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HUNGARY: THE NEW CONSTITUTIONAL COURT ACT

*Posted on 15 Dicembre 2011 by **Katalin Kelemen***

On November 14 the Hungarian Parliament (with 252 votes in favour and 105 against) adopted a new law on the Constitutional Court (Act no. 2011/CLI). This new law is going to replace the Constitutional Court Act currently in force (still available on the website of the Court) after January 1, 2012. It means that the new law will enter into force together with the new constitution or Fundamental Law (see also an older post on its adoption). In fact, the reason for adopting a completely new law instead of just modifying the former one is that it elaborates a new scheme for Hungarian constitutional justice, based on the new constitution. The knowledge of this Act is essential for assessing the new system.

The first draft of the new Act was written by the main political force in Parliament, the centre-right wing Fidesz, but it was presented as a proposal of the Committee on Constitutional Affairs which led the subsequent discussions (all documentation available – in Hungarian – on the website of the Parliament). It is important to remind the reader that the government holds two-thirds majority in the legislature, thus it can adopt cardinal laws (as the Constitutional Court Act) alone, without the consent of the opposition. As I have already pointed out in previous posts and other online publications, the new Fundamental Law abolishes the

actio popularis (at least does not mention it), extends the preventive review (Art. 6), introduces a new form of constitutional complaint, increases the number of judges from nine to fifteen and their term of office from nine to twelve years (Art. 24), and excludes from the jurisdiction of the Constitutional Court the review of any law related to public finances (Art. 37). However, the last paragraph of Article 24 leaves open the possibility for the legislator to define new competences. And so the new Act does. In particular, the new Constitutional Court Act adds to the list of competences:

- the review of the Parliament's decision to call a referendum (art. 33),
- the opinion on the dissolution of a local council violating the constitution (art. 34),
- the removal from office of the President of the Republic (art. 35),
- the resolution of conflicts between the organs of the state (art. 36),
- the interpretation of constitutional norms in connection with concrete constitutional problems (art. 38),
- the possibility to review the legislator's omission in the course of the exercise of the Court's competences (art. 46).

The Act also defines who has standing to raise issues before the Constitutional Court in the spheres of competence already established by the Fundamental Law, and regulates more in detail all the requirements for filing a constitutional complaint. In fact, the new constitution determines who can challenge a law before the Constitutional Court (i.e. the government, a quarter of the members of Parliament and the ombudsman), but leaves open the question of standing relating to other competences such as the review of conformity with international treaties (Art. 24, par. 2, letter f) of the Fundamental Law). The new Act fills is this gap and provides that a quarter of the members of Parliament, the government, the President of the Supreme Court, the Prosecutor General and the Ombudsman are entitled to challenge a law on the basis of its incompatibility with an international treaty ratified by Hungary. Moreover, this kind of review can be carried out by the Court *ex officio* or on the initiative of the claimant in the course of the exercise of other

competences (art. 32).

As to the constitutional complaint, it is going to have three faces instead of just one. Besides the already existing possibility (which has been rarely used in practice because of the availability of the *actio popularis*) of challenging a law applied in a concrete case after the exhaustion of all legal remedies, two new forms of constitutional complaint are created, both based on the German model. Firstly, a real *Verfassungsbeschwerde* is introduced, so anybody will be able to challenge a judicial decision violating his or her constitutional rights (art. 27). Secondly, there will be the possibility of challenging a law directly affecting a person without a court proceeding in course. This third form of constitutional complaint (as provided in art. 26, par. 2 of the Act) is only admissible if an act of execution is not necessary and the law interferes with the complainant's rights without requiring for its execution a special act. These two new faces of the constitutional complaint aim to replace the *actio popularis* which will not be available anymore after January 1, 2012.

A much debated point in the new Act is the answer that is gives to the question of what will happen to ongoing proceedings started on the basis of an *actio popularis*, that is to the overwhelming majority of the proceedings in course. Art. 71 provides that all these proceedings shall be terminated when the new constitution enters into force. It means that no decision will be delivered in these cases, unless the *actio popularis* was filed by one of those persons or groups entitled to challenge the constitutionality of a law according to the new rules. There will be the possibility for the claimant to file a constituional complaint within March 31, 2012 if the conditions laid down in art. 26 are met. It means that an *actio popularis* can be re-filed in the form of a constitutional complaint if the unconstitutional law in question was applied by a court or it affects directly the complainant's rights without requiring for its execution a special act.

Concluding, the new Constitutional Court Act restructures Hungarian constitutional justice and brings it even closer to the German model. After January 1, the Court will be less accessible, since claimants will have to

give proof of their personal interest in every case. On the other hand, an important new competence has been introduced as well: now the Hungarian Constitutional Court can review the constitutionality of judicial decisions. Even if ordinary courts' judgments were not completely out of reach for the Constitutional Court before (through the application of the Italian concept of *diritto vivente* or "living law"), now there is no more need for judicial activism to reach the same result.