Opinion on the new Constitutional Court Act of Hungary

January 2012

The Hungarian Parliament adopted Act CLI of 2011 on the Constitutional Court (hereafter referred to as: Constitutional Court Act) on 14 November 2011, which entered into force on 1 January 2012, at the same time as the new Constitution of Hungary (hereafter referred to as: Fundamental Law). The present opinion, prepared by the Eötvös Károly Institute, the Hungarian Civil Liberties Union and the Hungarian Helsinki Committee, analyses the legal provisions enshrined in the Fundamental Law concerning the Constitutional Court and the Constitutional Court Act. Provisions of the Constitutional Court Act are analysed in terms of constitutionality instead of the Fundamental Law, since the latter is often in contradiction with the requirements of constitutionality.[1] The aim of the analysis is to examine whether provisions of the Fundamental Law and the Constitutional Court Act serve constitutionality and whether they support or limit the Constitutional Court (hereafter referred to as: CC) in fulfilling its function of protecting the Constitution.

The most important conclusions of the analysis are the following:

- The preparation of the Constitutional Court Bill and its submission to the Parliament violated the legal provisions on the preparation of Bills, as well as the provisions of the Fundamental Law. The aim was to avoid the obligation of conducting a professional and social debate over the Bill.

- The provisions of the Constitutional Court Act on the nomination and election of judges, conflict of interest and term of office do not guarantee the independence of CC members.

- The fundamental change in the CC's competences diminishes its ability to act as a protective body for the Constitution and as part of the system of checks and balances for the Parliament.

[1] See the analysis of the Eötvös Károly Institute, the Hungarian Civil Liberties Union and the Hungarian Helsinki Committee for conclusions and arguments in this regard: *The Third Wave – the New Constitution of Hungary*, 14 April 2011. Available at: http://helsinki.hu/wp-content/uploads/Hungarian_NGOs_assessing_the_draft_Constitution_of_Hungary_20110414.pdf.

- The rules of ex ante constitutional review processes are dysfunctional, as ex ante reviews of Acts of Parliament may be initiated by those agreeing with the given Act. Provisions should have been aimed at avoiding the entering into force of unconstitutional Acts of Parliament.

- The drastic limitation of the ex post constitutional review's role means that unconstitutional laws may remain part of the legal system of Hungary. In order to avoid this consequence the circle of those entitled to initiate ex post reviews should be widened.

- The Constitutional Court Act requires judges to request the Constitutional Court to explicitly exclude the application of a rule already declared unconstitutional by an earlier Constitutional Court decision. In our view judges would be capable of deciding in these kinds of matters.

- The fact that citizens may turn to the CC only by way of constitutional complaints in the future decreases the level of objective fundamental rights protection. Furthermore, detailed rules of the Constitutional Court Act on constitutional complaint do not ensure the positive development promised in terms of individual fundamental rights protection. In order to provide real individual fundamental rights protection through constitutional complaint, unreasonable obstacles of admission should be abolished.

- The principle that the CC is bound by the content of petitions should be abolished, since it does more harm than good.

- Threatening petitioners that initiate procedures "abusively" with a high procedural fine may deter people from turning to the CC.

- The impartiality of CC judges is a fundamental requirement. Provisions aimed at excluding biased judges from the decision-making process shall ensure impartial CC decisions.

- The Constitutional Court Act provides for the termination of ongoing processes initiated by way of *actio popularis* as of 1 January 2012, which violates constitutionality. It should be ensured that submitted petitions challenging laws violating the new Fundamental Law are not rendered non-existing.

1. Problems regarding the preparation of the Bill

In its opinion on the new Constitution of Hungary, the Venice Commission expressed the view that in order to be "fully successful" the process of the adoption or amendment of numerous pieces of legislation, new institutional arrangements and other related measures "should be based on the largest consensus possible within the Hungarian society".[2] However, the governing majority did not take the advice of the Venice Commission: the preparation of the Constitutional Court Act did not differ in merits from the way of preparing the Fundamental Law as far as seeking consensus was concerned. The Bill was submitted by the Parliamentary Committee for Constitutional, Justice and Procedural Matters, even though the Fundamental Law obliges the Government to submit Bills necessary for the enforcement of the Fundamental Law.[3] Since, according to the relevant Hungarian legal provisions,[4] Bills submitted by Members of Parliament or parliamentary committees shall not be published and debated before their submission to the Parliament, the possibility of an official debate was excluded. The method of submission also shows that the Government was not willing to take the political responsibility for the preparation of one of the most important cardinal laws.

Furthermore, it is still not clear who actually framed the Bill. According to certain assumptions, the Bill was prepared by members or colleagues of the CC. For example, this allegation is supported by the following statement of the CC's President, made in the course of an interview: "Furthermore, the careful preparation of the cardinal law on the CC, in which we would like to take an active role, is very important; we will forward the Bill being optimal in our view to the legislator by this fall."[5] In addition, the Bill reflects the "comfort aspects" of the CC rather than the aspects of constitutionality, and the CC reacted in a quite sensitive way to the criticism concerning the Bill.[6] The authors of the current analysis would like to stress at this point that in their view stakeholders should be involved in the legislative process not through vesting them with the task of framing the entirety of legal provisions concerning them, but through drawing them into the in-merit debate of the Bill and channelling their comments and experiences into the Bill prepared by the legislator.

2. The Constitutional Court's status and organisation

The Constitutional Court Act ensures the independence of the CC as a body to a satisfactory extent. However, the provisions concerning the independence of CC judges, being also of key importance, may be severely criticized.

Re-election of Constitutional Court judges

Constitutional Court Act, Article 6 (3) *The mandate of the members of the Constitutional Court shall be 12 years. The members of the Constitutional Court may not be re-elected.*

[2] Opinion no. 621 / 2011. Opinion on the Fundamental Law of Hungary. Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17–18 June 2011) CDL-AD(2011)016. § 21.
[3] Fundamental Law of Hungary, Closing provisions 4.
[4] Act CXXXI of 2010 on the Social Participation in Preparing Laws
[5] Heti Válasz, 2011/28. p. 26.
[6] See for example the statements of Péter Paczolay made in the sitting of the Parliamentary Committee for Constitutional, Justice and Procedural Matters on 27 September 2011. The word for word minutes of the sitting are available here: http://www.parlament.hu/biz39/bizjkv39/AIB/1109271.pdf.

As far as the issue of independence is concerned, the only considerably positive development is the exclusion of the possibility of re-electing CC judges. However, post-employment restrictions are missing from the Constitutional Court Act, thus even though re-election is not possible, judges deciding propitiously for the Government may be appointed as high-ranking state officials after their mandate as a CC judge has terminated. Post-employment restrictions would be compensated with the sum received by judges according the Constitutional Court Act when their mandate is over.

Election of Constitutional Court judges

> *Constitutional Court Act, Article 7 (1)*
> *Members of the Constitutional Court shall be proposed by a nominations committee consisting of at least nine and at the most 15 MPs, nominated by the parliamentary groups of parties represented in the Parliament. At least one member of each parliamentary group shall be a member of the committee.*

Procedural rules of nomination and election should ensure the political independence of judges by requiring a political consensus for their election. However, the relevant provisions of the Constitutional Court Act basically place the possibility of proposing CC judges in the hands of the parliamentary majority. In this way the will of the governing majority remains without any counterbalance, and it is not ensured that the professional competences of the nominee are taken into account. It has to be stressed that since the Fundamental Law does not contain any provisions on the rules of nominating CC judges, the Parliament could have chosen from a range of better solutions in this regard.

Rules of conflict of interest

> *Constitutional Court Act, Article 10 (1)*
> *The mandate of Constitutional Court members is incompatible with any other state or local government, social, political, economical office or mandate, except offices related directly to scientific or higher education activities, if it does not hamper the fulfillment of the tasks of the Constitutional Court judge. Members of the Constitutional Court must not have any gainful occupation other than that of scientific, teaching, artistic, copy editor and editorial activities and intellectual activities falling under legal protection.*

The Constitutional Court Act allows CC judges to teach and carry offices directly related to scientific and higher education activities, which is detrimental both in terms of the independence of judges and in terms of time and energy members of the CC are able to devote exclusively to their judicial tasks. Leading positions in higher education (such as head of a department or head of an institution) should be incompatible with being a judge of the CC. It may also be argued that judges should not carry out teaching activities as an employee, e.g., as public servants in the field of higher education, since in these kind of legal relationships judges may be in subordinate positions.

Automatic prolongation of Constitutional Court judges' mandate

> *Constitutional Court Act, Article 15*
> *(1) Membership in the Constitutional Court shall terminate upon*
> *a) reaching the age of 70 years, or*
> *b) the expiry of the term of office.*
> *(3) If the mandate of the Constitutional Court's member terminates on the basis of Paragraph (1), the new member of the Constitutional Court shall be elected according to Article 8 (1)–(3). Should the Parliament not elect the new member of the Constitutional Court until the deadline set out by Article 8 (3), the mandate of the*

member of the Constitutional Court shall be prolonged until its successor takes up its duties. In cases where multiple judges simultaneously face the termination of their mandate and the number of these judges is higher than the number of new judges elected by the Parliament by the deadline, the mandate of younger members will be prolonged.

The Constitutional Court Act provides that if the new member of the CC is not elected before the set deadline, the former member's term of office shall be prolonged until the new judge is elected and takes up its duties. This solution is highly problematic for a number of reasons. The legitimacy of CC judges is based on Article 24 (4) of the Fundamental Law, which sets out that members of the body shall be elected for 12 years, thus when their 12-year term of office is over their constitutional legitimacy ceases to exist. Since the Fundamental Law does not authorize the Parliament to differ from the constitutional rule cited above, the Constitutional Court Act is in breach of the Fundamental Law. Furthermore, Article 15 (3) of the Constitutional Court Act allows parliamentary groups of political parties to keep judges with a favourable ideological background in their seats, since if a party has more than one-third of the seats in the Parliament it can obstruct the election of any CC member, which in turn means that a party with more than one-third of the seats can prolong CC members' mandate for an indefinite period.

3. Competences of the Constitutional Court

Competences of the CC were considerably altered as of 1 January 2012 according to the Fundamental Law.

First of all, we have to bear in mind that the Fundamental Law has preserved the limitation of the CC's competences as far as Acts of Parliament on state budget and taxes are concerned. Since these kind of acts may not be reviewed by the CC in merit (as long as state debt exceeds a certain amount), it is up to the Parliament to determine whether or not constitutionality prevails in these Acts of Parliament, and references to the will and interest of the majority may overrule constitutional considerations. This limitation of competence cannot be counterbalanced.

The function and character of constitutional review has changed considerably. It is not true that the CC fulfils the same tasks through more effective means, such as the extended ex ante review or the constitutional complaint, since these means are only seemingly more efficient. The protection of individual rights becomes more prevalent indeed, but the change in its competences simultaneously results in the diminishing of the CC's authority to protect the Constitution and act as part of the system of checks and balances for legislation with the same power. This conclusion was reached by analysing the circle of those entitled to initiate the proceedings of the CC, along with the body's competences.

Ex ante constitutional review

Fundamental Law, Article 6
(2) Parliament may send the adopted Act to the Constitutional Court to examine its conformity with the Fundamental Law upon the motion of the proponent of the bill, the Government or the Speaker of the House, submitted before the final vote. Parliament shall decide on the motion after the final vote. If the motion is adopted, the Speaker of the House shall immediately send the adopted Act to the Constitutional Court to examine its

conformity with the Fundamental Law.
(4) If the President of the Republic finds the Act or any constituent provision contrary to the Fundamental Law and no examination has been held under Paragraph (2), he or she shall send the Act to the Constitutional Court to examine its conformity with the Fundamental Law.[7]

Ex ante constitutional review as provided for in the Fundamental Law and the Constitutional Court Act is not capable of fulfilling the functions of a constitutional review of this kind. According to Article 6 of the Fundamental Law, an ex ante constitutional review may be initiated by the majority of MPs (upon the motion of those submitting the given Bill, the Government or the Speaker of the House) and by the President ("constitutional veto"). However, an ex ante constitutional review initiated by MPs could fulfil its function related to the division of powers – similar to that of the constitutional veto of the President – only if the parliamentary minority would also be entitled to initiate it.

It is hard to imagine that the Government or those submitting the Bill (also usually being the Government) and the Speaker of the House (who is supported by the parliamentary majority) would initiate the constitutional review in good faith in the case of Bills submitted as a rule by the Government or members of the governing majority and adopted with the support of members of the governing majority. It is more likely that those submitting the Bill will initiate an ex ante constitutional review in order to label the whole Bill as constitutional. The general reasoning of the Constitutional Court Act states the following in this regard: "the possibility that the Parliament sends the whole Act of Parliament to the CC in order to have it 'endorsed' shall be excluded", and it follows from the general reasoning that the Constitutional Court Act explicitly strives to mitigate the risk above by specifying the notion of a "definite petition" in Article 52 (1) of the Constitutional Court Act (a definite petition is a precondition of a constitutional review process). However, this is not a solution to the problem: since the CC is bound by the content of the petition in the course of its proceedings, it will not be able to do anything if the petition aimed at the ex ante constitutional review of a Bill does not refer to potentially unconstitutional provisions of the given Bill. In this case the CC will have to declare that the provisions referred to in the petition are constitutional in the light of the constitutional aspects referred to in the petition, and even though the decision would declare only the constitutionality of certain provisions, it could easily be infiltrated in the general knowledge as a statement valid for the whole Act of Parliament.[8]

It is obvious that the requirement set out in the opinion of the Venice Commission on the three legal questions arising in the process of drafting the new constitution of Hungary, saying that "an entitlement to submit a petition for binding preventive abstract review should be awarded restrictively",[9] is not fulfilled by providing the right of initiating ex ante review to those who voted for a given Bill. In this way ex ante constitutional review becomes a means suitable solely for widening the range of political tools in the hands of the parliamentary majority.

[7] Official translation, see: http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf.

[8] In addition, the general reasoning of the Constitutional Court Act says that the aim was to prevent unconstitutional legal provisions from entering into force, but such an aim would require the possibility of an ex ante constitutional review not only in the case of Acts of Parliament but in case of all laws.

[9] Opinion no. 614/2011. Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary. Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25–26 March 2011). CDL-AD(2011)001. § 43.

Abstract ex post constitutional review

While framing rules on ex post constitutional review, it should have been taken into account that the function of ex post review is to enforce constitutionality with regard to the legislation based on the will of the majority.

In the last two decades the CC has interpreted the Constitution of the Republic of Hungary mainly through decisions reached in *actio popularis* ex post constitutional review processes. Decisions on the constitutionality of death penalty, on the so-called "Bokros package" and on the dismissal of certain public servants without justification were results of *actio popularis* reviews. The fact that in Hungary every person has the right to protect his or her personal data and that those executing public power and public actors have to bear sharper criticism than "ordinary" persons are also results of *actio popularis* initiated ex post constitutional reviews. In the past 20 years it became part of Hungary's constitutional culture that, besides citizens, primarily human rights defenders and NGOs are taking up the task of challenging unconstitutional laws before the CC. For example, there are currently *actio popularis* initiated reviews in process on the so-called "three strikes" provisions of the Hungarian Criminal Code, the newly adopted provisions on secrecy protection regulation, rules obliging communication services to retain turnover data and media regulation rules on organizational and content regulation issues. For the last two decades, it has been hanging over the Parliament's head that unconstitutional Acts of Parliament will sooner or later get before the CC.

Fundamental Law, Article 24
(2) The Constitutional Court shall:
e) examine any piece of legislation for conformity with the Fundamental Law at the request of the Government, one-fourth of the Members of Parliament or the Commissioner for Fundamental Rights, (...)[10]

Constitutional Court Act, Article 24 (2)
The Constitutional Court examines the compliance of a law with the Fundamental Law on the basis of the Commissioner for Fundamental Rights' petition containing a definite request if the given law is contrary to the Fundamental Law in the view of the Commissioner for Fundamental Rights.

However, the possibility of *actio popularis* petitions ceases as of 2012 and ex post reviews initiated earlier via *actio popularis* will be terminated (see details below). Accordingly, provisions violating fundamental rights may be challenged by citizens in the future – as a rule, with only one limited exception – only if the given rule was applied against them in a court procedure (see analysis below regarding constitutional complaint). The other possibility is to convince the Commissioner for Fundamental Rights (i.e. the Ombudsman) to take the case before the CC as its own concern. Nevertheless, if a law violates certain provisions of the Fundamental Law other than those concerning fundamental rights, e.g., the principle of the division of powers or the requirement of the independence of judges, the latter opportunities for submission are not provided. In these cases only the Government or the one-fourth of MPs are entitled to initiate the proceedings of the CC.

During the two decades following the transition in Hungary the CC performed a strong constitutional control over the Parliament, partly due to the wide possibilities of initiating a constitutional review. In the light of the scope of those entitled to submit a petition for an abstract review beginning as of 2012, the ex post constitutional review will become a less "lively" institution than before, which considerably transforms the system of the division of powers as set

[10] Official translation.

out by the Constitution in force until the end of December 2011. So far it has been the abstract ex post review that characterized the CC' s role in protecting the Constitution, fulfilled in the system of division of powers, but from 2012 on ex post review becomes insignificant. Accordingly, altering the CC's competences brings a fundamental change to the system of division of powers: control over the majority-based legislation and the executive power defined by the majority loses its power and the role of the CC in balancing the Parliament weakens considerably. This results in the concentration of powers once again.

It has to be realized that the ex post constitutional review, which was previously a civil means of protecting the Constitution, has been transformed into a political tool, since it will be the weapon of the opposition and the Government instead of NGOs serving the case of constitutionality: the opposition may use it against the governing majority, whereas the Government may use it against the former Government according to its political goals.

The argument meant to support the restriction of the circle of those entitled to initiate reviews, saying that *actio popularis* results in unprofessional, non-definite petitions shall be strongly opposed.[11] A good Constitutional Court also finds the constitutional problem in these kinds of petitions, as it was also done by the first CC of Hungary. As a result of this restriction, future legitimate petitions concerning important constitutional problems (e.g., among others, well-founded and well-elaborated petitions of NGOs) will not reach the CC either, which is too high a price for relieving the CC of the burden of dealing with less elaborated petitions.

The *actio popularis* is a special Hungarian public law institution, being an integral part of the country's constitutional culture. It also has a unique role from a sociological aspect: by involving the society in the process of reviewing unconstitutional legal norms, *actio popularis* has made the aim of preserving constitutionality the citizens' own business. In the light of this context the argument referring to the high caseload shall be interpreted in the way that the Parliament punishes citizens using the possibility of *actio popularis* for initiating processes too many times. It is obvious that in the view of the Parliament this should be avoided in the future.

Constitutional Court Act, Article 24 (3)
The Constitutional Court's ex post constitutional review process is excluded if the petition is aimed at the examination of a law or legal provision already decided on by the Constitutional Court, and the petitioner requests that the Constitutional Court establishes that the law or legal provision is contrary to the Fundamental Law by referring to the same provision or principle (value) of the Fundamental Law and to the same constitutional context (res iudicata), except if the circumstances have fundamentally changed since the adoption of the Constitutional Court's relevant decision.

The *res iudicata* rule of the Constitutional Court Act, which excludes ex post constitutional review if the petition challenges a legal provision already decided on by the CC, provided that the basis of the petition is the same constitutional context as the one referred to in the former CC decision, is also extremely disagreeable. This rule prevents the CC from dealing with issues that have already been decided on once (in the same legal context). This means that the CC will not be able to adequately evolve to social change. Since the CC is not unerring after all, an even more serious consequence of the *res iudicata* rule is that even possibly wrong CC decisions, which do not serve the aim of constitutionality properly, will endure forever. There is obviously a need for a *res iudicata* rule, primarily because of the requirement of legal certainty. However, the *res iudicata* should not be an absolute barrier to the CC's procedure, rather only one of the possible reasons for rejecting a petition. In this way the CC could reject petitions concerning already closed

[11] The argument concerning effectiveness is to be found in the general reasoning of the Constitutional Court Act.

constitutional debates at any time, but judges would also have the possibility to overrule the CC's previous decisions, if that is justified.

Concrete ex post constitutional review

Constitutional Court Act, Article 25
If a judge detects that the law to be applied in an ongoing individual case is contrary to the Fundamental Law or it was formerly declared by the Constitutional Court that it is contrary to the Fundamental Law, he or she shall – besides suspending the procedure – initiate on the basis of Article 24 (2) b) of the Fundamental Law that the Constitutional Court declares that the given law or legal provision is contrary to the Fundamental Law or that it excludes the application of the law contrary to the Fundamental Law.

We find it appropriate that judges will be able to initiate the constitutional review of presumably unconstitutional laws to be applied in an ongoing court procedure. (This is not a new development: former rules ensured the same possibility.)

However, considering the caseload of the CC as referred to by the legislator, we find it unreasonable and unnecessary that ordinary judges shall bring cases before the CC if a provision to be applied in an ongoing individual case was formerly declared unconstitutional by the CC. This would require judges to request the Constitutional Court to explicitly exclude the application of the unconstitutional rule in the given legal dispute. In our view judges would be capable of deciding in these kinds of matters. The question arises that if the legislator deems judges unable to draw the conclusions of CC decisions, then how can it expect others to do so?

Constitutional complaint

Constitutional Court Act

Article 26
(1) Any person or organization affected in a given case may turn to the Constitutional Court with a constitutional complaint under Article 24 (2) of the Fundamental Law if applying a law contrary to the Fundamental Law in the course of the court procedure conducted in the case resulted that
a) their right ensured by the Fundamental Law had been violated, and
b) they had exhausted all possible remedies, or the possibility of remedy is not ensured.
(2) Contrary to Paragraph (1), the procedure of the Constitutional Court may be initiated exceptionally also if
a) the rights violation occurred directly, as a result of applying or the coming into force of the provision of a law contrary to the Fundamental Law, without any judicial decision, and
b) there is no remedy process aimed at remedying the given rights violation or available remedies have been exhausted.
(3) The Chief Public Prosecutor may petition the Constitutional Court to examine whether a law applied in the course of an individual case conducted with the participation of a public prosecutor, resulting in the violation of rights ensured by the Fundamental Law, is contrary to the Fundamental Law, if the person concerned is not able to protect his or her own rights, or the rights violation affects a larger group of people.

Article 27
A person or organization affected in an individual case may file a constitutional complaint to the Constitutional Court against the judicial decision contrary to the Fundamental Law if the in-merit decision or another decision concluding the judicial procedure
a) violates the right of the petitioner ensured by the Fundamental Law, and
b) the petitioner has exhausted available remedies or the possibility of remedy is not ensured.

Article 28
(1) In the process aimed at the review of a court decision as set out in Article 27, the Constitutional Court may also conduct the examination of the compliance of a law with the Fundamental Law as set out in Article 26.
(2) The Constitutional Court may also examine the constitutionality of a court decision in a procedure initiated on the basis of Article 26.

The need for introducing the "real" constitutional complaint, applicable also if rights are violated through the application of law, was a case at issue in the debates on the CC's competences constantly since the transition. Introducing this kind of a constitutional complaint is undoubtedly strengthening the toolkit of fundamental rights protection, thus it is a positive development from the perspective of constitutionality. However, this new option cannot be assessed in itself, since, in return, *actio popularis* is no longer available. Thus, from 2012 on citizens may initiate a constitutional review by the CC only if the application or coming into force of an unconstitutional provision affects them personally and violates their fundamental rights directly.

As a result of the changes, the public interest in abolishing unconstitutional laws is served to a lower extent than before, since the considerably narrowed range of those entitled to initiate proceedings, particularly due to the exclusion of NGOs and human rights defenders, will certainly be able to challenge a lower amount of unconstitutional laws before the CC. It is undeniable that the institution of the constitutional complaint may provide remedy in a more direct way and in a wider scope than former CC processes. However, detailed procedural rules are not helping, but rather hindering, the institution of constitutional complaint in becoming an effective means of individual fundamental rights' protection. Procedural rules do not ensure that any fundamental rights violation of any citizen, not addressed by another organ, will get before the CC and be provided with a remedy.

Constitutional Court Act, Article 51 (2)
Legal representation is mandatory in the course of constitutional complaint processes. Representation rights shall be verified.

According to the Constitutional Court Act the CC does not deal in-merit with constitutional complaints unless certain in-merit and procedural admissibility requirements are fulfilled. First of all, legal representation is mandatory; the reason behind the requirement being that of convenience, namely the aim of decreasing caseload and filtering out inadequately established petitions. In our view, mandatory legal representation does not necessarily result in a considerable decrease in the number of ill-founded petitions. Furthermore, this rule may have a serious withholding affect: it may result in situations where citizens do not challenge unconstitutional individual decisions because they are not able to cover the expenses that result from the mandatory legal representation. According to the original text of the Bill, indigent complainants were entitled to legal aid, but this possibility was abolished by amendment T/4424/126. in the course of the parliamentary legislative process. (The amendment was suggested by an MP of the Fidesz party, claiming that it was necessary for budgetary reasons.) In this regard, it should be borne in mind that the typical citizen submitting a constitutional complaint has been unsuccessfully litigating for years, since typically all remedies must be exhausted in order to be in the position to submit a constitutional complaint. Mandatory legal representation before the CC may deprive less wealthy people (a significant part of the society) of the opportunity to face the CC. It may be concluded that mandatory legal representation compromises the institutions efficiency, undermines the chances for citizens to resort to equal fundamental rights protection and moves constitutional complaint away from the traditional forms of subjective rights enforcement. It should be noted that the respective German provisions, serving as a model for Hungary, do not set out legal representation as a requirement either.

Constitutional Court Act, Article 29
The Constitutional Court admits the constitutional complaint in case of unconstitutionality affecting the judicial decision in merit or in case of a constitutional law question of fundamental importance.

The Constitutional Court Act provides the CC with wide discretion as to whether it admits constitutional complaints or not: constitutional complaints shall be admitted in case of unconstitutionality affecting the judicial decision in merit or in case of a constitutional law question of fundamental importance. While Article 29 of the Constitutional Court Act gives the CC the freedom of not dealing with insignificant, hollow or evidently ill-founded cases, Article 54 (2) sets out that submitting a complaint may result in a fine. (See opinion on Article 54 below.)

Constitutional Court Act, Article 31
(1) If the Constitutional Court, based on a constitutional complaint or judicial initiative, has already decided whether a law or legal provision applied is in conformity with the Fundamental Law, constitutional complaints aimed at establishing inconformity with the Fundamental Law or the examination of judicial initiatives aimed at establishing inconformity with the Fundamental Law are excluded in case the same law or legal provision, the same right ensured by the Fundamental Law and the same constitutional context is referred to, provided that the circumstances have not fundamentally changed.
(2) If the conformity with the Fundamental Law of a judicial decision in a given case has been already decided on by the Constitutional Court on the basis of a constitutional complaint, the Constitutional Court must not proceed if a complainant affected in the same case refers to the same law or legal provision, the same right ensured by the Fundamental Law and the same constitutional context.

The function of individual fundamental rights protection is further relativized by the provisions of the Constitutional Court Act on *res iudicata*. If the legislator's aim was truly to ensure actual rights protection, then it would not create provisions like Article 31 of the Constitutional Court Act, which practically result in a race to challenge the law applied in a given concrete case before the CC, and provide remedy only to the first complainant approaching the CC. It is clear on the basis of the above provision that the CC's decision establishing the unconstitutionality of a law in a concrete legal procedure between given parties also has a *res iudicata* affect on legal procedures between other parties; thus, after the CC's decision one may not turn to the CC because of a rights violation caused by the same legal provision and on the same basis. The provision basically makes the enforcement of the complainant's fundamental right depend on fortune, which explicitly suggests that the constitutional complaint primarily has an objective fundamental rights protection function, thus protecting the public interest in maintaining constitutional order. In turn, the remedial function of the constitutional complaint becomes secondary: the remedy is granted as a "reward" to the person who firstly challenges the unconstitutional law in his or her case, or the complainant whose petition is decided on first by the court.[12]

4. The Constitutional Court's order of operation and procedural rules

The binding nature of the petition

Constitutional Court Act, Article 52 (2)
The examination carried out by the Constitutional Court shall be limited exclusively to the constitutional request indicated. This provision does not apply to the CC's competence of making ex officio statements as indicated in

[12] This is by the way explicitly contrary to the solution followed by the CC in one of its recent decisions. See: Decision 35/2011. (V. 6.) of the CC.

Article 28 (1), 32 (1), 38 (1), and 46 (1) and (3).

In our view it is unreasonable to set out that the scope of the CC's examination shall be limited exclusively to the constitutional request indicated in the petition. The CC's procedures are not contradictory, and their content may affect directly any person or citizen. Therefore, it is not reasonable to limit the scope of the CC's examination to the constitutional approach of the person submitting the petition if the legal provision challenged is unequivocally and evidently unconstitutional in another constitutional context.[13]

Sanction for initiating procedures „abusively"

Constitutional Court Act, Article 54
(2) The council of the Constitutional Court or the single judge acting on the basis of Article 55 (5) may impose a procedural fine on the petitioner and oblige him or her to pay emerging extra costs if he or she exercises the right to initiate procedures in an abusive way, along with petitioner and other persons taking part in the procedure whose intentional conduct protracts or hampers the conclusion of the Constitutional Court's process.
(3) The amount of the procedural fine may range from 20 000 to 500 000 HUF, which shall be paid by the person fined by the deadline set out in the Constitutional Court's decision. When establishing the amount of the procedural fine, the graveness and the consequences of the act giving rise to imposing the fine shall be taken into account.
(4) The decision imposing a procedural fine and obliging someone to pay the costs as set out in Paragraph (2) may be amended by another council of the Constitutional Court, appointed by the President, on the initiative of the person fined or ex officio, because of reasons meriting particular treatment.

According to the Constitutional Court Act, a procedural fine ranging from 20 000 to 500 000 HUF may be imposed on petitioners initiating procedures in an "abusive" way; the sum of the fine is due to the CC. However, in our view it is a more important constitutional interest to review unconstitutional laws and judicial decisions than withholding potentially ill-founded petitions. The procedural fine is extremely problematic not only because its amount (amounting to triple the highest petty offence fine), but also because of the precondition of its imposition. The provisions on the fine do not provide any guidance on the meaning of "abusiveness" in this context and do not provide any guarantees, but on the other hand may raise considerable doubts in citizens as to whether they should turn to the CC or not. Democracies that function normally naturally involve notorious litigation, and instead of discouraging citizens from enforcing their rights, the CC should undertake the responsibility of sorting out cases.

Exclusion rules regarding decisions in concrete cases

Constitutional Court Act, Article 62
(1) The member of the Constitutional Court must not take part in the decision-making on constitutional complaints if he or she is the relative of the petitioner or the petitioner's legal representative, or has taken part in the court procedure subject to the procedure as a party or in another way, or as a judge in reaching the judicial decision.
(2) The member of the Constitutional Court must not take part in the decision-making on the petition if he or she may not be expected to reach an impartial, objective, fair-minded decision in the case due to his or her personal and direct affection related to the subject of the case.

The original text of the Bill set out in Article 62 (2) that Constitutional Court judges shall be excluded from deciding on petitions if they have contributed to preparing, submitting or working

[13] No similar limitation can be found in the German practice either. See: BVerfGE 4, 157 (176) and 8, 61 (68f.), and Schumann, Ekkehard: Verfassungs- und Menschenrechtsbeschwerde gegen richterliche Entscheidungen. Berlin, Duncker & Humblot GmbH, 1969. p. 41.

out the law affected by the Constitutional Court's procedure with their personal, in-merit work. However, this provision was erased from the Bill as a result of an amendment submitted by an MP of the Fidesz party. The MP claimed that the Standing Order of the CC regulates the case covered by the provision above, thus it is unnecessary to include it in the Constitutional Court Act. This reasoning is obviously ill-founded, since only exclusion rules set out by an Act of Parliament may guarantee the objective impartiality of a person's or organisation's decision: if these rules are included in the standing orders, it depends on the institution's own decision whether one may take part in the decision-making despite a conflict of interests. In our view it would be necessary to widen the scope of grounds for exclusion rather than narrowing it. For example, it would be necessary to ensure that judges must not take part in the decision-making if they have voted in the Parliament for the Bill reviewed, since it is clear that one may not be expected to establish the unconstitutionality of a law which he or she supported earlier. Furthermore, it is also unacceptable that the Constitutional Court Act does not guarantee political independence in the sense that it does not impede politicians working as MPs to become Constitutional Court judges from one day to another. In addition, the amendment is inconsistent, since it does not provide any explanation as to why only the ground for exclusion included in the amendment may be regulated by the Standing Orders.

The termination of ongoing actio popularis processes

Constitutional Court Act, Article 71
(1) By the coming into force of the present Act of Parliament ongoing procedures shall terminate, if they are, according to their content, aimed at the ex post review of the constitutionality of a law as set out by Article 24 (1), and they were not submitted by a person having the right of initiation as set out by Article 24 (2) e) of the Fundamental Law.[14]
(2) *By the coming into force of the present Act of Parliament procedures before the Constitutional Court aimed at the elimination of unconstitutional omissions shall terminate if the petition was not submitted by a person having the right of initiation as set out by Article 24 (2) e) of the Fundamental Law.*
(3) The petitioner of the procedure terminated on the basis of Paragraphs (1)–(2) may submit a petition containing a constitutional concern related to the law identified in the petition not decided on and complying with the content of the latter until 31 March 2012 to the Constitutional Court, provided that conditions enshrined in Article 26 of the present Act of Parliament are fulfilled and if the violation of a constitutional right identified in the petition is contrary to the Fundamental Law.
(5) After 30 June 2012 petitions specified in Paragraph (3) may not be filed.
(6) In petitions specified in Paragraph (3) the petitioner shall refer to the petition submitted earlier, serving as a basis for a terminated procedure by indicating data permitting identification.

According to the Constitutional Court Act, ongoing *actio popularis* procedures not concluded until 31 December 2011 were terminated as of 1 January 2012 without an in-merit decision, and only procedures initiated by those having the right to initiate proceedings under the Fundamental Law will remain in progress. This means that petitions of citizens will be decided on by the CC only if the law challenged is contrary to the Fundamental Law and if they may also be filed under the rules on constitutional complaint. Consequently, almost all of the ongoing procedures, i.e. approximately 1 600 cases, mostly aimed at ex post constitutional review, will cease automatically, since according to the information provided by the CC there are no pending procedures aimed at ex post constitutional review which had been initiated by the one-fourth of MPs or by the Government, and 10 out of the 12 ongoing procedures initiated by Ombudspersons are aimed at ex post constitutional review. A considerable part of the petitions do not directly affect the fundamental rights of citizens or legal entities filing the petition. Thus, for example, petitions

[14] I.e. the Government, one-fourth of the MPs or the Commissioner for Fundamental Rights.

concerning the legal standing of the media authority, filed by the authors of the present analysis, will not be decided upon, even though the provisions challenged are contrary to the constitutional values of the rule of law and of democracy, because they do not result in the violation of a fundamental right, thus there was no possibility to file a constitutional complaint against them.

In other cases, such as the so-called "three strikes" rule, the provisions above mean that unconstitutional provisions remain part of the legal system for a considerably longer period of time, causing – possibly serious – rights violations. After 1 January 2012 laws challenged by earlier (i.e. automatically terminated) processes aimed at ex post constitutional review may reappear before the CC if someone encounters them in his or her own case and files a related constitutional complaint. However, in the latter case the affected person first has to go through one (or more) lengthy proceedings and must bear the fundamental rights violation to be remedied. The legislator could have spared all this both for the court system and individual complainants, if it would have let the CC – having more members than before – decide on already submitted petitions in merit.

Thus, the termination of procedures is more detrimental for the public interest than for those submitting petitions for ex post constitutional review, since unconstitutional laws may remain part of the legal system. The possibility to decide on previously submitted petitions, provided of course that they may also be interpreted in light of the Fundamental Law, serves constitutionality and rationality: by deciding on these in-merit the CC would reach a decision in a procedure still falling under its competence, except that the procedure in question may not be initiated any more by those who have submitted the petition in question. Terminating ongoing procedures is of retroactive effect, since changing the scope of those entitled to initiate proceedings has an impact on the validity of petitions filed by persons entitled to submit petitions under the former provisions. According to this solution, not only will in-merit questions (i.e. whether the challenged provisions are unconstitutional) be decided upon based on the rules in force at the time of the CC's decision, but these rules shall decide whether the CC should deal with a petition submitted years ago, in another legal situation. If this solution would make it impossible for complainants to enforce their subjective rights, it would surely be unconstitutional. However, since in *actio popularis* procedures complainants represent the interest of the political community instead of their own, the unconstitutionality of the termination of these procedures is doubtful. On the other hand, it would be hard to deny that the idea of constitutionality would be served by keeping these procedures "alive", since the non-existence of unconstitutional rules is in the interest of constitutionality. The latter aim would be served by transitional provisions, which should set out that the right to initiate procedures should be judged on the basis of provisions being in force by the time of filing the petition. The competence of the CC, i.e. whether it may review the constitutionality of laws and may abolish unconstitutional provisions, should be established on the basis of provisions in force at the time of decision-making.

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As outlined in this analysis, the concept of constitutional court jurisdiction suggested by the rules of the Fundamental Law and the Constitutional Court Act – a concept which has not been published, thus it could not be debated – serves as a retreat from both constitutionality and the standards held by the Hungarian constitutional court jurisdiction over the last two decades, which had a significant impact and considerable results. As it was demonstrated above, arguments presented to support the "innovations" of the Constitutional Court Act are hypocritical.