni! "It will be hard to stop on this slope."" *Iustum, Aequum, Salutare*. 2010/4. 5-9.

[27]It can be mentioned as an exception that as of 2012, the Constitutional Court may only establish unconstitutional legislative omission *ex officio;* this may not be requested by petition. The Constitutional Court may also initiate the examination of conflicts with international treaties *ex officio*.

court procedure, an attempt will be made to assess the input as well.

A significant part of the petitions, especially the constitutional complaints are not suitable for examination on the merits. With regard to the organisation and operation of the Constitutional Court, single judges have appeared as a new institution as opposed to earlier practice, who are authorised to reject petitions with formal defects if the petitioner has not accepted the information provided by the Secretary General and the single judge evaluates the petition as unsuitable for being the basis of further investigation.

Pursuant to Section 50 (1) of the Act on the CC, the five-member-panel has become the typical forum for the examination of cases. In the majority of cases, the five-member-panel examines the admissibility of constitutional complaints, so this is the forum which may reject petitions without examination on the merits. Section 50 (2) rules that only those cases are not to be adjudicated by the five-member-panel which pertain to the exclusive jurisdiction of the plenary session. The five-member-panel may not annul an act but it may annul a court decision and may also establish an omission on behalf of the National Assembly or a constituional requirement giving the constitutional interpretation of the law.

According to the justification of the Fundamental Law, the constitutional complaint regulated in Section 27 of the Act on the CC is to be regarded as a brand new competence of the Constitutional Court, which "opens up a whole new era in the protection of fundamental rights", since "petitioners who have already exhausted their effective legal remedies are provided with an additional special legal remedy, which ensures that in the most serious cases of violations of fundamental (constitutional) rights, there is a possibility for arriving at a decision in conformity with the Constitution".

Pursuant to Article 24 (2) c) of the Fundamental Law, on the basis of a constitutional complaint, the Constitutional Court reviews the conformity with the Fundamental Law of the rules of law applied in a particular case. Pursuant to Article 24 (2) d) of the Fundamental Law, on the basis of a constitutional complaint, the Constitutional Court also reviews the conformity with the Fundamental Law of a judicial decision. Based on the rules set out in the Fundamental Law, the Act on the Constitutional Court has established three categories of constitutional complaints.

Pursuant to Section 26 (1) of the Act on the CC "[i]n accordance with Article 24 (2) c) of the Fundamental Law, persons or organisations 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 Fundamental Law in their judicial proceedings, their rights enshrined in the Fundamental Law were violated, and the possibilities for legal remedy have already been exhausted or no possibility for legal remedy is available". This type of constitutional complaint had already been a functioning institution of Hungarian law before 2012. In 2011 there were a total of 51 pending cases of this kind.

Pursuant to Section 26 (2) of the Act on the CC, by way of derogation from

the previous case, Constitutional Court proceedings may also be initiated – by exception – if, due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision, and there is no procedure for legal remedy designed to repair the violation of rights, or the petitioner has already exhausted the possibilities for remedy. This type of complaint is frequently named direct constitutional complaint in the relevant literature.

Pursuant to Section 27 of the Act on the CC, in accordance with Article 24 (2) d) of the Fundamental Law, persons or organisations affected by judicial decisions contrary to the Fundamental 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 Fundamental Law, and the possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available for him or her. This competence for the constitutional review of judicial decisions is often called the "real" constitutional complaint in Hungarian technical jargon.

The new competences were presumably introduced as a consolation for the abolition of *actio popularis*. However, as a general rule, procedural laws set rather high standing criteria for procedures aiming at the protection of individuals' right. The primary aim of the constitutional complaint types is to provide remedy for the violation of law by way of annulling the judicial decision and the unconstitutional legal norm. As a peripheral effect of such procedures, the unconstitutional norm is eliminated from the legal order, or – as it is the case in Hungarian law –, the establishment of a generally binding constitutional requirement has a constitutive effect.

The examination of admissibility of constitutional complaints is a new phase of the Constitutional Court procedure; the examination of format and content so as to decide whether the petition is suitable for being adjudicated on the merits. In Hungary, according to the new rules of the Act on the CC, similarly to the constitutional court procedure in the region following the German model[28], prioritising the principle of equality above all, the declared main focus of the regulation is the screening principle, i.e. when the Constitutional Court decides on admissibility, it only examines the existence of the format and content requirements set out in the Act on the CC regarding the particular case; in principle, no other aspects may be considered. Nevertheless, the considerations for selection appear in Section 29 of the Act on the CC, which states that in order for a petition to be admissible, it must be demonstrated that the conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance. Similar screening criteria for constitutional law issues of fundamental importance also

[28] András Jakab: A valódi alkotmányjogi panasz – nemzetközi kitekintés, "The "real constitutional complaint" and the main characteristics of its adjudication – an international excursus". *Alkotmánybírósági Szemle*, 2011/2 p. 64–74.

exist in other countries, e.g. in Germany,[29] or in Spain, which applies the institution of *amparo*,[30], still, in Hungary, it did not help the popularity of the new constitutional complaint that the scope of admissible petitions has been very limited.

The Constitutional Court ruled several times that it considers the purpose of the constitutional complaint to be the remedy for the violation of law,[31] which, due to the person affected, eventually distinguishes this competence from that of posterior abstract norm control. Nonetheless, it also acknowledged that the constitutional complaint aimed at the annulment of the act also has an objective, general function of protecting the constitutional order, as a result of which legal consequences are determined in a way that goes beyond the individual case.

In 2011 there were 969 pending norm control cases, 558 of which aimed at posterior abstract norm control. 545 were *actio popularis* petitions, while 13 were petitions by the Ombudsman. As of 1 January 2012, the cases initiated by an actio popularis petition were terminated unless they could be transformed to a constitutional complaint under Section 26 of the Act on the CC, which had to be expressly requested by the petitioner by submitting an addition to the petition according to the criteria of the new Act on the CC and the Rules of Procedure of the Constitutional Court, which was virtually a new petition. The proportion of cases continued as constitutional complaints was insignificant.

Under the new rules, posterior abstract norm control, that is the constitutional review of a law after its publication not connected to the violation of a right enshrined in the Fundamental Law or a specific case, may only be initiated by the Government, one-fourth of the Members of the National Assembly, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights.

In 2011, 58% of posterior norm control procedures were posterior abstract norm control procedures, 37% were petitions submitted by judges, while only 5% were constitutional complaints. Of the 58%, little more than 2% were submitted by the ombudsman. However, after 2012, from among the dedicated petitioners, hardly anyone other than the Ombudsman submitted any petitions[32]. These led to several important Constitutional Court decisions, often with a very high

[29] „*Specifisches Verfassungsrecht*" For a detailed presentation in Hungarian see Kinga Zakariás: A bírói döntések alkotmányossági felülvizsgálata a német Alkotmánybíróság gyakorlatában, "The review of ordinary judicial decisions in the practice of the Constitutional Court of the Federal Republic of Germany". 2010/2 p. 98-104

[30] In Spain, amparo was introduced by the Organic Act 2/1979 on the Constitutional Court (Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional; LOTC). The Organic Act 6/2007 modified the LOTC, which significantly affected the rules of acceptance, among others. An additional criterion similar to the constitutional issues of fundamental importance was introduced, which enables the Constitutional Court to accept those petitions only which have fundamental constitutional importance. The Constitutional Court explained this criterion in detail in the constitutional court decision STC 155/2009.

[31] Order no. 3367/2012 (XII. 15.) of the CC, Reasoning [11],[13]; Decision no. 6/2013 (III. 1.) of the CC, Reasoning [214]

[32] The Prosecutor General and the President of the Curia were only given the petition right later, in 2013, as a result of international pressure.

degree of division, as shown by the dissenting opinions and concurring opinions attached to the decisions. Examples include decisions on the registered partners' right to inherit, on the declaration of the unconstitutionality and annulment of Sections 7 and 8 of Act CCXI of 2011 on the Protection of Families[33], the annulment of the legal provisions on the right of the homeless, the minor offence sanctioning the use of public spaces for habitation and other legal provisions[34], on the use of legal assistance in constitutional complaint procedures, the declaration of unconstitutionality and annulment of Section 3 (3) c) of Act LXXX of 2003 on Legal Assistance[35], on the unconstitutionality and annulment of certain provisions of the Fundamental Law[36]. However, as a result of the way the new ombudsman has interpreted his role, the number of motions has radically decreased by 2018, and the other persons with the power to initiate procedures have not indicated too many cases of unconstitutionality either. A petition of the Government or one-fourth of the MPs is basically a political act, while petitions of the Curia and the Prosecutor General could rather be responsive to constitutionality matters affecting their own organisation and operation, or those arising in the course of the application of law. The Government would only be interested in initiating a posterior abstract norm control procedure in order to cause annulment of an act passed in previous cycles of governments by a two-thirds majority. In all other cases, it is able to eliminate unconstitutionality on its own initiative, or by a legislative act of the National Assembly featuring a majority identical with the Government. As regards decrees and ordinances, in cases of conflicting interests, the unconstitutionality of decrees of the President of the Central Bank of Hungary or the President of an independent regulatory authority, or that of local government ordinances may be initiated in the future.

Analyses on the case law of the Constitutional Court show that even among the substantial decisions passed within the competence of posterior abstract norm control, there have been very few cases where, by annulment, or the establishment of omission or a constitutional requirement, the Constitutional Court actually and finally imposed a constitutional restriction on the legislator's will.[37]

5. Conclusion

The Constitutional Court had a hard, identity formative time in the period 2010-2018. The Constitution to be applied has undergone fundamental changes, the composition of the body has changed, the applicable cardinal rules on the Constitutional Court have changed, moreover, the Fundamental Law, which

[33] Decision no. 43/2012 (XII. 20.) of the CC
[34] Decision no. 38/2012 (XI. 14.) of the CC
[35] Decision no. 42/2012 (XII. 20.) of the CC
[36] Decision no. 45/2012 (XII. 29.) of the CC
[37] Gábor Halmai: Pártos alkotmánybíráskodás (Partial constitutional judicature) (201-2014). In Gárdos-Orosz-Szente (fn. 23.) 105-150.

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forms the basis, and the legal environment have been constantly altered by the parliamentary majority. Consistency problems can be perceived in the relevant rules both from legal technical aspect and with regard to the protection of fundamental rights, which is reinforced and made even more uncertain by the theoretical debate of the 'old and new' approaches. I beleive that the constitutional complaint regarded as a „constitutional legal transplant" is a great means for reaching the optimal protection of constitutional rights in a constitutional rule of law state, but it should not be misused in order to hide the necessity of abstract norm controll in the constitutional system. It is also important that in relation to the ordinary courts the constitutional complaint should not serve as a way of undue influence, meaning that the constitutional jurisprudence produced by the „Government majority" elected constitutional judges should not impose undue influenc on the ordinary jurisdiction through the constitutional complaint procedure, The introduction of the German type constitutional complaint was sudden in 2011 with no former legislative assessment. This competence was offered to the constitutional jurisprudence in change of the loss of actio popularis. With the change of the general political and constitutional environment: with the entering into force of the Fundamental Law in 2012, with the amendments of it and with the change of the political regime, however, the German type constitutional complaint might have complex funcions in the Hungarian legal system. The perception is strongly dependent on the assessment of the political and related constitutional environment.