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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

EFFECTIVE CASE-MANAGEMENT AND SMOOTH PROCEDURE – A REQUIREMENT FOR THE FUNDAMENTAL RIGHT TO ACCESS TO COURTS (THE HUNGARIAN EXPERIENCE)

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I. What kind of procedure?

A basic characteristics of functioning democracies is the right of citizens to access to courts. The topic we investigate in this paper is a specific one: the procedure before a constitutional court (and not an ordinary court). Constitutional courts in European democracies have a specific role, first and best defined by the famous Austrian legal philosopher Hans Kelsen: to assure the supremacy of the constitution, to delete from the legal system all laws and other legal norms that contradict to the constitution, and thus restore the unity of the legal order. Access to the special court entitled to declare unconstitutional laws and annul them depends on a political decision. Who has standing before the Constitutional Court? Who is entitled to file a petition? Unlike before ordinary courts where citizens have a general right to access to the court, constitutional courts accept cases only from the persons and organs authorised for that by the law.

Who can submit a motion as a rule? Let us see some typical examples.

A) In the so-called "**political procedures**" high officers of the State (President of the Republic, the Prime Minister, the Prosecutor;General, etc.), group of parliamentary representatives – constitutional courts of several new democracies follow this solution including the draft law on the Constitutional Court of Azerbaijan.

B) "***Actio popularis***": anyone, that is any private individual can file a petition before the court. The most eccentric example of this rights can be seen in the case of the Hungarian Constitutional Court; in the literally sense of anyone, any Hungarian citizen or foreigner can challenge any Hungarian legal rule before the Constitutional Court, even having no personal interest in annulling the challenged legal rule. The exceeding use of this competence can be traced back to a specific political situation as early as in 1989. In the summer of 1989 the rules relating to the future Constitutional Court became a central issue during the negotiations among political groups. Contrary to the proposal of the Communist party, the Opposition Round Table succeeded considerably in extending the Court's competence. The framers of the new constitutional order could not foresee the oncoming dramatic changes in the other countries of the soviet bloc. Apparently, the main concern was how to carry out reforms and at the same time maintain the *status quo* within the soviet bloc. The fear of the opposition was that the key positions in the political system would remain in the hands of the communists: at that time the seventy-five percent of the members of the Parliament was member of the ruling Communist Party (that was called the Hungarian Socialist Workers' Party, then its follow-up party from October 1989 was the Hungarian Socialist Party), the cabinet was communist, and a prominent figure of that party was expected to be elected as president of the Republic. Therefore, the opposition submitted two basic proposals; the first suggested that every citizen should have the right to challenge the constitutionality of the legal norms before the Constitutional Court; and secondly, that the Court should revise also the constitutionality of legislative acts. The communist party experts argued against the acceptance of the opposition's proposals, but the head of the delegation ignored the warnings, so the opposition easily managed to realize its ideas concerning the outstanding role of judicial review in the transitory period.

Act No. 32 creating the Constitutional Court was enacted in October 1989, and soon afterwards the first five members of the Court were elected by Parliament. On the 1st of January, 1990 the Constitutional Court commenced its functions. Five additional members were elected by the new, freely elected Parliament in mid-1990. The members of the court are now eleven.

The jurisdiction and power of the Court, even by international comparison, is very large. For instance, the Court can review the constitutionality of draft-laws before their enactment by legislation, and has the right to review the legislative acts as well as sublegislative norms, declaring them null and void in case of unconstitutionality. The Court also gives advisory opinions at the request of high State officers. In the first years of its operation, the Court proved its powerful role in the new political system when it delivered a series of very important decisions that pertained to the following: capital punishment, to the interpretation of human dignity, equal protection, tax issues, the compensation acts, presidential powers, abortion, and lifting of the statute of limitations for political crimes. Meanwhile the *actio popularis* (the right for all citizens to seek assistance from the Constitutional Court) resulted in a flood of requests on the part of the citizens which in turn created a tremendous overload for the Court. However, the institution of judicial review essentially worked in Hungary, despite the lack of tradition and experience in that field.

C) The Constitutional Court may itself initiate a **procedure *ex officio***:

– the examination of the conformity of legal rules as well as other legal means of state control with international treaties, and
– the elimination of unconstitutionality manifesting itself in omission.

As a matter of fact, the Court rarely makes use of this possibility.

D) **Concrete norm control**, i.e. a procedure initiated by a judge in a concrete controversy:

A judge shall initiate the proceedings of the Constitutional Court while suspending the judicial process if in the course of any pending case, he/she considers unconstitutional the legal rule which he/she needs to apply. This procedure is different from the right of the President of the Supreme Court to seize the Constitutional Court in case of the examination of the conformity of legal rules as well as other legal means of state control with international treaties, or when asking for the interpretation of the provisions of the Constitution.

II. Motions

Are there any formal requirement how to submit a motion before a Constitutional Court? The Hungarian regulation does not subscribe any special requirement, although such requirements exist in ordinary judicial procedures. Note that the Constitutional Court in Hungary as in most European countries in general is obliged to take all the

justiciable cases, and must adjudicate them. At the beginning of the functioning of the Court the judges discussed the issue, and finally decided that they would accept all petitions, and would not refuse on formal grounds even hand-written letters sent by prisoners.

The substantial requirement to have the effect of initiating a procedure are the following:

– the motion has to specify, first, the challenged legal provision,
– secondly, the constitutional provision that is supposedly violated.

The establishment of compulsory legal representation was also raised, but the court rejected it.

III. Filtering of the petitions

It is closely connected to the previous problem, to the admissibility of the petitions, the way of filtering the petitions. This is the task of the staff of the secretary-general. All the incoming letters are opened and qualified by the Register's Office. They check the register (more precisely the electronic database) for the name of the petitioner, the legal provision challenged, the subject. Afterwards the secretary-general reads through the letters and qualifies them according to the competencies of the Constitutional Court. This is still a preliminary overview. The detailed examination of the petitions is done by the lawyers who assist the secretary-general. They fill out an evaluation sheet that contains the challenged legal provision, the violated constitutional rule, the list of similar or identical previous cases. They also examine whether the challenged provision is still in effect. This phase of the procedure divides the cases into two groups: those that cannot be admitted to the judges, and those that can be adjudicated.

As for the first group:

1. All the petitions that do not fulfil the two basic requirements (a definite legal provision must be challenged that violates a specific constitutional rule) are rejected by an informal letter signed by the secretary-general that explains to the petitioners the necessary requirement for accepting a case. Almost the half of the petitions (their number is generally about 1500 a year) are rejected in this way. The legal nature and the force of these letters is discussed by experts, politicians, and by some petitioners as well, mostly on the ground that they addressed a court, and the secretary-general responding to them is not a member of the court. I consider this solution as a price for the informal and easy access to the court. Anyway, if a petitioner insists on the adjudication of the claim without complementing it, a panel of three judges rejects the claim.

This solution was worked out basically in order to handle the flood of petitions arriving to the court due to *actio popularis*. This is seemingly not relevant in the case of the future Constitutional Court of Azerbaijan where under the Constitution the

Constitutional Court may be seized by the President of the Republic, the National Assembly, the Council of Ministers, the Supreme Court, the Prosecutor General, and the Assembly of the Nakichevan Autonomous Republic. Nevertheless, in Hungary the same rules are adapted to the claims arriving from the high officers of the State, if their petition does not fulfil the above mentioned requirements. Thus in 1997 October the secretary-general sent back a petition of the Prime Minister to his Office, because he did not specify that his claim under which competence of the court fall. In the same month 51 parliamentary representatives of the opposition asked for the preliminary review of a bill yet not passed by the parliament. The petition did not indicate which constitutional provision was violated by the challenged provision of the bill. The secretary-general sent back the petition again in order to be completed.

2. The President of the Constitutional Court shall forward the motion submitted by a party not entitled to submit such a motion to the organ entitled to submit it.

3. An obviously groundless motion is rejected by the President of the Constitutional Court.

4. Any motion related to a matter not within the competence of the Constitutional Court, shall be forwarded by the Constitutional Court to the competent organ. The Hungarian Court often sends cases to the Ombudsman's Office.

B) The second group of cases are those that can be adjudicated in substance by the court.

IV. The Court at work

The cases to be decided by the court in merit are presented by the secretary-general to the President of the Constitutional Court, who assigns them to the judges. There is no general rule how to assign the cases so it is an absolute discretionary power of the President. In the beginning it was seriously considered to assign cases automatically, but the judges rather opted for a solution that takes into consideration their professional background and specialisation. The other consideration is the approximately equal distribution of the cases among the judges.

The judges sit either *en banque*, in plenary session, or in three-member panels.

The full session of the Constitutional Court decides in the following cases:

a) the preventive control of constitutionality of any contestable provision of a bill, of an Act of Parliament which has been enacted but not yet promulgated, or of a provision of the Standing Order of Parliament;
b) the preventive control of an international treaty;
c) the constitutional review of an Act of Parliament;
d) the examination of an Act of Parliament conflicting with an international treaty;
e) the interpretation of the Constitution;
f) the writing of the Bill on the Procedural Rules of the Constitutional Court;

g) the assent to the arrestation of, to the institution of criminal proceedings or to the application of coercive measures of the police against, any Member of the Constitutional Court, except if he/she is caught in the act;
h) the finding of incompatibility in connection with a member of the Constitutional Court;
i) the declaration of the termination of the membership of any member of the Constitutional Court in consequence of not having terminated the cause of incompatibility;
j) the discharge of a member of the Constitutional Court of his/her mandate;
k) the exclusion of a Member of the Constitutional Court from among the Members of the Court;
l) in any other matters which is suggested by the President or three members of the Constitutional Court, to be decided in a full session.

The panels composed of three Members of the Constitutional Court proceed in the following cases:

– repressive (*a posteriori*) norm control of sublegislative legal provisions (e.g. governmental or ministerial decrees),
– examination of the conformity of legal rules with international treaties,
– the adjudication of constitutional complaints submitted because of alleged violations of constitutional rights;
e) the elimination of unconstitutionality manifesting itself in omission.

The judge to whom the case was assigned by the President of the court, elaborates the draft of the decision. Each judge is assisted by two advisers and a legal secretary. The Constitutional Court shall take evidence on the basis of documents at its disposal and if required by granting hearings and involving experts. No other mode and means of taking evidence shall be applied in the proceedings. The draft of the ruling is circulated through the secretary-general among the judges who may make if they wish comment on them in writing.

The discussion list of the weekly conferences is decided by the president of the court on the proposal of the secretary-general. At least ten days are left for the judges after the circulation of the draft to be prepared for the discussion.

The plenary judicial conferences (the full sessions) take place on Mondays and Tuesdays. Conferences are conducted in secrecy, only the secretary-general is allowed into the room: he prepares the minutes of the conference but obviously does not have the right to take part in the discussion. On entering the conference room the judges shake hands with each other as a symbol of conciliation; during the conference they address each other in a formal, polite way.
Although the court proceeds using mostly written evidence, sometimes it hears experts, members of the government, legislators. In the beginning the court held formal oral arguments, but they could not add too much to what had been already written down. As the constitutionality of legal provisions is examined on abstract grounds, the concrete

circumstances do not influence the decision. In the last years the open sessions' function is the public announcement of the court's opinion. The open session may be attended and addressed by the President of the Republic, the Prime Minister, the Speaker of the Parliament, the President of the Supreme Court, the Chief Prosecutor, the Minister of the Justice and the petitioner, as well as by any other person invited by the President of the Constitutional Court.

The full session of the Constitutional Court consists of all of the eleven members of the Constitutional Court. The full session has a quorum if attended by at least eight members of the Constitutional Court, including the President or, if the President is prevented from attending, the vice-president. The panels have a quorum if all three members are present. The Constitutional Court renders its decisions in a closed session generally by the majority of votes. In the event of an equality of votes the vote of the President decides.

The decision is delivered to the petitioner or the petitioners. The most important (e.g. those annulling a law) are published in the official gazette, and all decisions are published in the monthly gazette of the Constitutional Court, and also republished in the yearly volume.

Under the law judges are entitled to attach a dissenting opinion to the other documents. The judges also write concurring opinions that are published together with the ruling in the official gazette. The decision of the Constitutional Court may not be appealed. The decisions of the Constitutional Court are binding on everybody.
Proceedings before the Constitutional Court are exempt from fees and expenses. The Constitutional Court may charge the petitioner for the costs incurred in the proceedings if the bad faith of the petitioner concerning the submitting of the motion may be established.

The detailed rules concerning the structure and the proceedings of the Constitutional Court should be established in the Rules of the Constitutional Court which is prescribed by Parliament in an Act upon the proposal of the Constitutional Court. This proved to be a mistaken solution because the Parliament has not been able to pass this law in eight years.

V. Technical infrastructure

The secretary-general besides having a staff of lawyers to filter the petitions supervises the register’s office, the library of the court and the work of the computer department. All correspondence, the evaluation sheets filled out by the secretary-general's staff, the decisions are kept in personal computer files. The working stations (terminals) are linked to internal network that provides specific databases: all the decisions of the court, the updated texts of laws and other legal rules, statistics, the distribution list of cases (to which judge are they assigned), list of cases according to the legal provisions challenged, the name of the petitioners, and subject matter - these databases make possible searches for different purposes, for example to check all the newly arrived petitions whether they

refer to subjects or legal provisions adjudicated already in earlier cases.